# MARRYING INTO ELDER ABUSE

*By Ellen McKissock, Esq.**

## I. INTRODUCTION

Senator Ralph Dills (1910-2002) served 43 years in the Assembly and Senate, making him the longest standing lawmaker in California history. Dills also sat as a judge for 17 years. Dills championed legislation to protect elders during his years of service. Sadly, Dills became a victim of the abuse he sought to curtail.

Dills married Elizabeth Ging Lee in 1970. When Elizabeth died in 2000, Dills lost his soul mate. Dills' stepdaughter, Wendi, lived with the couple before her mother's death and acted as caregiver to Dills (who then suffered from Alzheimer's Disease). Shortly after her mother's death, Wendi began wearing her mother's clothes and perfume. She then divorced her own financially troubled husband, took her stepfather to Reno and married him. The marriage was kept a secret until one day, when Dills was in the hospital, Dills' sons asked him why he was giving so much money to Wendi. Dills responded, "I think she's my wife." The Dills' estate plan had already provided for Wendi. Why did Wendi marry Dills?

Marrying an elder has become the latest form of perpetrating elder financial abuse. Enticing a lonely elder to marry with the promise of constant companionship may be far easier than unduly influencing him to change his estate plan. Marriage is easy to accomplish, is nearly impossible to challenge, and is not punishable under any law. Marriage can entitle an abuser to a statutory share of the elder's estate at death as an omitted spouse or an intestate heir or a financial settlement on dissolution. Creating a remedy for this new form of elder financial abuse is problematic because any solution must balance the elder's right to choose a companion and spend his money as he pleases against any well-intended effort to protect him.

## II. CHANGES IN THE LAW DESIGNED TO PROTECT ELDERS MAY DRIVE THE AVARICIOUS TO MARRY THEIR PREY INSTEAD

In the 1980s and 1990s, the California Legislature passed laws to protect elders from financial predators. Recognizing that elders constitute a significant and identifiable segment of the population more subject to risk of abuse, the Legislature passed the Elder Abuse and Dependent Adult Civil Protection Act in 1982 (herein "Elder Financial Abuse Statute").[1] A decade later, the first prohibited transferee statute was passed, invalidating testamentary transfers to caregivers and estate plan drafters under most circumstances.[2] These statutes operate as deterrents to the greedy. Although it may be difficult for a loved one to gain legal standing to protect an elder under these statutes, at least the avenues exist.

With marriage, there is very little a family member or a conservator can do to protect an elder from the rapacious spouse or fiancée. Further, a marriage to such a person may even be in the elder's interest. If the elder finds companionship, happiness, and good care in a marriage (even a marriage to a financially abusive spouse), should a family member be able to interfere with that marriage simply to protect an anticipated inheritance? However, when a spouse uses the institution of marriage as a platform for financial abuse, taking the elder's assets while he is alive, manipulating the elder's estate plan, and failing to provide care or companionship to the elder, such interference may be warranted. Unfortunately, as the law exists in California today, it is very difficult to protect an elder from "marriage abuse," and for that reason, it has become the option of choice for some elder financial abusers.

### A. Marrying the Elder is Less Risky and More Efficient than Traditional Elder Financial Abuse

With the 1982 passage of the Elder Financial Abuse Statute, predators now face stiff penalties if found liable for elder abuse. Prosecution under that statute is difficult only because the elder holds the cause of action against the abuser and often cannot be convinced to challenge that abuser. However, a duly appointed conservator can bring an elder financial abuse claim on behalf of the elder during the elder's lifetime.[3] By contrast, a marriage is more difficult to challenge. Ending a marriage is a right personal to the elder that neither a family member nor a conservator can assert.[4]

Proving elder financial abuse is not difficult once standing is achieved. An abuser is liable under the Elder Financial Abuse Statute merely by taking an elder's property with knowledge that the taking will harm the elder.[5] While proof of undue influence or intent to defraud is also a basis for elder financial abuse, neither is required to establish liability.[6] Once elder financial abuse is proven, the abuser is liable for compensatory damages, attorney's fees and costs.[7] Where fraud, recklessness, or malice is proven, punitive damages are recoverable.[8] Thus, elder financial abuse is not difficult to prove and the penalties are high.

Marrying the elder is less risky. As discussed below, not only is it difficult to undo a marriage, but the abusive spouse

has wide access to the elder spouse's assets, both during life and at death.

