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A NEW USE FOR CONFIDENTIAL MARRIAGE: ELDER ABUSE

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When the California State Legislature chose not to recognize common law marriages over a century ago, it made sense to allow a couple living together to legalize their relationship through the "confidential marriage." Today, however, the confidential marriage process allowed by Family Code section 500 seems more a fertile field for elder abuse or evading the law than a mechanism to shield families from the humiliation of a public marriage after years of cohabitation.

I. WHAT IS A CONFIDENTIAL MARRIAGE?

In 1850, the California Legislature enacted the first Act Regulating Marriages. By 1862, amendments to that statute required marrying couples to obtain a marriage license. The Legislature added statutes the following year allowing persons who had been living together as husband and wife to marry without a license. In 1872, California statutes were organized into four codes of general laws, among them the Civil Code, which contained section 55, the precursor to current Family Code section 300 that governs the typical public marriage.[1] Six years later, the Legislature added Civil Code section 79, which continued the statutes involving confidential marriage, and is the precursor to Family Code section 500 governing today's confidential marriages. Civil Code section 79 provided:

> 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.

The purpose and public policy behind confidential marriages was to "shield the parties and their children, if any, from the publicity of a marriage recorded in the ordinary manner, and thereby to encourage unmarried persons living together as man and wife to legalize their relationship."[2] Confidential marriage was a mechanism by which those who had been married by common law could obtain recognition by the state of their marriage, without publicly revealing that their marriage had not been previously recognized.

II. CONFIDENTIAL MARRIAGE LICENSES ARE EASILY OBTAINED AND CONCEALED FROM FAMILY MEMBERS

As late as 1969, when Civil Code section 79 became Civil Code section 4213, a cohabitating couple still was not required to obtain a marriage license under the confidential marriage statute. The clergyman performing the ceremony, however, was required to file a marriage certificate with the county clerk.[3] That marriage certificate was not open to public inspection without court order.

Under the current statute,[4] a marriage license must be obtained from the county clerk, but its recordation is held confidential and only disclosed to third parties by court order.[5] To obtain the confidential marriage license, the parties need only appear before a county clerk, have capacity, not be under the influence of drugs or alcohol, and fill out the license.[6]

A. A Confidential Marriage License Can be Obtained Without the Elder Ever Appearing Before a County Clerk

Nevertheless, even the statutory safeguard of having the parties appears before the clerk who might determine capacity can be relinquished under the confidential marriage statute. Under Family Code section 502, if for any reason one or both of the marrying parties is physically unable to appear in person before the county clerk, the person solemnizing the marriage can obtain the confidential marriage license by executing an affidavit on the couple's behalf explaining the reason the person(s) cannot appear. In one unreported case, a "clergyman for hire" obtained the confidential marriage license for a couple, one of whom was on her deathbed in a hospital.[7] In another case, a clergyman accompanied the petitioner to city hall to obtain the confidential marriage license, returning to the hospital to perform the marriage the day before the decedent died.[8] Fortunately, in both instances, the decedents were so ill that they could not sign the marriage license and the county clerk did not record the document. However, the "surviving spouses" both attempted to validate their marriages by petitioning under Health and Safety Code section 103450 for an order establishing the fact, time and place of the marriage. The estate expended litigation fees to invalidate the marriages.

B. Appearance Before a Clerk is No Guarantee that Advantage is Not Being Taken of an Elder

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. Generally speaking, a person has capacity to consent to marriage so long as he or she is able to understand the nature, duties, obligation and effect of marriage. Even appointment of a conservator does not affect the capacity of a conservatee to marry.[9]

Confidential marriage can make the victimization of an elder even more likely. Since a confidential marriage does not require public solemnization, family members may never know during the elder's lifetime that he or she married. 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. Parties to a confidential marriage can be

married by any person authorized to solemnize marriages under Family Code section 400, which includes the county clerk who is "a commissioner of civil marriages."[10] The county clerk, in turn, may appoint any deputy commissioner to solemnize marriages.[11] The marrying parties need only state in the presence of the deputy commissioner that they take each other as husband and wife and sign a marriage license that states in small print that they meet all of the requirements of a confidential marriage—specifically that they are an unmarried man and an unmarried woman, not minors, and that they have been living together as husband and wife.[12] The deputy commissioner is allowed, but not required, to ask questions about the information on the marriage license if he or she has reason to doubt its correctness.[13] Otherwise, the deputy commissioner is required only to ensure there is a marriage license, and attach to it a statement indicating the date, place and fact of the marriage, the names and residences of the parties, and his own position and address.[14]

