

The **POWER** of ATTORNEY PROJECT

Predatory Marriages with Seniors

Welcome to the Power of Attorney Podcast which is part of our Conversations that Matter Podcasts. My name is Mary Bart, Chair of Caregiving Matters. This podcast is intended to provide general information only and is not intended to be a substitute for seeking personalized legal, financial or other advice. This podcast raises issues that our audience can further explore on their own in their own local communities with their own local experts. This project will help to be a call to action for families to solve their issues, find solutions to their problems, and have greater peace of mind.

Mary- Our guest expert is Steven Benmor. Steven is the principle lawyer with Benmore Family Law Group. Good morning Steven. Thank you for joining our project. Before I go into my list of questions could you please share a bit about your practice?

Steven- Absolutely. Thank you Mary for inviting me and I'm happy to share with you information about this very interesting and developing subject but before I do, let me introduce myself. I am a family law lawyer, also called a divorce lawyer, and for the last twenty years I have represented and advised husbands and wives, parents and even grandparents on the subject of custody, access to children, parenting plans, child support and also spousal rights such as property division upon separation or divorce, and also including issues pertaining to domestic abuse and contracts that allow people to forward plan. So effectively my practice is to help people understand the rights and remedies stemming from marriage and also resulting from separation and divorce.

Mary- Thank you for that and I'd like to begin with my first question for you and it is, how are rights changed because of marriage?

Steven- So interestingly, family law lawyers who are experts on the subject of the legal aspects of marriage are rarely ever consulted on the subject of marriage meaning we as lawyers usually only get involved when discussing the matters of separation and or divorce when quite frankly the much larger issue is what happens to somebody's rights when they decide to get married; when they walk into city hall and they get a marriage licence. Their legal rights are dramatically changed when they enter into marriage. Specifically marriage under Ontario law is recognized as an economic partnership so essentially no different than going into partnership in purchasing a building or a business or starting a new business. Marriage in itself is considered an economic partnership under the law of Ontario and as a result when two people marry they become financial partners which basically means that any assets that either person has on the date of marriage as those assets grow the growth is automatically

considered family growth not individual growth. So as the assets grow over the course of a marriage, that growth is otherwise considered shared growth under the laws of Ontario. Secondly, marriage also includes support obligations. When two people marry they take on the commitment of supporting one another so therefore whether it is during marriage or as a result of separation or divorce, there are support obligations that are automatically triggered by a marriage. Then the third thing that occurs upon marriage is the home that they live in is called the matrimonial home and if there is a home that is owned on the date of separation, that home is considered shared and either spouse has two rights to that home that are triggered by marriage. Right number one is they're entitled to half of the equity in it and right number two is that they're entitled to occupy it. Those rights apply even if the marriage was short and even if one person is on title. Even if one person brought it into the marriage. So a perfect example which a lot of people are surprised by is if two people get married today and the husband moves into the wife's condominium and let's pretend the wife owned the condo outright. Maybe she worked and earned to pay it off or maybe she inherited the condo. However she got it, she owns it, she's on title and then they are married for say five years and that condo went from a value of say \$500000 to \$555000 during the time they were married. On its face most on the street would think if it went up \$50000 then the husband would be entitled to half of the growth so \$25000 but that's not what the law in Ontario says. Each spouse is entitled to half of the value so \$275000 for the husband by virtue of marriage and living together in that condominium so to your question Mary...to recap marriage creates an economic partnership, marriage creates support obligations, marriage creates the rights to rights to a matrimonial home upon separation.

Mary- Thank you for that Steve. That's very important to know. My next question is, a little bit different. How are rights changed follow a separation?

Steven- So following the answer I just gave, separation is a process but under the law of Ontario it is considered a date. So what do I mean by separation? Well first of all if a couple isn't getting a long and they have a spat, they ordinarily don't split up and sometimes spats have lasted for a long time but for the most part separation is a process where people have had arguments, differences, they have disconnected, they don't communicate, there may be infidelity and this usually happens over the course of time. But then, there is a date when a decision is made often by one sometimes by both that they are now separated. That doesn't necessarily mean that one of them moves out. They could be separated but living in the same home. That date of separation, the date when someone says we are done. I am no longer with you and the world sees them as a separated couple, no eating, sleeping or behaving as a couple and most people know when it is and some don't agree, but for the most part the date of separation is known and that crystalizes the rights that each of them have stemming from the marriage which include the three rights I talked about before. They are all connected to that date of separation. What it means is that the date of valuation of the items that are to be divided are dealt with based on the date of marriage and the date of separation. So there are people who separate but don't do anything to resolve their financial affairs and in some cases those people go and see a lawyer to ask what their rights are. The right of the spouse stemming from marriage goes back to the date of separation so for example that I just settled where the couple separated fifteen years ago. I was asked to provide advice to my client with respect to his rights stemming from the marriage and the separation.