### B. The Prohibited Transferee Statutes and Careful Estate Planners Make Securing a Bequest Under a Testamentary Instrument Difficult

The prohibited transferee statute passed in 1993 rendered invalid any donative transfer made to the drafter of a testamentary instrument or a caregiver of the donor unless a certificate of independent review was obtained.[9] The original prohibited transferee statute has since been repealed and replaced by a new prohibited transferee statute in Probate Code section 21380.[10]

Under the new prohibited transferee statute, the presumption remains that a donative transfer to the drafter of a testamentary instrument is invalid. That presumption is conclusive and not rebuttable.[11] However, a donative transfer to a care custodian or fiduciary is no longer presumed invalid; rather, a presumption of fraud or undue influence arises, rebuttable by clear and convincing evidence that the transfer was not the product of fraud or undue influence.[12]

The definition of a care custodian is someone who is paid for providing health or social services to a dependent adult.[13] An unpaid person is considered a care custodian if they have not had a relationship with the elder for at least 90 days before caring for the elder, or for six months before the elder's death, or if they met the elder while he was in hospice.[14] Where the recipient of a donative transfer under an estate plan is a care custodian, the fraud presumption only arises if the instrument was executed while the care custodian was providing services, or within 90 days before or after the services were provided.[15] Thus, an elder can make a bequest to a care custodian that has left his employ, so long as he waits more than 90 days. The logic behind this 90-day period is that a former care custodian, replaced by another, likely loses the ability to unduly influence an elder to change his estate plan.

While the new prohibited transferee statute makes it difficult for care custodians to become beneficiaries under donative instruments, such difficulties all but disappear if the care custodian marries the elder. The new prohibited transferee statute excludes from its purview donative transfers to cohabitants[16] of the elder or a person related by blood or "affinity." Affinity is defined as a spouse or domestic partner.[17] Therefore, the fraud presumption never arises if the a donative transfer is to a spouse or domestic partner of the elder.[18] By contrast, if an elder signs a testamentary document that provides for a care custodian with whom the elder currently lives, the gift to the care custodian will be presumed to be the product of fraud or undue influence. The care custodian need only marry the elder to become related by "affinity" and avoid this presumption.

In instances where the abuser is not a care custodian, he must still get past the conscientious estate planner to have himself named as a beneficiary under a testamentary instrument. The Elder Financial Abuse Statute defines a "taking" as depriving an elder of a property right by means of a testamentary bequest.[19] A person who "assists" in the taking of an elder's property right (such as an estate planner creating a testamentary instrument) can be liable for elder financial abuse.[20] The careful estate planner, aware that an elder may be prey to the undue influence of an abuser, will refuse to assist in creating the testamentary instrument. An abusive spouse, however, who is entitled to receive an elder spouse's assets upon the elder's death by operation of law, does not have to overcome the resistance of an astute estate planning attorney, potentially making it easier for the wrongdoer to inherit through marriage than through an estate plan.

## III. MARRIAGE IS EASY TO ACCOMPLISH AND CAN BE DONE IN SECRET

### A. The Mental Capacity Required to Marry is Low

The law presumes that all persons have the capacity to make decisions, including the decision to marry, and to be responsible for their acts or decisions.[21] That presumption is rebuttable if a judicial determination is made that a person suffers from a deficit in at least one of the mental functions listed in Probate Code section 811. Courts apply a sliding scale for mental capacity based upon the complexity of the act or decision in question.[22]

The mental capacity required for a person to marry is low. Courts have held that an incompetent person, including a person subject to a conservatorship, is capable of entering into a valid marriage.[23] Courts further have held that a person need only understand the duties and obligations of marriage to marry.[24] There is scant legal authority on just what constitutes the "duties and obligations" of marriage, but one court granted an annulment for failure to live with the spouse, provide companionship, and make the marriage known to friends.[25]

The recent case of *In re Marriage of Greenway* justified the lower level of mental capacity required for marriage on the basis that there are statutory safeguards in place to protect spouses and their assets.[26] The author questions, however, whether these safeguards really apply primarily in the divorce

setting, and not during the course of the marriage or upon the death of a married person.

### B. The Consent Required to Marry is Easily Obtained

In order for a marriage to be valid under California law, consent is required.[27] The ability to consent to a marriage is nearly as minimal as the level of mental capacity required to marry. All that is necessary to consent to marriage is "one lucid moment" during the ceremony.[28] The mental capacity making that consent valid is the degree of mental capacity at the precise time the marriage is performed.[29] Therefore, even an elder with significant mental incapacities can enter into a valid marriage if he has "one lucid moment" during which he understands the obligations of marriage and agrees to be bound by the marriage. A marriage, even by an incompetent person, is valid until it is set aside.[30]

### C. The Confidential Marriage

Family Code section 500 permits couples to marry confidentially. This provision dates back to the 1850s, and was enacted to allow couples in common law marriages to have their unions recognized under California law without the embarrassment of neighbors learning that their marriage and their children were not previously considered legitimate.[31]