In a case currently pending before the San Mateo Superior Court,[15] an estate-planning attorney in her fifties married her 86-year-old client the year before he died, using a confidential marriage license. The essentially housebound elder was lonely, as his only family lived abroad. Both the attorney and the decedent appeared before the county clerk to obtain the confidential marriage license, both signed it and were married by the deputy clerk. The elder had very poor eyesight, and it is questionable that he could read the marriage license he signed, which stated that he lived with the attorney as husband and wife. Deposition testimony from numerous witnesses, including the attorney, confirmed the two never lived together as husband and wife, either before or after the marriage. Shortly before he died, the elder realized his mistake and asked his family abroad to help him annul the marriage. Unfortunately, he died before his family could travel to the United States. His alleged surviving spouse filed a spousal property petition in San Mateo Superior Court, claiming she is an omitted spouse entitled to half of the decedent's separate property left to his nieces under the estate plan the attorney had prepared.

III. THE DIFFICULTY IN DECLARING A MARRIAGE VOID AFTER DEATH OF THE ELDER

The primary problem with confidential marriage is that it is confidential. Family members are often not aware an elder has married until after his or her death and cannot challenge the marriage, since there are very few limitations preventing a man and woman from marrying. Although minors do not have the capacity to consent to marriage, confidential or public, there is no mechanism to determine when capacity to consent is no longer present in an adult. A marriage is voidable if the person marrying is of unsound mind, but once the elder dies, that marriage is no longer voidable on the grounds of lack of capacity.[16] The action to annul the marriage must be brought during the married parties' lifetime.[17]

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. Under the current law, it is then too late to challenge the marriage on the basis that the elder did not have capacity to enter into the marriage.[18] *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.*

A. Declaring the Marriage Void from the Inception, Rather than "Voidable"

The only way to invalidate a marriage after death is to prove that the marriage was void from its inception, rather than "voidable."[19] Criteria listed in the Family Code rendering a marriage void from its inception are limited to such situations as incest and bigamy.[20] However, more recent authorities have held that a marriage may be invalid for reasons other than those enumerated in the Family Code.[21]

Lack of a marriage license is not listed in the Family Code as a ground for invalidating a marriage and, prior to *Estate of DePasse,* some authorities maintained that lack of a marriage license was not fatal to finding a valid marriage.[22] Authorities considered statutory requirements merely "directory" and not mandatory.[23] However, the court in *DePasse* reviewed the recent amendments to the Family Code and explicitly held that the Legislature's use of the term "shall" is mandatory, not directory, and that "a license is a mandatory requirement for a valid marriage in California."[24] Thus, a marriage of an elder can be declared void, after death, if no marriage license was obtained.[25]

B. Declaring the Marriage Void as an Attempt to Evade the Law

If a marriage license signed by the elder was recorded prior to his or her death, the avenues for attacking the marriage are limited, if nearly nonexistent. In the action currently pending in San Mateo County,[26] family members argue that the marriage was void from its inception because the parties to the marriage deliberately evaded the law. In a motion for summary judgment brought against the allegedly omitted spouse, family members argue that she cannot profit from her own evasion of the law.

This argument is based upon the fact that in recent years both the Sixth District Court of Appeal and the California Supreme Court reaffirmed that the State of California "has a vital interest in the institution of marriage and plenary power to fix the conditions under which the marriage status may be created or terminated. [Citation.] The regulation of marriage is solely within the province of the Legislature."[27] The Legislature has enacted a comprehensive scheme regulating marriage and establishing the standard for eligibility to marry.[28]

> [M]arriage itself is a highly regulated institution of undisputed social value, and there are many limitations on the ability of persons to contract with respect to it, or to vary its statutory terms, that have nothing to do with maximizing the satisfaction of the parties or carrying out their intent.[29]

These limitations show that marital arrangements are tempered with statutory requirements and case law establishing social policy with respect to marriage.[30]

As the Family Code states, consent to marriage alone does not constitute marriage. The Legislature has mandated that a marriage *must* be licensed and solemnized as authorized by Family Code section 300 *unless* the parties meet the requirements of Family Code section 500.[31] Therefore, it may be argued that when the parties to the marriage admit that they never lived together as husband and wife, they do not meet the requirements of Section 500, and must comply with the requirements of Section 300. Marriage under Section 300 requires that a witness to the marriage sign the marriage license, which does not happen with a confidential marriage because a witness is not required on the confidential marriage license.

