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Summer 7-24-2012

## How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America

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### Recommended Citation

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## HOW DO I LOVE THEE, LET ME COUNT THE DAYS: DEATHBED MARRIAGES IN AMERICA

Terry L. Turnipseed\*

**“It was early evening on August 18 when they gathered at the bedside of legendary Washington tycoon Herbert H. Haft, who lay in a glass-enclosed cubicle in the second-floor intensive care unit of Sibley Memorial Hospital. Wearied by age and illness, Haft, 83, was jaundiced from liver failure, his weakened heart maintained a feeble beat and his kidneys no longer functioned. Short and pugnacious, the white-haired millionaire and former Wall Street terror who stood just over five feet tall now seemed shrunken and frail against the expanse of his hospital bed. He had just two weeks to live, but those who had assembled amid monitors, IV tubes and other hospital machinery that muggy Wednesday hadn't come to say farewell. They were there to see Haft marry. His fiancée, Myrna C. Ruben, 69, wearing an elegant new pink suit, looked nervous as a judge intoned, "Repeat after me." The wedding ceremony lasted about 15 minutes. There was no cake. Then the groom stayed behind as his bride headed out for dinner with their friends. They threw flowers as she sat down in the restaurant.”<sup>1</sup>**

### I. Introduction

Should you be able to marry someone who has only days to live? If so, should the government award the surviving spouse the many property rights that ordinarily flow from such a marriage?

Herbert Haft had to know that he had only days to live when he married Myrna Ruben from his hospital bed three years ago in Washington, D.C. Why, then, would he marry? Did he even know he was getting married? Even if he did understand and acquiesce in it, was he capable at that moment of understanding the property

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<sup>1</sup> Michael E. Ruane, Caroline E. Mayer and Carol D. Leonnig, *Family Feud Reaches Beyond Grave*, WASHINGTON POST, October 10, 2004.

consequences of marriage? The first priest Myrna contacted refused to perform the ceremony<sup>2</sup> - why?

If this gives you a queasy<sup>3</sup> feeling, think about how Herbert Haft's children felt. When Herbert's daughter got wind that her father, worth an estimated fifty million dollars,<sup>4</sup> was going to marry while he lay dying in intensive care, she was appalled and went to court to obtain an injunction against the marriage.<sup>5</sup> The probate judge assigned to the case ordered a court-appointed professional to pay Herbert a visit to see whether he had the capacity to enter into marriage. But, alas, the wheels of justice turn slowly in the Probate Division of the District of Columbia Superior Court (as is the case in many state probate courts), and Haft was married by the time the court's agent could get to Sibley Hospital.<sup>6</sup> Haft died exactly two weeks after his marriage.<sup>7</sup>

The logical legal next step for Haft's children would have been to challenge the validity of the marriage, or at least the property rights awarded Haft's blushing bride. So, they perhaps were about to do just that when they likely discovered something seemingly peculiar about District of Columbia law: the only person allowed to challenge the validity of a marriage (or, by extension, the property consequences thereof) after the death of one of the spouses is the *surviving spouse*!<sup>8</sup> Seems incredible does it not? The heirs of a dying man (or woman) who marries on his (or her) deathbed cannot challenge the marriage post-death. Ironically, the one person allowed to challenge is the only person who has absolutely no motivation to do so.

But, you ask, surely that must be simply some oddity of District of Columbia law? No. That appears to be the rule in virtually every American jurisdiction that has

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<sup>2</sup> *Id.*

<sup>3</sup> Deathbed marriages have been a symbol of unprincipled behavior for a long time. Appendix 1 contains a wonderful and intricate Harper's Weekly cartoon from 1872.