A couple is permitted to marry confidentially if they have been living together as husband and wife, and declare on the marriage license that they have held themselves out as married.[32] The text making this declaration is typically below the signature line and in very small print—something that many elders cannot see. When marrying confidentially, the standard requirement of a witness is waived.[33] Further, the appearance before the county clerk (who typically performs confidential marriages) also can be waived.[34] Any friend of the wrongdoer can apply to be appointed a deputy commissioner for a day to perform the marriage.[35] Once married, the marriage license is confidentially recorded and not a part of the public record; access can only be obtained by court order.[36]

The ease of marrying confidentially is of a particular concern when viewed in the context of Probate Code section 21610. Potentially, an elder abuser could marry a spouse confidentially and become an omitted spouse under that provision if the elder does not modify his or her estate plan. As an omitted spouse, the abuser is entitled to a significant portion of the elder's assets on death—so the abuser inherits the elder's assets without the effort of coercing the elder to create new testamentary documents. The author presumes that most elders do not recognize that the elder's estate plan will be changed automatically by operation of law to provide for the new spouse.

## IV. CHALLENGING THE MARRIAGE WHILE THE ELDER IS ALIVE

During lifetime, there are two ways to end a marriage—dissolution or annulment.

### A. Dissolution

In California, a marriage can be dissolved for irreconcilable differences or incurable insanity. Suing for divorce is strictly personal; a guardian or conservator cannot institute a divorce proceeding for an elder.[37] Unless a spouse is able to consent to the divorce—expressing a wish to end the marriage—a dissolution proceeding cannot be brought on behalf of the elder.[38] The level of mental capacity required to consent to a divorce is identical to that required to consent to marriage—simply an understanding of the meaning of a divorce.[39]

If an elder begins divorce proceedings, but suffers a stroke or otherwise is unable to express the desire to continue with the divorce, the proceeding cannot continue; a conservator cannot maintain the divorce.[40] As discussed below, a conservator might be able to annul the marriage based upon lack of consent, but if the elder had the mental capacity and consented to the marriage, the conservator cannot seek a divorce on the elder's behalf.[41]

If an elder is conserved but has the ability to exercise judgment and express the desire that the marriage be dissolved, the conservator is permitted to pursue the divorce.[42] If the elder cannot express a desire to divorce, a conservator can bring an action for division of community property and an order for separate maintenance.[43]

Where the elder has incurable insanity, an action for divorce cannot be brought on behalf of the elder because he has no capacity to express the desire to divorce. However, the other spouse can sue for divorce and the conservator is required to defend the conservatee, protecting his property interests.

### B. Annulment

In California, parties can seek to annul or "void" a marriage. A marriage can be annulled because a party was not capable of consenting to the marriage, a party was of unsound mind, consent was obtained by force or fraud, or a party was not physically capable of entering into the marital state.[44]

While an elder is alive, a marriage may be challenged as "void" from the inception (as never having occurred) or

"voidable" due to fraud or undue influence. A "void" marriage can be attacked and declared void before or after death of the elder; a "voidable" marriage cannot be attacked after death.[45]

Only a party to a marriage has standing to sue to annul the marriage based on consent being obtained by force or fraud.[46] A conservator cannot seek annulment for his conservatee based on force or fraud. Annulment based on fraud is allowed only where the false representation or concealment goes to the very essence of the marriage, i.e., living as a couple and engaging in procreation.[47] So, for example, where a husband misrepresented his financial status and fraudulently induced his spouse to marry him to gain control over her assets and invest in his business venture, there is no annulment based on fraud.[48] The statute of limitations for seeking annulment based on fraud begins to run after the discovery of the fraud and is four years.[49] If a spouse commences annulment proceedings to void the marriage based on fraud, but dies before the proceeding is concluded, the proceeding can be concluded after death by a representative.[50]

### C. Standing

Where consent to the marriage was obtained by force, only the party whose consent was obtained by force can bring the action (not a conservator). The action must be brought within four years of the marriage.[51] Note that force indicates a lack of consent and, under the elements described in the *Estate of DePasse* case, voids a marriage.[52]

Therefore, there may be little a conservator can do to protect an elder from an abusive marriage. If the elder himself does not commence proceedings to end the marriage based on fraud or forced consent, a conservator cannot bring or continue such a proceeding. Further, a conservator may bring an annulment action during the life of the elder only where the marrying party was of unsound mind or was unable to consent to the marriage.[53] There is no statute of limitations for bringing an action prior to death for annulment based on unsound mind.[54]