Although the case of *Lockyer v. City and County of San Francisco* deals with same-sex marriages and is not factually on point, the language in that California Supreme Court opinion sheds additional light on the evolution of marriage legislation in California. It states that where the parties attempting to marry do not meet the statutory requirements, there is no authority to issue a marriage license or register a certificate of registry of the marriage.[32] A marriage performed in violation of state law is void and of no legal effect.[33] The California Supreme Court rendered a very similar opinion in a marriage case more than 100 years ago and again in 1945, but whether the San Mateo Superior Court follows the language in *Lockyer* and these older cases remains to be seen.[34]

In *Norman,*[35] a couple chartered a boat from Long Beach, California to marry at sea for the purpose of evading California law governing who can solemnize a marriage. (California law did not permit a sea captain to solemnize a marriage.) The California Supreme Court found the marriage void from the inception because the parties themselves had engaged in a deliberate noncompliance with the laws.[36] In *Norman,* the female defendant admitted that she and the plaintiff had the ceremony performed at sea for the purpose of not complying with California law governing marriage.[37] The parties *had the ability* to comply with the law; the reasons for not complying with the law "were of their own creation" and for the purpose of evading the law.[38] The Supreme Court refused to uphold the marriage.

While marriage statutes provide that noncompliance with its provisions by a party *other than* the couple engaged in the marriage will not invalidate the marriage, the same does not hold true for the couple marrying.[39] The court in *Norman* found that "such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them."[40] The court in *Norman* denied the petition to validate the marriage, finding that because the couple had evaded the law, a marriage license did not exist and the court would not recognize the marriage.[41]

This analysis, however, requires California courts to take *Estate of DePasse* one step further: not only is it mandatory to obtain a license to have a valid marriage, but the parties to the marriage cannot have obtained that license through fraud on the state. Though promising, this solution still does not address the situation in which an elder signs a marriage license, but was either incompetent or under the undue influence of the other party.

IV. AMENDING THE CONFIDENTIAL MARRIAGE PROVISIONS

Upholding the rights of elders to marry at any time in their life is important. However, the value of the confidential marriage process in this age where couples openly cohabitate is questionable, especially in light of the abuses made of the statute.[42] Elimination of the entire confidential marriage procedure might be considered, but at minimum, the Legislature should consider amendments either setting parameters for elders to enter into confidential marriages or their kin to challenge the marriage after a decedent's death. Remedying the abuses that occur under the confidential marriage statutes will not address abuse of elders that also occurs under the public marriage statutes.

In 2007, the Texas State Legislature added a section to its Probate Code allowing a court to deem a decedent's current marriage void for lack of mental capacity even after the decedent

has died. The statute was designed to undo marriages entered into due to the actions of conniving or abusive caregivers. Texas Probate Code section 47A provides for invalidating a marriage after death, whether the proceedings to invalidate were commenced prior to the decedent's death or not until after death. The criteria for voiding a marriage pursuant to proceedings commenced after death are that the decedent entered into the marriage within three years of his or her death; an interested person petitions to void the marriage within one year of the date of death; the court finds that the decedent lacked mental capacity to consent to the marriage and understand the nature of the marriage ceremony; and the court does not determine that the decedent regained mental capacity after the marriage, recognizing the marriage. A marriage found void under this statute renders the surviving partner unable to receive any interest in the decedent's estate as a surviving spouse.

Although the Texas statute does not permit challenging a marriage of an elder after his or her death based on undue influence, it is at least a step in the right direction. Without some change in the laws governing marriage, probate or elder abuse, the current status of California law provides abusers an easy opportunity to take advantage of elders. So long as the marriage is not challenged before the elder's death, the purported surviving spouse will suffer no consequences.