We had to rebuild and investigate his assets and debts going back fifteen years in order to calculate division of property because the date of separation was the date the economic partnership ends. So to answer your question, the date of separation is the date when the rights are triggered and crystalized. In fact, many would argue that the support rights are crystalized on the date of separation. For example, let's say the wife was a stay at home mom and the husband earned \$75000 a year on the date of separation. Some would say well the support obligation that the husband has to the wife and the children is predicated based on her having an income of zero and him having \$75000. What happens if two years later her income is \$60000 and his is \$100000 so there are two schools of thought on that. There are those that would say when they split up that establishes the support obligation but then some say today the numbers have changed and therefore should be predicated on today's income and the short answer is that both are right. Judges grapple with it. Should the wife benefit from his increase in income? Should the husband pay even though the ex-spouse is now making more. Most times those issues are sorted in court. But to answer your question, Mary, the answer is the separation date triggers the rights.

Mary- The next question also related to that is how are rights changed because of divorce?

Steven- So a moment ago we talked about how rights have changed because if separation and actually the rights or main right which is the right of property division has what's called a limitation period so when a couple splits up there is a limitation period that runs to determine if and when there should be a division of property and the limitation is the first of one of these three dates. So in other words whenever one of these three things happen first, that's when the right to property division under separation expires. The first one is six months after death of one's spouse, second is two years after divorce, the third one is 6 years after living separate and apart. So the answer to your question of how are rights changed after divorce, is if a person splits up today and then divorces in 6 months, the two year limitation period is triggered from the date of divorce. So that person has two years in order to seek a division of property. This is really important because if there is a pension or rrsp's, a house in one person's name, those are very valuable assets and in some cases worth hundreds of thousands of dollars and the right expires when the limitation period lapses. The person who divorces today, who didn't divide their property basically has two years to get it done or lose the right. No divorce then it is six years from separation. Divorce also terminates the title of spouse. When a person is married the legal term is spouse and when a person separates they are still considered spouses but divorce makes them considered former spouses which is relevant for estate planning purposes and they lose rights that are only accorded to spouses and those rights are found in rrsp's, pensions, wills, life insurance and therefor the word spouse is very critical and divorce ends that title.

Mary- My next question is, what is a power of attorney and how does that interplay with a will?

Steven- So everybody knows what a will is. A will is something that anybody can do if they are an adult and are capable and it is a document that someone sets out to say what will happen after their death. It has no legal effect until after death. At the time of death the executor of a will opens the will and determines what it was that the deceased person set out to occur upon their death. A will often sets out what the person wanted done with their assets, how they want to be buried, but will also set out if

they have minor children how they would like them to be raised. It was their “will” to have these events occur after death. The will has no power or legal authority until after death. A power of attorney is a document that only works from the date of incapacity until the date of death. A power of attorney is used by someone to say that in the event I am unable to make a decision for myself, regarding my health, regarding my property, I appoint this other person under a power of attorney. This person would be the substitute decision maker for the person who is incapacitated. So the person who signs the power of attorney and then gets say stroke, Alzheimer’s, dementia and cannot make decisions, the attorney then becomes empowered and they receive the powers set out in the power of attorney. So they would decide health care, money and property decisions so typically those people have wills and often the same person is the executor of the will but it doesn’t have to be that way. One person could be the power of attorney over property, one could be the power of attorney over health and one person could be the executor of the will and so the reason why a power of attorney is so important is because it gives the power to somebody to decide the quality of care, medical treatment when they can’t make decisions themselves and also the power as to how to use their property and money so if a will says I want my house to go to my children upon my death but the person is incapable for years before death, the power of attorney gave the attorney the power to sell the house to use the money to pay for the incapable person’s health care, funeral etc. So it’s possible that the attorney under a POA can actually usurp the intentions under a will by using and spending the money that otherwise be in the hands of the executor upon death. Now of course, whether you are an attorney under a power of attorney or an executor under a will, you have a fiduciary obligation which means you are a trusted person with those decisions and often times people choose people they wholeheartedly trust to do the right thing and in the event that any of these abuse their powers the other family members have the right to challenge their conduct.

Mary- My next question is, can anyone get married in Canada? For example could it be an immigrant? Same sex marriage? People who are terminally ill? Incapable?