Because consent, by both parties, is required to marry, one might argue that proof of undue influence under the Civil Code might indicate lack of consent if the elder had a "weakness of mind" and the person used a "position of authority" to obtain an "unfair advantage" over the elder.[55] Unfortunately, the elder financial abuse statutes in the Welfare and Institutions Code do not yet apply to marriage.[56] In addition, to stand in the shoes of the elder and seek annulment of a marriage, a party must first conserve the elder. Conservatorship is possible, but very difficult if the elder is only susceptible to undue influence and not of unsound mind. As noted above, a conservator must prove lack of consent or unsoundness of mind to annul the conservatee's marriage.[57]

## V. ELDER FINANCIAL ABUSE DURING MARRIAGE

Once the marriage is in place, each spouse has a duty of support.[58] Therefore, the elder spouse must support the abusive spouse.

However, spouses also are subject to the general rules that control the actions of persons in confidential relationships. As the court explains in *In re Marriage of Haines*, the confidential spousal relationship "imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."[59] Therefore, if one spouse secures an advantage over the other, the confidential relationship will give rise to a presumption of the use and abuse of that relationship by the spouse obtaining the advantage.[60] The spouse receiving the advantage carries the burden of proof that undue influence was not exercised in obtaining the advantage.[61]

If a spouse takes advantage of an elder, that spouse can be subject to a claim of elder financial abuse.[62] Only the elder holds the cause of action during lifetime, and so long as the elder is competent, only the elder can sue for elder financial abuse. A concerned family member can assert an elder financial abuse claim on behalf of the elder only if that family member first establishes a conservatorship over the elder.

Unfortunately, the elder's spouse has priority to be appointed the elder's conservator. In addition, unless the elder is completely incompetent, any action to conserve him is likely to be divisive among the elder and the family members. For practical purposes, family members who attack the elder's spouse (who usually provides the elder's only daily companionship) are sure to damage their relationship with the elder. This makes it difficult for concerned family members to protect an elder from a spouse who married the elder only for money and who is fast spending the elder's assets.

## VI. CHALLENGING THE MARRIAGE AFTER DEATH OF THE ELDER IS NEARLY IMPOSSIBLE

The validity of an elder's marriage can be adjudicated after death, in the decedent's probate administration proceedings.[63] However, once the elder dies, the marriage is no longer "voidable" on the grounds of unsound mind, fraud or lack of capacity.[64] Dissolution of the marriage is no longer available after death, because the elder cannot consent to the divorce.[65] The only means to invalidate a marriage after death is to prove that the marriage was "void" from the inception, rather than "voidable."[66]

Only annulment or a nullity action seeking to determine that a marriage never existed may be brought after death.[67] The factors rendering a marriage void from its inception are limited to incest, bigamy or failure to follow the mandatory criteria required by the Legislature to marry.[68] Four of the five criteria required by the Legislature can apply after death: failure to properly obtain (1) a license, (2) solemnization, (3) a witness or (4) recordation.[69] The fifth criteria, lack of consent, renders a marriage voidable, but not void.

In *Estate of DePasse*, the decedent executed a will on her deathbed naming her brother as executor. Two days later, the decedent and her boyfriend asked the hospital chaplain to marry them, claiming there was no time to obtain a marriage license. The marriage was performed without a license. Six months after the decedent's death, "husband" filed a petition under Health and Safety Code section 103450 to establish the fact, time and place of a marriage that is not registered or for which a certified copy of the registration is not obtainable. The Court of Appeal held that obtaining a marriage license is a mandatory requirement for a marriage to be valid; the provisions of the Health and Safety Code section do not apply because those provisions are to establish the record of the marriage, not its validity. The marriage was held invalid for lack of a license.[70]

If an elder marries under the confidential marriage provisions of Family Code section 500, then a witness is not required. A confidential marriage only requires a license, solemnization and confidential recording. However, a confidential marriage has been successfully attacked after death where evidence showed the couple never lived together prior to marriage and did not hold themselves out as husband and wife.[71] Under such a scenario, it was argued that the couple did not have the legal right to marry under the confidential marriage provisions of Family Code section 500, and therefore the marriage was void for failure to have a witness to the marriage as required under Family Code section 300.[72]

The recent California Supreme Court case of *Ceja v. Rudolph & Sletten, Inc.*[73] may weaken the ability to challenge a marriage as void for failure to follow the mandatory, objective requirements of the Family Code. Until 2013, a putative spouse was held to an objective standard in trying to claim validity of a marriage. A putative spouse is a party to an invalid marriage who is allowed to enjoy certain of the civil benefits of marriage if he or she believed the marriage was valid. Unless a spouse had an "objectively reasonable belief" in the marriage's validity, the party was not considered a putative spouse.[74] So, for example, when an Iranian citizen performed a private marriage ceremony with her college teacher authorized by a Muslim sect, but did not follow the requirements of California law, the marriage was held invalid despite the fact she relied upon the representations of her teacher that the marriage would be valid; failure to comply with California law was objectively unreasonable.[75]

