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Family Law Considerations for the Wills and Estates Practitioner

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Implications for Estate Plans Following Separation and Divorce

Family Law Considerations for the Wills and Estates Practitioner

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INTRODUCTION

Our experience as lawyers tells us that human nature being what it is; people are not terribly motivated to put their affairs in order. This seems to be particularly so with respect to estate planning, and even when people's relationships are good. So maybe it should not be a surprise that when someone's relationship ends, they do not update their estate plan or at least not completely even though they generally do what is required to formalize the end of their relationship. This paper attempts to address some of the pitfalls of that inaction.

MARRIAGE

Marriage is a pretty simple concept, which arguably is reflected in how low the threshold is for the capacity to marry.¹ Section 27 of the *Marriage Act*² reads as follows:

Capacity Issues

27(1) Except as provided in subsection (2), no person shall issue a marriage licence when the person knows or has reason to believe that there is in effect with respect to a party to the intended marriage

- (a) a guardianship order or trusteeship order under the *Adult Guardianship and Trusteeship Act* or equivalent legislation of another jurisdiction,
- (b) a certificate of incapacity under the *Adult Guardianship and Trusteeship Act* or equivalent legislation of another jurisdiction, or
- (c) a committee under *The Mentally Incapacitated Persons Act*, RSA 1970 c232, or equivalent legislation of another jurisdiction.

(2) If subsection (1) applies, an issuer may issue a marriage licence if

¹ The Court of Queen's Bench of Alberta in *Barrett Estate v Dexter* 2000 ABQB 530, following 100-year old decisions of the Supreme Court of Canada and the English Probate Court, stated the standard is whether the individual had the capacity "to understand the nature of the contract, and the duties and responsibilities which it creates". The British Columbia Court of Appeal in *Ross-Scott v Potvin* 2014 BCSC 435, after stating the same test went on to say:

The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.

In *Banton v Banton* 66 OTC 161 (Gen. Div.), however, the Court concluded that an individual's incapacity to manage his property should not render that person incapable of marrying, notwithstanding the effect a valid marriage may have on division of property on marital breakdown, previous testamentary dispositions and dependent relief rights. Likewise, the Court of Appeal in *Wolfman-Stotland v Stotland* 2011 BCCA 175 found that while the wife did not have capacity to manage her own affairs, she had capacity to instruct counsel, which sufficed to show she had the capacity to separate.

² RSA 2000, c M-5.