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ENDNOTES

1. Civ. Code, § 55 provided: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations."
2. *Encinas v. Lowthian Freight Lines, Inc.* (1945) 69 Cal.App.2d 156, 163.
3. Civ. Code, § 4213 provided: "When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman, without the necessity of first obtaining health certificates. A certificate of marriage shall be filled out by the parties to the marriage and authenticated by the clergyman performing the ceremony. The certificate shall be filed by the clergyman with the office in the county clerk in the county in which the ceremony was performed within four days after performance of the ceremony. The county clerk shall maintain this certificate as a permanent record which shall not be open to public inspection except upon order of the superior court issued upon a showing of good cause."
4. Fam. Code, §§ 550 -536.
5. Fam. Code, §§ 501 & 511(c).
6. Fam. Code, §§ 352, 501 & 505.
7. Respondent's Brief and Cross-Appellant's Opening Brief, *In re Estate of Reynolds* (Jan.27, 1998, No. B108956) 1998 WL 34359067. The trial court found the marriage void for lack of a signed marriage license. The decedent was unable to write her name.
8. *In re Langley* (Cal.App., Aug. 10, 2004, No. A105449) 2004 WL 1776580 [nonpub. opn.].
9. Prob. Code, §§ 1900 & 1901.
10. Fam. Code, § 440(b).
11. Fam. Code, § 401(b).
12. Fam. Code, § 420.
13. Fam. Code, §§ 421, 500 & 505.
14. Fam. Code, §§ 421 & 422.
15. *In re The Matter of the Estate of Rodney E. Pozas aka Rodney Emile Pozas,* Super. Ct. Santa Clara County, 2001 No. 1-01-PR-148736.
16. *In re Karau's Estate* (1938) 26 Cal.App.2d 606.
17. *Id.*
18. *In re Karau's Estate, supra,* 26 Cal.App.2d 606.
19. *In re Karau's Estate, supra,* 26 Cal.App.2d 606; *Estate of DePasse* (2002) 97 Cal.App.4th 92.
20. *In re Karau's Estate, supra,* 26 Cal.App.2d 606, 607; Fam. Code §§ 2200, 2201 & 2210.
21. *In re Marriage of Vryonis* (1988) 202 Cal.App.3d 712, 718-719; *Estate of DePasse, supra,* 97 Cal.App.4th 92, 106.
22. *Argonaut Insurance Co. v. Industrial Accident Com.* (1962) 204 Cal.App.2d 805.
23. *Id.* at p. 810.
24. *Estate of DePasse, supra,* 97 Cal.App.4th 92, 102.
25. *Estate of DePasse, supra,* 97 Cal.App.4th 92, 106.
26. *In re The Matter of the Estate of Rodney E. Pozas aka Rodney Emile Pozas,* Super. Ct. Santa Clara County, 2001 No. 1-01-PR-148736.
27. *Estate of DePasse, supra,* 97 Cal.App.4th 92, 99; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1113.
28. *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1079.
29. *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 25.
30. *In re Marriage of Bonds, supra,* 24 Cal.4th 1, 26.
31. *Estate of DePasse, supra,* 97 Cal.App.4th 92, 99 & n. 5.
32. *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1082.
33. *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1113.
34. *Norman v. Norman* (1898) 121 Cal. 620; *In re Abate's Estate* (1959) 166 Cal. App.2d 282, 292; *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1113.
35. *Norman v. Norman, supra,* 121 Cal. 620.
36. *Norman v. Norman, supra,* 121 Cal. 620, 628-629.
37. *Norman v. Norman, supra,* 121 Cal. 620, 623.
38. *Norman v. Norman, supra,* 121 Cal. 620, 626-627.
39. *Norman v. Norman, supra,* 121 Cal. 620, 628.
40. *Norman v. Norman, supra,* 121 Cal. 620, 625, citing *Holmes v. Holmes,* 1 Abb. (U.S.) 525 Fed.Cas. No. 6, 638.
41. *Norman v. Norman, supra,* 121 Cal. 620, 629.
42. Another abuse made of the confidential marriage statute occurred in a matter in which a man, not an elder, knew his divorce was not yet complete, so he married his second spouse in a confidential marriage. Although the second marriage was void from the inception as bigamy, this did not prevent a claim by the second spouse that she was a putative spouse when he unexpectedly died. (*In re the Matter of the Estate of Rodney E. Pozas aka Rodney Emile Pozas,* Super Ct. Santa Clara County, 2001, No. 1-01-PR-148736).