In the *Ceja* case, the California Supreme Court changed the "objectively reasonable belief" standard when it held that reasonableness is only one factor that should be considered by the court in determining if a party's belief in the marriage's validity was genuine and sincere.[76] The court also must consider the totality of the circumstances, including the party's sophistication and prior marital experience, not just the objective circumstances.[77]

*Ceja* is a further weakening of the mandatory marital rules that elder financial abusers already find easy to manipulate when they marry an elder.[78] This weakening concerns the author, who has heard of instances in which county clerks encourage the use of confidential marriage licenses for those concerned with identity theft. The confidential marriage provisions of Family Code section 500 were not intended to protect against identity theft; as noted above, the provisions were designed in the 1850s to encourage persons "living in sin" to legitimize their marriage and protect them from the humiliation of public recordation of a marriage license. The author questions if the looser standard for upholding a marriage in the *Ceja* case now provides a loophole for the savvy elder financial abuser who can claim he relied upon a county clerk's recommendation to use the confidential marriage license to avoid identity theft, when in reality the abuser simply intended to hide the marriage from the elder's family.

## VII. CHALLENGING TESTAMENTARY DISPOSITIONS AFTER DEATH

If an elder dies intestate, one-third to one-half of the elder's separate property estate passes to the abusive spouse by operation of the law, depending on the number of the elder's children.[79] If the elder creates an estate plan that provides for the elder's spouse, the elder can control what the spouse will receive. If this testamentary instrument is fair, it typically does not give rise to the presumption of undue influence under Family Code section 721 discussed above. However, if one spouse comes to the marriage with significant separate property, and by his or her testamentary instrument leaves some or all of that separate property to the other spouse, the presumption of undue influence under Family Code section 721 may be triggered as it was in the recent case of *Lintz v. Lintz*.[80]

In *Lintz,* the decedent was married to his third wife for four years before he died. Between 2005 and 2008, his wife's attorney prepared numerous trust amendments and an agreement that transmuted all of the decedent's

property to community property. The new documents and this transmutation enabled the decedent's surviving wife to disinherit the decedent's favorite child, which she did.

Upon challenge by the decedent's children, the probate court invalidated the decedent's estate plan and found that the children carried their burden of establishing undue influence by the surviving spouse. The Court of Appeal upheld the decision, but stated the burden of proof did not belong to the children; instead, the surviving wife should have carried the burden of showing lack of undue influence. As the Court of Appeal noted, the confidential relationship that exists between a husband and wife under Family Code section 721 imposes the duty of the highest good faith and fair dealing on each spouse.

Many estate planners are concerned about the consequences of the *Lintz* decision when couples with different levels of wealth marry and one spouse creates a testamentary document that leaves substantial assets to the other spouse. Some bar associations have proposed legislation to create an exception to the presumptions under Family Code section 721. That legislation, if passed, may make estate planners' lives more convenient, but it also will shift the burden of proving undue influence back to family members. In loving marriages of longevity, presuming undue influence by a spouse merely because she receives the decedent's assets is not fair. However, where a predator has lured a lonely elder into marriage, a presumption of undue influence seems appropriate.

## VIII. POSSIBLE SOLUTIONS TO MARITAL ELDER ABUSE

In considering possible solutions to marital elder abuse, the author believes that the elder's protection must be the primary goal; benefit to the family is incidental. An elder-first position flows naturally from the deeply-rooted principles of individual liberty and personal property rights which the civil justice system defends. Simply, it is the elder's money, honor, and love life most directly at stake, not the family's. Family members may have the potential to inherit assets from an elder, but they have no enforceable right to require that an elder provide for them in testamentary dispositions. Too often the author sees a family member who is more motivated to protect his or her anticipated inheritance than the elder who is being abused.

Yet, ignoring the family's interests—which can range from altruistic to selfish—is also unworkable. From a social standpoint, family members have the right to be concerned that the elder will be left destitute and in their care. Striking this balance between the elder's right to marry and the family's interest in the elder is not easy. As elder abuse by marriage becomes more pervasive, it is clear that something must be done. The author suggests below six proposals for change, along with the benefits and drawbacks of each.