<sup>4</sup> Ruane, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *Loughran v. Loughran*, 292 U.S. 216, 226 (1934) (District of Columbia case: voidable marriage cannot be annulled after the death of either spouse) (citing *Sammons v. Sammons*, 46 W.L.R. 39, 41 (S.C.D.C.); *Tyler v. Andrews*, 40 App. D.C. 100, 104 (1913); *Simmons v. Simmons*, 57 App. D.C. 216, 218, 219, 19 F.2d. 690, 692, 693 (1927); *Abramson v. Abramson*, 60 App. D.C. 119, 121, 122, 49 F.2d. 501, 503, 504 (1931)); see also *Norris v. Harrison*, 198 F.2d 953 (D.C. Cir. 1952) (step-grandchildren of a decedent would not have standing to maintain action to annul marriage of decedent).

expressed an opinion on the subject.<sup>9</sup> How did this rule come about? What, if anything, should we do to change it? Given the Supreme Court's rhetoric over the years hailing one's "fundamental right" to marry,<sup>10</sup> how far can we as a society really go to restrict the ability of someone, even on her deathbed, to marry?

This article will explore these and other related questions, and will propose a theoretical framework for a model act that would allow heirs and beneficiaries standing to sue to negate the property consequences that flow from a marriage, depending on the level of mental capacity at the time of the marriage.

## II. Property Consequences of Marriage

There are multiple property consequences that flow from a marriage. These vary substantially from state to state, but can be generalized by separate and community property jurisdictions.

### A. *Separate Property Jurisdictions*

Forty-one states have separate property regimes.<sup>11</sup> Below are some of the property rights that come with marriage in these states.

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<sup>9</sup> See generally JOHN DE WITT GREGORY ET AL., *Understanding Family Law*, chapter 2 (Third Edition, LexisNexis); see also discussion *infra* Part IV.

<sup>10</sup> See discussion *infra* Part V.

<sup>11</sup> Marital property regimes are classified as either community property or separate property. Only nine states currently have a system of community property: Arizona (ARIZ. REV. STAT. ANN. § 25-211 (1998)), California (CAL. [FAM.] CODE § 760 (West 2004)), Idaho (IDAHO CODE ANN. § 32-906 (2003)), Louisiana (LA. CIV. CODE ANN. art. 2338 (1985)), Nevada (NEV. REV. STAT. ANN. § 123.220 (LexisNexis 1989)), New Mexico (N.M. STAT. ANN. § 40-3-2 (LexisNexis 1978)), Texas (TEX. [FAM.] CODE ANN. § 3.002 (Vernon 1998)), Washington (WASH. REV. CODE ANN. § 26.16.030 (West 2000)), and Wisconsin (WIS. STAT. ANN. § 766.001 (West 2001)). Alaska allows spouses to choose whether to be subject to community or separate property (ALASKA STAT. § 34.77.030 (1998)). JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 423 (7th ed. 2005). These community property states, however, represent over one-fourth of the United States population. *Id.* As summarized by Dukeminier:

Community property in the United States is a community of acquests: Husband and wife own the earnings and acquisitions from earnings of both spouses during marriage in undivided equal shares. Whatever is bought with earnings is community property. All property that is not community property is the separate property of one spouse or the other or, in the case of a tenancy in common or joint tenancy, of both. Separate property includes property acquired before marriage and property acquired during marriage by gift or inheritance. In Idaho, Louisiana, and Texas, income from separate property is community property. In the other community property states, income from separate property retains its separate character.

### 1. Elective Share

In all but one of these states,<sup>12</sup> often the primary right obtained in conjunction with marriage is the so-called right of election against the will encompassed in elective share statutes.<sup>13</sup> Even if there is a valid will, the surviving spouse is allowed to elect, in a typical state, one-third of the decedent-spouse's property if the decedent had surviving issue, or one-half if there were no surviving issue.<sup>14</sup>

Obviously, then, even if the decedent spouse had proper testamentary capacity at the moment of executing an otherwise valid will, then that will may well be defeated in large part by a deathbed marriage, and the elective share rights that come with it.

### 2. Surviving Spouse Share Under Intestacy

If a decedent spouse died without a valid will, she is deemed to have died intestate.<sup>15</sup> Every jurisdiction has default provisions that specify who is to get what share of an intestate decedent's property. Surviving spouses generally receive at least one-third to one-half of the decedent's property.<sup>16</sup>

### 3. Other State Law Property Rights

There are several other rights bestowed on surviving spouses by state law. Again, these vary quite a bit, but include: the family allowance amount (generally a fixed

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Almost all community property states follow the theory that husband and wife own equal shares in each item of community property at death.