Steven- Now this is a good question because it is now leading us to the subject of this webinar. That is if somebody is ill can they marry? Most people would say of course and there are some very romantic stories about that for example they fall in love and the ill person marries the caregiver because of the love and caregiving that occurs and I’ll get to that in a moment. The quicker answers on the can anyone marry well first of all minors can’t marry so if your thirteen year old wants to get married she can’t. An immigrant can marry of course. The fact that they may be illegal or not have permanent status, well that doesn’t matter. Can a same sex couple get married well absolutely. For those that have been following the news, we are a torch bearer to the world on the fact that our government had authorized people of same sex to marry and have been praised by communities all over the world for recognizing the equality of people of the same gender and a flood of same sex partners who attended Ontario to get married. Let’s get to the nitty gritty of this conversation which is predatory marriages. If you think about the fact that we are a society where people are living longer because of medical care, medicine supports etc. It used to be if somebody broke their hip they were most likely going to die sometime shortly thereafter because of lack of mobility and shut down of their organs but now people have hip replacement surgery and live longer because of that. People are cured or treated for cancer and it is not

always an immediate death sentence so medicine has come a long way and there are cognitive or psychological disorders such as dementia, bipolar, Alzheimer's and they affect people along a spectrum even including his age. So let's specifically talk about the cognitive disorders of dementia and Alzheimer's. There are thousands who suffer from this and some of them are living in their homes and family has arranged for caregivers to live with them or visit them. Some of them are in nursing homes or retirement homes and so these thousands of Ontarians that are suffering from Alzheimer's or dementia are presenting on a different place on the spectrum. Some of them remember their family members and some of them can't. Some don't have the ability to remember where they were born or their name. There is a whole broad spectrum of dementia and Alzheimer's and in many cases there are support workers. There are stories of people who fell in love with their client because despite the fact that Alzheimer's affect memories, it doesn't always affect their ability to have a healthy relationship or a romantic relationship and in that situation when we look at who can marry, it is a very difficult conversation because there is a question of morality not just legality in that question. It would be wrong of us to deprive a person who suffers from Alzheimer's with a right and a privilege to have a relationship with somebody but when you are the adult child of someone who suffers from Alzheimer's and you hired a caregiver to take care of your mother or father you're not expecting that caregiver to be your mother or father in law and you certainly aren't expecting that caregiver to secretly be engaging in a romantic relationship with the parent you love so dearly. So can somebody with Alzheimer's marry? That question has not been answered by the law in Ontario but there have been cases in the courts that have sided on both sides of that question and in some cases, the judges have said the person had the mental capacity to marry. They did not have the mental capacity to sign a loan, a cell phone contract etc, or mtg but they had the capacity to marry and then there are others where the judges have said this is clearly a case where the person could not have understood the implications of marriage and even though that person and their caregiver are now married it is now void because that person did not understand what they were doing when they got married. So Mary, to answer your question regarding can anyone get married; on the subject of those with cognitive disorders such as Alzheimer's, the answer is we don't know. It's fact specific and each case will be decided on its own merits.

Mary- Just to comment about that and the statistics that the aging population is seeing more and more dementia and Alzheimer's becoming more prevalent, this issue will come to the court more often and as a lawyer you will see these issues grow just because this disease is taking over our population and so it will be interesting as a layperson to watch what happens as lawyers and judges deal with this issue more frequently. Very interesting topic.

Steven- It is and as an adult child of a person with Alzheimer's who visits his mother regularly at her long term care facility I see almost daily what is occurring in the halls of these facilities. There are people who have no caregivers. They just rely on the caregivers at the place. There are people who have part time caregivers who work a couple hours a day or a week and there are those who have full time staff there around the clock who the family has paid for in order to care for the person, to bath the person, change the person, stay with the person and what I see in the halls is absolutely beautiful because what I see is a lot of good quality care and a lot of love and I hired for my mom a part time caregiver who shows my mom a tremendous amount of love and my mom shows her a tremendous amount of love. In

fact, my mom says “I love you”. Does that mean my mom has the capacity to marry? I don’t think so but if my mom was not a mom but my father was saying I love you do they have the capacity to marry? These questions cannot be answered with a rule of thumb or parameter. I’m not even sure you could answer that question with a legal test because it’s a legal question. Can a person form the legal intention to marry? That question is a very challenging question and by the way equally is challenging as can a person decide when they would like to expire? Can a person decide when they would like to have their life terminated? These are very difficult questions that invoke ethical, religious and constitutional issues that are very difficult to answer and any two people can very realistically have two very different views and may I suggest that a lot of people within the family have a difference of opinion on these issues. These are very tough questions that I think society for the reasons I mentioned about the increased numbers of people with dementia that they are going to have to address these issues and realize that there is not a one size fits all answer that is going to apply to everybody.

Mary- You know that’s so true. My mom also had dementia and stress just watching her decline was so hard for us but to build in the other complexity of having her in a relationship and the thought of getting married to somebody must send people over the moon with shock and disbelief. You never would ever think that the caregiver would be that important to someone to get married and so my next question is, what is a predatory marriage?