### A. Change the Level of Mental Capacity Required to Marry

Although marriage is a contract, it is a special type of contract. As noted above, minimal capacity is required to marry—one need only understand the vaguely defined "obligations of marriage." Under the Family Code, minors cannot marry without parental consent. This limitation presumably exists because the brain is not fully developed until the early twenties[81] and an undeveloped brain is not capable of fully understanding the duties under a contract. Yet, no similar limitation in the law exists at the other end of life, when mental capacity declines. This asymmetry is hard to justify, as both mental development and decline are highly individualized. Perhaps, then, a simple age limitation, past which an elder must prove a higher level of capacity or actual understanding of the obligations of support in order to marry, would be scientifically and legally appropriate.

But the paternalistic nature of such a limitation will hinder its political viability. Minors cannot vote, but elders are a politically powerful group. Thus, protective measures that do not offend an elder's sense of dignity (e.g., the Elder Financial Abuse Statute, under which, after age sixty-five, no impairment need be shown to gain the act's protections) can pass the Legislature, but protective measures which strip rights or force elders to "prove" their competence to marry likely will not.

Beyond politics, whether such a measure—which would likely amount to a substantial restriction on the right to marry—would pass constitutional scrutiny is unclear. And, even if California enacted such a measure, and even if it were constitutional, California would still be forced to recognize marriages from other states.

Increasing the required capacity to marry for all persons, young and old, seems to avoid the elder discrimination problem, but invites a disability-based discrimination issue. Non-elders whose cognitive abilities fall short of the new, heightened capacity standard would find greater restrictions on their fundamental right to marry.

### B. Provide for a Status Only Marriage after a Certain Age

Another approach to protect elders is to create a form of marriage that lessens the financial impact of marriage, and thus lowers the scope for abuse. With this approach, after a certain age, any marriage by an elder would be deemed a "status only"

marriage, under which assets are not shared with the spouse by operation of the law on death through intestacy or omitted spouse rules. To the extent an elder has retired, and no community property is generated during the marriage, a status-only marriage serves simply to protect the elder's separate property. If the elder chooses to leave his assets to his new spouse, he can do so by affirmatively creating an estate plan leaving his assets to her.

This solution poses some of the same problems discussed above. It, too, may be politically difficult to enact and its constitutionality is unclear. Why are persons over a certain age excluded from omitted spouse benefits? Further, all of the sundry questions that arise in divorce and probate cases would need to be addressed in light of the "status only" marriage and could take years to resolve.

### C. Eliminate Confidential Marriage Licenses

The repeal of Family Code section 500 et seq. allowing confidential marriage licenses appears to be a simple solution to protect the elder from an abusive marriage. The purpose behind the confidential marriage license—to protect those in unrecognized, common law marriages from public humiliation—no longer exists. However, when floated, this proposal is often met with entirely new, and appropriate, justifications for confidential marriages. As discussed above, some use confidential marriage as a safeguard against identity theft; others, like public safety officers, use it to insulate their spouses from their dangerous jobs.

Disallowing the use of a confidential marriage license only by elders would be discriminatory. Repealing the statute, but enacting a law redacting all private information on marriage licenses other than the identity of the married couple, is a potential solution. Undoubtedly, the Legislature would be wading into the increasingly unsettled question of whether a person's relationships, and what types of relationships, are public or private affairs.

Regardless, eliminating the confidential marriage license only solves a portion of the problem. Abusers often use standard marriage licenses to marry an unsuspecting elder.

### D. Repeal the Omitted Spouse Statute

It is likely that the new prohibited transferee statutes encourage care givers to look to marriage as an alternative way to obtain an elder's assets. Many elders (and most laymen) are not aware that a marriage can disrupt an existing estate plan. Education may ameliorate this, but it is not practical to assume that every elder will be aware of, and understand, the omitted spouse provisions of Probate Code section 21610. A warning on an application for a marriage license ("THIS WILL DISRUPT YOUR EXISTING ESTATE PLAN") might assist, but, again would need to be both read and understood by the elder.

Repealing the omitted spouse statute would remove a predatory fiancée's incentive to marry an elder. The mere knowledge that marriage will not increase the chance of inheritance might stop some abusive marriages from ever happening.

However, repeal of the omitted spouse statute would only protect elders who have existing estate plans, not those whose assets would be inherited through intestacy. Repeal of the statute would not prevent an abuser from looting an elder's bank accounts during marriage, and thus this solution is designed more for the benefit of the elder's family than the elder. Most importantly, the omitted spouse statute does legitimately protect some spouses who would be harmed by its repeal.

### E. Amend Statutes to Further Focus on Care Custodians

Because care custodians are the most common culprits marrying elders for their money, amending various existing statutes to further protect elders from these care custodians might help address the marital abuse problem.

The possible statutory adjustments to the care custodian statutes are many. A marriage between an elder and his care custodian under a confidential marriage license could be deemed presumptively invalid. The omitted spouse statute could be amended to state that it does not apply to a care custodian marrying his or her dependent adult. The prohibited transferee statutes could be amended to exclude as a "spouse or domestic partner," any person who attained that status while acting as the care custodian of the elder.