*Id.* at 455, 457. Separate property states are simply states that do not have a community property system.

<sup>12</sup> Georgia is the only state that does not have dower/curtesy, a statutory elective share, or community property concepts. Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose At My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, Brandeis Law Journal at the University of Louisville Brandeis School of Law, 44 B.L.J. 737, 739, (2006) (citing Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI L. CENTER EST. PLAN. § 904 (1998)).

<sup>13</sup> For a detailed discussion of the history and current workings of the elective share, *see generally* Turnipseed, *supra* note 12.

<sup>14</sup> *Id.*, at Part III.

<sup>15</sup> DUKEMINIER ET AL., *supra* note 11, at 59.

<sup>16</sup> DUKEMINIER ET AL., *supra* note 11, at 62-64.

amount or the amount necessary to support the surviving family members for a year);<sup>17</sup> placing valuable property in a tenancy by the entirety;<sup>18</sup> the homestead allowance (to ensure the family home passes to the surviving spouse free of encumbrances);<sup>19</sup> and the exempt personal property set-aside (to ensure that certain tangible personal property passes to the surviving spouse).<sup>20</sup>

### 5. Federal Property Rights

The federal government affords surviving spouses numerous property and tax-related rights including: a one hundred percent estate tax deduction for transfers to United States citizen spouses;<sup>21</sup> Employee Retirement Income Security Act (“ERISA”) protection for qualified retirement plans (surviving spouses must have survivorship rights if the employee-spouse predeceases, and spouses can only waive this right in writing and not via a premarital agreement);<sup>22</sup> and Social Security spousal survivor benefits.<sup>23</sup> In all, these benefits can be quite substantial.

### B. Community Property Jurisdictions

Most of the rights listed above apply to community property jurisdictions as well, with the notable exception of the elective share right. The latter is not present in a community property jurisdiction presumably because the concept of community property is intended to protect the surviving spouse adequately. Surviving spouses in community property jurisdictions would, generally, receive less of the decedent's property than their separate property counterparts in situations where the marriage is short-lived. This is because the “community” (the property brought in during the marriage) would be relatively small, and the surviving spouse is only guaranteed a split of the community

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<sup>17</sup> See DUKEMINIER ET AL., *supra* note 11, at 422; Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Years Support and Intestate Succession*, 10 GA. L. REV. 447, 468 (1975-1976); *see, e.g.*, Unif. Probate Code § 2-404(a) (amended 1993) (granting a reasonable allowance that cannot continue beyond a year if the estate is inadequate to pay creditors).

<sup>18</sup> See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 145-46 (1994).

<sup>19</sup> See DUKEMINIER ET AL., *supra* note 11, at 421-22.

<sup>20</sup> *Id.* at 422.

<sup>21</sup> See Brashier, *supra* note 18, at 140-41; Pennell, *supra* note 12, § 905; MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 239 (1989) (“tax law (which can be decisive for the estate planning of the well-to-do) increasingly encourages dispositions in favor of the surviving spouse by giving such dispositions preferred treatment”); Chaffin, *supra* note 17, at 465.

<sup>22</sup> See DUKEMINIER ET AL., *supra* note 11, at 420-21; Pennell, *supra* note 12, § 905. *See generally* Chaffin, *supra* note 17, at 465-67. Is it odd that Congress has chosen to step into this debate only with respect to qualified plans?

<sup>23</sup> See DUKEMINIER ET AL., *supra* note 11, at 419-20; Chaffin, *supra* note 17, at 465-67.

property, not the decedent's separate property if she has a valid will that channels that property elsewhere.<sup>24</sup>

### III. After the Death of One Putative Spouse, Deathbed Marriages are Voidable, not Void – Why?

#### A. Generally

Conceivably, one could challenge a marriage based on a number of grounds: improper age, the parties are too closely related, mental incompetence (either permanent or temporary), bigamy, lack of consent (including lack of ability to consent), fraud, duress, and undue influence just to name a few.<sup>25</sup> In ancient and modern times, some of the above challenges have made the marriage *void* and some have made the marriage *voidable*.<sup>26</sup> The distinction between the two is important to an understanding of who may contest the validity of the marriage and when they may do so, *i.e.*, the standing rules surrounding annulment proceedings.