Steven- Well we have beautifully segued it into that by answering the last question. A predatory marriage or exploitative marriage is when somebody marries another person and the person that they marry is unhealthy. For example they may have dementia or Alzheimer’s that prevents them from understanding the implications of marriage and the person that is the capable person often times is healthy physically and mentally. In the profile of a predatory marriage you have the younger healthy person and the older unhealthy person and a difference of economic power. The healthy younger person less financially fit and the unhealthy incapable person with some wealth or great wealth and so you have as a foundation a significant difference of health, age, and financial wealth and when you look at those differences and you understand what happens upon marriage as I mentioned about economic partnership and an immediate right to the matrimonial home. So as a perfect example, in this day and age adult children who have a parent who suffers from Alzheimer’s often times are coached or advised by the health care people that what would be best would be to keep them living in their own home where they know their bedroom etc and are comfortable as long as possible but to bring in caregivers because it would be easier on the family and the patient to consider the status quo. That sounds fair having moved my mother twice, it’s very difficult on the person with Alzheimer’s when you are changing their environment so keeping them as long as you can is a goal of the medical community, the psychological community and the community in general so going back to the subject of a predatory marriage where you have this significant imbalance of health, age and finances, the caregiver marries the Alzheimer’s patient and that house now becomes half owned by the caregiver just by virtue of marriage. The other thing that happens and this is very important, the last will and testament that the person created before the diagnosis is invalidated by marriage. To be clear the act of marriage terminates a will and there are exceptions to that but for the vast majority, the act of marriage terminates the will and whether that is a predatory marriage or appropriate the fact is that marriage

terminates a will so when you think about those rights we talked about such as economic partnership, the right to the matrimonial home and the right to support, you can see how a clandestine act by a caregiver to marry an Alzheimer's person could be seen as an exploitation or act of a predator and that is what a predatory marriage is.

Mary- So in Ontario, could you describe what the law is to prevent these predatory marriages?

Steven- Well, regrettably Mary, there is no specific protection from a legal standpoint. The best protection is from a family and medical care standpoint. Involved adult children and children who regularly visit their incapable parents are the best protection for the incapable person who may be the victim of a predator. Choosing the caregiver, checking references and more importantly regularly checking in is the best protection. In other parts of Canada there are some legal protections so that currently is not the case in Ontario. There is a group of lawyers who are currently working on a submission to seek a change to the laws that would give greater protection but currently there is no legal protection. The person can have the capacity to make a will, then they get Alzheimer's, then they have the capacity to get married and the marriage null and voids the will but now the Alzheimer's patient doesn't have the capacity to make a will. So there is a will and a death but the estate of the diseased goes to their legal spouse and if there are adult children there is what is called a preferential share of the estate that goes to the spouse and then gets divided amongst the other children. This is a serious issue that the government of Ontario will have to look at and provide protections. There have been cases where the adult children have sued the caregiver that became the legal spouse on the basis that the parent did not have the capacity to enter into marriage and that has been lawsuits for fraud or deceit and used legal doctrines to argue in court that a person should not be allowed to profit from their wrongdoing and many of these cases have been expensive and difficult and the outcomes have not been fantastic. To answer your question, my advice is to be present, be aware and be careful.

Mary- And you know sometimes our families don't live close. Someone might not be able to visit their relative in a home with dementia and for them the stress of distance can be so hard and not watching over somebody adds great stress to the whole issue of caregiving and I'm sure you see families shocked when these kinds of things happen and I've heard of situations where these predators will read obituaries and seek out the widows to go and purposely be that next new spouse so it's a sad statement on society. We need to watch out for our elderly and even if you lived across the country I would hope you could have someone closer watch out and report back. This is so terrible when these poor souls are lured into marriage without knowing the consequences so thank you so much for bringing this topic to our attention. I hope that the audience has learned so much by what you have said.

Steven- You are most welcome, Mary and if anyone who is listening to this has questions, comments, thoughts or even ideas on what can be done, I am willing to speak and to hear those ideas and so I invite anyone to email me and share with me their questions or ideas. My email is steve@benmor.com .

Mary-I would like to wrap up with some closing remarks and that is that Chris Kata, one of our board of directors and I would now like to share a few closing comments.

Chris - Mary, who are our initial project supporters?

Mary – We wish to acknowledge that this project is funded in part by the government of Canada’s New Horizons for Seniors Program. Our other initial supporters include Care Connect, The Care Guide, The Healing Cycle Foundation and Scotiatrust. Caregiving Matters is an internet based registered Canadian Charity dedicated to educating and supporting family caregivers. 90% of our work is done online and by leveraging technologies. 10% is done by producing local educational events. We leverage technologies in everything that we do ensuring greater reach and sustainability. I trust that we have given some of the highlights of our exciting new initiative. If you are interested in speaking with me about the project, please let me know. We look forward to your questions and your ideas.

Chris - Mary, if listeners have questions, what is the best way for them to contact us?

Mary Bart- You can contact me directly Mary Bart, Chair of Caregiving Matters at 905-939-2931. My email is mary@caregivingmatters.ca and our website is www.caregivingmatters.ca