Elders may still be prey to other malefactors, but by curtailing the benefits of marriage to those that spend significant time with elders—their care custodians—we may see a decline in predatory marriage.

### F. Post-Death Challenges

As discussed above, in California, a marriage generally cannot be challenged after an elder's death. In at least two other states, legislation has been passed allowing a marriage to be challenged post-death. This remedy, of course, is primarily for the benefit of the elder's family who hopes to recover his estate. However, such post-death challenges can act as a deterrent to someone considering marrying an elder for his money. Also, by allowing a post-death challenge, nasty litigation during the elder's twilight years is postponed until after he has passed.

In Texas a post-death action may be brought to void the marriage based on lack of consent by the elder and lack of mental capacity to understand the nature of the marriage ceremony if the elder was married within three years of his death.[82] If the elder gained mental capacity during the marriage, and recognized the relationship, then the court cannot void the marriage. The action must be filed within one year of the elder's death.

Under the post-death statutory scheme in Florida, the marriage will remain intact, but a spouse found to have procured the marriage to the decedent by fraud, duress or undue influence is not entitled to any rights or benefits arising by virtue of the marriage status or as the surviving spouse.[83] The spouse is not entitled to an elective share or a family allowance. The spouse cannot be appointed personal representative and cannot receive any benefits under a life insurance policy, a will or a trust unless he or she is identified by name in the policy or instrument.

Although expanding post-death litigation preserves the elder's social prerogatives and legal rights better than solutions based on restricting the access to marriage, it comes at the cost of completeness. As a practical matter, litigation is only useful when it can be made economically viable. As the financial reward declines, so does the incentive to sue. This leaves the more vulnerable class of elders—those with modest estates—with the least protection.

## IX. CONCLUSION

Predatory marriage is a new means of committing elder financial abuse. Marriage is easy to accomplish, easy to hide, and nearly impossible to challenge before or after death. The California Legislature recognized more than a quarter of a century ago that elders are at great risk of financial abuse and since then has repeatedly passed laws protecting elders and penalizing their abusers. Few would oppose a law that would protect an elder from a financial abuser.

However, the law has always been able to protect the wallet better than the heart. Now, abusers are invading the most personal and intimate spheres of an elder's life. In love, the lines between good and bad are not as clear. Policies designed to protect our elders from harm can easily harm instead of help. It will take creativity and compassion to reach a legally and socially tenable solution. It will not be simple or easy, but the human toll exacted by predatory marriages demands our best efforts.

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1 Welf. & Inst. Code, section 15600, subd. (b).

2 Prob. Code, section 21350 et. seq.

3 Welf. & Inst. Code, section 15657.3.

4 *Pulos v. Pulos* (1956) 140 Cal.App.2d 913, 914.

5 Welf. & Inst. Code, section 15610, subds. (a)(1) and(b).

6 *Ibid.*

7 Welf. & Inst. Code, section 15657.5.

8 *Ibid.*

9 Prob. Code, sections 21350 and 21351, repealed.

10 Prob. Code, sections 21355 and 21380.

11 Prob. Code, section 21380, subds. (a) and (b).

12 Prob. Code, section 21380, subd. (c).

13 Prob. Code, section 21362, subd. (a).

14 *Ibid.*

15 Prob. Code, section 21380, subd. (a)(3).

16 Prob. Code, section 21364 incorporates the definition of a cohabitant from Pen. Code section 13700.

17 Prob. Code, sections 21374 and 21382.

18 Prob. Code, section 21382.

19 Welf. & Inst. Code, section 15610.30, subd. (c).

20 Welf. & Inst. Code, section 15610.30, subd. (a)(2).

21 Prob. Code, section 810, subd. (a).

22 *Andersen v. Hunt* (2011) 196 Cal.App.4th 722.

23 *Middlecoff v. Middlecoff* (1959) 167 Cal.App.2d 698, citing *In re Estate of Gregorson* (1916) 160 Cal. 21.

24 *Dunphy v. Dunphy* (1911) 161 Cal. 380; *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628.

25 *Handley v. Handley* (1960) 179 Cal.App.2d 742.

26 *In re Marriage of Greenway, supra*, 217 Cal.App.4th at p. 375.

27 Fam. Code, section 300; *Vitale v. Vitale* (1957) 147 Cal.App.2d 665.

28 *Vitale v. Vitale, supra*, 147 Cal.App.2d at p. 666.

29 *Ibid.*

30 *Middlecoff v. Middlecoff, supra,* 167 Cal.App.2d at p. 704.