Marriages deemed to be **void** (or void *ab initio*<sup>27</sup>) are legal nullities that, in theory, never existed in the first place.<sup>28</sup> In modern times in the United States, examples of grounds that lead to marriages being deemed void include: bigamous or polygamous marriages; same sex marriages in most states; incestuous marriages; and marriages that include one or more underage persons (the last is void only in a minority of jurisdictions).<sup>29</sup> The putative spouse, the State, or any interested third party may collaterally attack a marriage on grounds that render it void.<sup>30</sup> These attacks may be made even after the death of one or both spouses.<sup>31</sup>

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<sup>24</sup> See generally DUKEMINIER ET AL., *supra* note 11, at 455-458.

<sup>25</sup> See, e.g., WILLIAM P. STATSKY, FAMILY LAW, 181 (2d ed. 1984).

<sup>26</sup> *Id.* at 181-99.

<sup>27</sup> Literally “from the beginning” in Latin. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Fourth Edition, 2000) by Houghton Mifflin Company.

<sup>28</sup> GREGORY, ET AL., *supra* note 9, at 49; see also Annotation, *Marriage of Mental Incompetent as Void or Voidable*, L.R.A. 1916C, 691 (1919) (“a marriage is termed void when it is good for no other legal purpose, and its invalidity may be maintained in any proceeding in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife and whether the question arises directly or collaterally”); see also STATSKY, *supra* note 25, at 179-80.

<sup>29</sup> See GREGORY, ET AL., *supra* note 9, at 50; see also STATSKY, *supra* note 25, at 181-99.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Marriages deemed to be **voidable** are valid for all civil purposes, unless attacked in an annulment proceeding by one of the putative spouses.<sup>32</sup> Examples of grounds that lead to marriages being deemed voidable include: fraud; duress; mental incompetence (either permanent or temporary); undue influence; sham; jest; and underage (voidable in a majority of jurisdictions).<sup>33</sup> In general, because only the husband or wife can challenge a voidable marriage, neither a third party nor the State may bring a proceeding to deem it invalid, even after the death of one of the spouses.<sup>34</sup> This right to attack a marriage with a voidable-type defect has, historically, been seen as a personal right maintainable only by a party to the marriage contract, or at worst by a guardian *ad litem* in an instance where both spouses are alive but one is under a legal disability.<sup>35</sup>

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<sup>32</sup> See GREGORY, ET AL., *supra* note 9, at 50; see also L.R.A. 1916C, *supra* note 28, at 691 (“a voidable marriage may be defined generally as one between parties having capacity to contract marriage, but in the constitution of which there is an imperfection, in that it is forbidden by law, which imperfection can be inquired into only during the lifetime of both of the parties in a proceeding instituted for the very purpose of obtaining a sentence declaring it null”); see also STATSKEY, *supra* note 25, at 179-80.

<sup>33</sup> See GREGORY, ET AL., *supra* note 9, at 50; see also, STATSKEY, *supra* note 25, at 181-99. Note that older common law rules were different in some instances. For example, marriages annulled because of mental incompetence were void, not voidable, under common law. L.R.A. 1916C, *supra* note 28, at 700, 700-01; see also *Johnson v. Sands*, 53 S.W.2d 929 (1932) (marriage of one so lacking in mental capacity at time as to be incapable of entering into marriage contract void from inception; heirs could sue after death to set aside). Most states now have statutes that provide the marriage of mentally incompetent individuals to be voidable only, though a minority of jurisdictions hold otherwise. GREGORY, ET AL., *supra* note 9, at 59. In general, modern statutes are moving more categories of marriage defects from the void to the voidable characterization. L.R.A. 1916C, *supra* note 28, at 692. A thorough discussion follows *infra* Part IV.

<sup>34</sup> See GREGORY, ET AL., *supra* note 9, at 50; see also 4 AM. JUR. 2D *Annulment of Marriage* §61 (2004) (a third person cannot maintain an action to annul a marriage which is merely voidable).

<sup>35</sup> Irwin J. Schiffres, *Annulment of Marriage; Action for Annulment; Parties; Generally*, 4 Am Jur 2d ANNULMENT OF MARRIAGE § 61 (2004).

The chart below summarizes the general standing rules in the United States as they exist today. These rules are discussed in detail in Part IV, *infra*.

	<b>PARTIES WITH STANDING TO BRING ANNULMENT ACTION</b>	<b>WHEN MUST AN ANNULMENT ACTION BE BROUGHT</b>
suit based on annulment grounds resulting in a <b>void</b> marriage	putative spouse, the State, or any interested third party	anytime, even after the death of one or both putative spouses (subject to the relevant statute of limitations)
suit based on annulment grounds resulting in a <b>voidable</b> marriage	either putative spouse, but generally no one else  some states allow other interested parties to sue before the death of either putative spouse	for putative spouses, anytime, even after the death of one spouse  for interested third parties, some states allow suits prior to the death of either putative spouse  almost no state allows suits by interested third parties after one of the putative spouses dies  in any case, suit is subject to the relevant statute of limitations

Likely you have noted that all of the common grounds that might be used to attack a deathbed marriage – such as temporary mental incompetence due to illness, undue influence, fraud, duress or a combination thereof – fall into the voidable category, thus making it impossible for a decedent-spouse's heir to challenge a marriage (and thereby the property consequences of a marriage).

Should this be the case? Perhaps there are very good reasons for these very old-school categories and we should not upset them. Let us just see about that.

*B. Why This Distinction Between Marriages That Are Void and Voidable?*

Modern American law seems to classify marriage defects as either void or voidable based upon some perceived “seriousness of the marital defect.”<sup>36</sup> The categorization of marital defects as either void or voidable began its existence in a significantly less defensible manner.

Deathbed marriages have been around for quite some time, probably since shortly after marriages began. The term “deathbed marriage” dates back to the Middle English

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<sup>36</sup> GREGORY, ET AL., *supra* note 9, at 49.

term “deathbed.”<sup>37</sup> “Deathbed” first appeared in print in the epic poem *Beowulf* (c. 1400).<sup>38</sup> It appeared in books three more times in the 16th century and was used by Shakespeare in 1604 in the play *Othello*.<sup>39</sup> However, it was not until John Norris’s *Practical Discourses Upon the Beatitudes* that the word “deathbed” became associated with the notion of a belated change of conduct, as in Norris’s “deathbed charity” and “deathbed repentance.”<sup>40</sup>

The distinction between determining a marriage to be void or voidable goes back, as these things tend to do, to the differing approaches of old English ecclesiastical courts (applying canon law) and temporal courts (applying common law).<sup>41</sup> Everything related to marriage and the dissolution of marriage initially rested exclusively with the Church.<sup>42</sup> The Church, over time, imposed ever-increasing impediments on marriage for the “corrupt” purpose of raising revenues by charging a special exemption fee in order to allow couples to marry, notwithstanding the fact that the marriage technically violated one or more Papal edicts.<sup>43</sup> These increasing impediments became intolerable.<sup>44</sup>

In response, under King Henry VIII, the Crown enacted a series of statutes granting temporal courts authority to prohibit the ecclesiastical courts from interfering with marriages, except for those with impediments specified by statute (civil disabilities).<sup>45</sup> These statutes gave no power to the temporal courts to determine if a marriage were valid, with the result that the power to avoid marriages continued exclusively with the ecclesiastical courts.<sup>46</sup>

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<sup>37</sup> Random House Unabridged Dictionary, Random House, Inc. (2006).

<sup>38</sup> Oxford English Dictionary (1989).

<sup>39</sup> *Id.* (citing *Othello* V, ii, 51 (“Sweet Soule, take heed, take heed of Perjury, Thou art on thy deathbed.”)).

<sup>40</sup> *Id.* (citing John Norris, *Practical Discourses Upon the Beatitudes* (vol. IV, 1707)).