31 McKissock, *A New Use for Confidential Marriage: Elder Abuse* (Spring, 2008) vol. 14, No. 1, Cal. Tr. and Est. Q.

32 Fam. Code, section 505.

33 Fam. Code, section 500.

34 Fam. Code, section 502.

35 Fam. Code, section 401, subd. (b).

36 Fam. Code, section 511, subd. (c).

37 *Pulos v. Pulos, supra*, 140 Cal.App.2d at p. 914.

38 *In re Marriage of Higgason* (1973) 10 Cal.3d 476.

39 *In re Marriage of Greenway, supra*, 217 Cal.App.4th at p. 643.

40 *In re Marriage of Straczynski* (2010) 189 Cal.App.4th 531.

41 *Pulos v. Pulos, supra*, 140 Cal.App.2d at p. 914.

42 *In re Marriage of Higgason, supra*, 10 Cal.3d at p. 483; *In re Marriage of Straczynski, supra*, 189 Cal.App.4th at p. 540.

43 *Pulos v. Pulos, supra*, 140 Cal.App.2d at p. 915.

44 Fam. Code, section 2210.

45 *In re Karau's Estate* (1938) 26 Cal.App.2d 606, 607.

46 *Pryor v. Pryor* (2009) 177 Cal.App.4th 1448.

47 *In re Marriage of Meagher and Maleki* (2005) 131 Cal.App.4th 1; *Handley v. Handley* (1960) 179 Cal.App.2d 742, 747.

48 *In re Marriage of Meagher, supra*, 131 Cal.App.4th at p. 668.

49 Fam. Code, section 2211, subd. (d).

50 *In re Marriage of Goldberg* (1994) 22 Cal.App.4th 265.

51 Fam. Code, section 2211, subd. (e).

52 *Estate of DePasse* (2002) 97 Cal.App.4th 94.

53 *In re Karau's Estate, supra*, 26 Cal.App.2d at p. 607; Prob. Code, section 1901.

54 Fam. Code, section 2211, subd. (c).

55 *Estate of DePasse, supra*, 97 Cal.App.4th at p. 101; Civ. Code, section 1575.

56 Welf. & Inst. Code, section 15610.70.

57 Prob. Code, section 1901.

58 Fam. Code, section 4300.

59 *In re Marriage of Haines* (1995) 33 Cal.App.4th 277.

60 *In re Marriage of Baltins* (1989) 212 Cal.App.3rd 66, 88.

61 *Ibid; Lintz v. Lintz* (2004) 222 Cal.App.4th 1346.

62 *Lintz v. Lintz, supra*, 222 Cal.App.4th 1346.

63 *Estate of DePasse, supra*, 97 Cal.App.4th at p. 97.

64 *In re Karau's Estate, supra*, 222 Cal.App.2d at p 607.

65 However, see *Kern v. Kern* (1968) 261 Cal.App.2d 325, where a divorce proceeding was commenced and wife obtained an interlocutory decree of divorce and then died. The court entered a final decree of divorce nunc pro tunc because there was substantial evidence that the wife wanted the divorce.

66 *Ibid.*

67 *In re Marriage of Goldberg, supra*, 22 Cal.App.4th at p. 268.

68 Fam. Code, sections 2200, 2201 and 2210; *Estate of DePasse, supra*, 97 Cal.App.4th at p. 101.

69 *In re Karau's Estate, supra*, 26 Cal.App.2d at p. 606; *Estate of DePasse, supra*, 97 Cal.App.4th at p. 101.

70 *Estate of DePasse, supra*, 97 Cal.App.4th at pp. 154-156.

71 *In re Estate of Tollefsen* 2009 WL 3470401 [nonpub. opn.]; *In re Matter of Lowney* 2012 WL 5406782.

72 *Ibid.*

73 *Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113.

74 *In re Marriage of Vryonis* (1988) 202 Cal.App.3d 712.

75 *Ibid.*

76 *Ceja v, Rudolph & Sletten, Inc., supra*, 56 Cal.4th at pp. 1126-1127.

77 *Ibid.*

78 See Fam. Code, sections 401, subd. (b), and 502 providing an exception for appearing before the clerk for a license and allowing a friend to become a deputy commissioner for a day to perform a marriage.

79 Prob. Code, section 21610.

80 *Lintz v. Lintz, supra*, 222 Cal.App.4th at p. 1353.

81 Baird & Bennett, *Anatomical Changes in the Emerging Adult Brain* (Sept. 2006) Human Brain Mapping, Vol. 27, Issue 9, pp. 766-777.

82 Texas Estates Code, section 123.101-123.104.

83 Florida Estates and Trusts Code, section 732.805.