<sup>41</sup> W.W. Allen, *Right to Attack Validity of Marriage After Death of Party Thereto*, 76 A.L.R. 769, § I (2004). Principally, canon law was an amalgamation of Papal decrees interpreted in a “book of institutes,” named the *Corpus Juris Canonici*, published in 1582 and revised in 1603. L.R.A. 1916C, *supra* note 28, at 690. This book of institutes was binding only upon the clergy and ecclesiastical courts since the English Parliament had not adopted same. *Id.*

<sup>42</sup> Allen, *supra* note 41, at § I.

<sup>43</sup> Allen, *supra* note 41, at § I.; L.R.A. 1916C, *supra* note 28, at 691.

<sup>44</sup> L.R.A. 1916C, *supra* note 28, at 691.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

In time, there came to be a distinction between civil disabilities enforceable by temporal courts and canonical impediments enforceable by ecclesiastical courts.<sup>47</sup> An adjudicated violation of one of the civil disabilities resulted in the marriage being made void: these actions could have been maintained in any proceeding, either direct or collateral, in any civil court, either before or after the death of either or both parties.<sup>48</sup> Civil disabilities, as stated by an English court in 1812, “do not put asunder those who are joined together, but they previously hinder the junction.”<sup>49</sup> Further,

civil disabilities . . . make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made; but they render the parties incapable of contracting at all: . . . and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union, and, therefore, no sentence of avoidance is necessary.<sup>50</sup>

Contrast that with an alleged violation of a canonical impediment to marriage in an ecclesiastical court, which were deemed voidable – actionable only in a direct proceeding (only by one of the spouses), and only during the lives of the parties.<sup>51</sup> Once one of the spouses died, the marriage was valid forever since it was not declared invalid during the lives of both spouses.<sup>52</sup> This was so, apparently, because ecclesiastical courts had jurisdiction only to “vindicate the divine law rather than to uphold property rights.”<sup>53</sup> Obviously, the surviving spouse retained all support and property rights relating to the marriage despite any apparent canonical violations.<sup>54</sup>

Once Henry VIII's Church of England split from the traditional Catholic Church, no one could appeal to the Roman Pope to annul a marriage. At this time, English common law courts gained jurisdiction over actions yielding both void and voidable marriage declarations.<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citing *Elliot v. Gurr* (1812) 2 Phillim. Eccl. Rep. 16, 161 Eng. Reprint, 1064).

<sup>50</sup> L.R.A. 1916C, *supra* note 28, at 691.

<sup>51</sup> See generally R.H. Helmholz, *CANON LAW AND THE LAW OF ENGLAND* (Hambleton Press, 1987); see also L.R.A. 1916C, *supra* note 28, at 691.

<sup>52</sup> L.R.A. 1916C, *supra* note 28, at 691.

<sup>53</sup> *Id.*

<sup>54</sup> GREGORY, ET AL., *supra* note 9, at 49.

<sup>55</sup> *Id.*

In modern England, a voidable marriage may be put in issue only by a party thereto and during the lifetime of both parties.<sup>56</sup> Voidable grounds include a marriage where either party did not validly consent, *e.g.*, if made under duress, mistake, unsoundness of mind or otherwise.<sup>57</sup>

As discussed above in Part I.A., *supra*, the distinction still has very real meaning in modern America. Prior categorization of a marital defect – no matter how egregious and obvious in a given case – as voidable means that heirs are stopped cold on a *per se* basis from challenging the marriages of a mother, father, or other ancestor. Should this be the case, or is this just yet another lousy legal leftover from old English feuding between the Church and head of State?

#### IV. Who Has Standing to Sue to Challenge the Validity of a Marriage?

*Marriage is something more than an ordinary contract affecting the property rights of the parties; it is an institution in which the public have an interest, and it may well be doubted as to whether the heirs of John Blackburn could be heard to question the legality of his marriage.*<sup>58</sup>

The most important threshold question in a marriage (or marital property rights) challenge is standing – who can get into court to sue? Clearly, if you cannot sue, then it does not matter in the least what the legal standards are, nor does it matter how egregious the facts of the case are: “you can’t win if you don’t play,” as the Powerball slogan goes.

Modern statutes and cases uniformly provide that a marital challenge ground utilizing the standing rules of a voidable (not void) marriage may not be attacked after the death of either of the parties.<sup>59</sup> In deathbed marriage cases, all but two or three states use these voidable standing rules with the result that, after the death of one of the putative spouses, no one but the surviving spouse has standing to challenge the marriage (and, by extension, the property rights flowing from same).<sup>60</sup>

Recall that there are several marital defects that might be raised in a suit to annul a deathbed marriage (and thus negate the property rights consequences of same), including temporary mental incompetence due to illness, undue influence, fraud, duress, impotency

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<sup>56</sup> See, *e.g.*, *A. v. B.*, L.R. 1 P & D 559 (Ct. of Probate 1868) (suit by next of kin of deceased wife).

<sup>57</sup> See S12 (c) & (d) Matrimonial Causes Act 1973.

<sup>58</sup> *Castor v. Davis*, 120 Ind. 231 (1889).

<sup>59</sup> See generally, Allen, *supra* note 41, at § 2 (2004); see also Irwin J. Schiffres, *Annulment of Marriage*, 4 Am Jur 2d Annulment of Marriage § 61 (“a third person cannot, as a general rule, maintain an action to annul a marriage which is merely voidable”).

<sup>60</sup> See *supra* notes 69-71.

or some combination of these.<sup>61</sup> One could imagine any or all of these grounds coming into play in the Herbert Haft situation mentioned in the opening (though of course we will never know because Herbert's heirs were not allowed to challenge the marriage).<sup>62</sup>

Of all of the grounds on which deathbed marriages might be challenged, the most common is incompetence. A comprehensive statutory and common law review of standing, vis-à-vis incompetence, is detailed below to show how these suits (or, more appropriately, nonsuits) often play themselves out.

Putative spouses must, of course, have the requisite mental capacity to get married.<sup>63</sup> I have heard it joked that the level of mental capacity necessary to get married is roughly equivalent to that of a vegetable. For better or worse (no pun intended), this is not far from the truth.

Generally, under common law, the burden of proof is on the party alleging the mental incapacity of a party to a marriage: in other words, a person is presumed to have capacity to marry.<sup>64</sup> In a relative sense, the capacity required to marry is less than the capacity required to execute a will (testamentary capacity), which is less still than the capacity required to execute a contract or conduct business (for example, the capacity to execute an irrevocable trust).<sup>65</sup>

MARITAL CAPACITY < TESTAMENTARY CAPACITY < CONTRACTUAL CAPACITY

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<sup>61</sup> See, e.g., STASKY, *supra* note 25, at 181-99.

<sup>62</sup> There have been many other infamous cases of deathbed marriages throughout history. One of the more interesting – detailed in Appendix 2 – is that of writer George Orwell who married Sonia Brownell, a woman fifteen years younger than Orwell.

<sup>63</sup> GREGORY, ET AL., *supra* note 9, at 49.

<sup>64</sup> Annotation, Mental Capacity to Marry, 28 A.L.R. 635 § IX (2004).

<sup>65</sup> GREGORY, ET AL., *supra* note 9, at 60.

Even though a person might have been previously adjudged to be legally incompetent to handle his or her business affairs, nevertheless such a person might still be competent to marry, by applying a lesser test of competency for marriage than for other business purposes, again to validate the public policy of promoting marriage in general, and to validate the marital expectations of the parties in particular.

*See also, e.g., Park v. Park*, [1954] P. 89 (1953) (decedent had capacity to marry but the will he executed the following day invalid for lack of testamentary capacity – wife gets intestate share); *Payne v. Burdette*, 84 Mo. App. 332 (1900) (a person may have sufficient mental capacity to contract a valid marriage, though he may not have mental capacity to contract generally).

The legal standards for the requisite marital capacity vary significantly from jurisdiction to jurisdiction<sup>66</sup> and their details are outside the scope of this article. Whether a suit to annul a marriage based on incompetence is governed by the void or voidable standing rules, however, is very much within this article's scope. For it is the void or voidable status that determines which parties have standing to sue and when.

Generally under very old common law in the United States, a suit to annul a marriage due to incompetency was controlled by the void, not voidable, standing rules as to who could sue and when.<sup>67</sup> This older rule is distinctly in the minority today.<sup>68</sup> Most states now, either by statute<sup>69</sup> or updated common law,<sup>70</sup> treat incompetence as a cause of action

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<sup>66</sup> Many courts tend to use the “capacity to understand the nature of the marital contract” and “capacity to understand the duties and responsibilities of marriage” tests. *See, e.g., Homan v. Homan*, 147 N.W.2d 630 (Neb. 1967); *Forbis v. Forbis*, 274 S.W.2d 800 (Mo. 1955). Some courts use the less rigorous standard of “ability to consent at the time of the marriage” deleting the “additional duties or responsibilities” test. *See, e.g., Young v. Colorado Nat'l Bank*, 365 P.2d 701 (Colo. 1961). Any standard for incompetence, by its very nature, is obviously very subjective and cases tend to be quite fact specific.

<sup>67</sup> GREGORY, ET AL., *supra* note 9, at 59; *see also* L.R.A. 1916C, *supra* note 28, at 700-702.

<sup>68</sup> GREGORY, ET AL., *supra* note 9, at 59; *see also* L.R.A. 1916C, *supra* note 28, at 702-704; discussion *supra* notes 66-68.

<sup>69</sup> *See* GREGORY, ET AL., *supra* note 9, at 59; *see also* L.R.A. 1916C, *supra* note 28, at 702-704; ALASKA STAT. § 25.05.041 (2006) (in Alaska, marriage cannot be challenged for any reason after the death of one of the parties); CAL. [FAM.] CODE §§ 2210 and 2211 (West 2006) (in California, action to annul a marriage on grounds of physical or mental incapacity, fraud or force is voidable only and must be brought during the life of the putative spouses); COLO. REV. STAT. ANN. §§ 14-10-111(2, 3) (West 2006) (in Colorado, children and other third parties may not attack the validity of a marriage after the death of one of the parties); DEL. CODE ANN. tit. 13 § 1506 (2006) (in Delaware, “in no event may a decree of annulment be sought after the death of either party”); Ill.Rev.Stat.1989, ch. 40, par. 301(1) (“[i]n no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage”); Indiana Code 31-11-9-2 (2006) (in Indiana, a “marriage is voidable if a party to the marriage was incapable because of . . . mental incompetency of contracting the marriage”); LA. CIV. CODE ANN. art. 403 (2006) (prohibiting “a contest of the validity of the acts of a person on account of insanity after the death of the person, unless his interdiction was pronounced or petitioned for prior to his death”); MASS. GEN. LAWS ANN. ch. 207, § 5 (West 2006) (in Massachusetts, marriage of incompetent can be attacked “only in a process instituted in the lifetime of both parties to test such validity”); N.J.STAT.ANN. § 62:1 (West 1931) (in New Jersey, marriages are valid until nullified by action by party to the marriage); N.D. CENT. CODE § 14-4-2 (2006) (in North Dakota, action on grounds of physical or mental incapacity, fraud or force must be brought during the life of the putative spouses); OHIO REV. CODE ANN. §§ 3105.32, 3105.32(C) (West 2006) (in Ohio, only party aggrieved may sue to have marriage annulled on grounds of mental incapacity or fraud); OR. REV. STAT. § 106.030 (2006) (in Oregon, only the incompetent spouse can sue to invalidate a marriage); 1937 Tenn. Pub. Acts, c. 81, § 3 (marriage of incompetent voidable only); TEX. [FAM.] CODE ANN. § 6.111 (Vernon 2006) (a voidable marriage under Texas governing provisions is not subject to any challenge instituted after the death of either party); WASH. REV. CODE § 26.04.130 (2006) (in Washington, marriage “is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed”); and W. Va. Code, § 48-3-103 (2006) (all relevant grounds voidable, not void).

governed by the voidable rules, not the void rules. Research uncovered only two jurisdictions that clearly use the standing rules governing void, not voidable, marriages if mental incompetence or impairment is at issue in an annulment proceeding.<sup>71</sup>

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<sup>70</sup> See GREGORY, ET AL., *supra* note 9, at 59; see also L.R.A. 1916C, *supra* note 28, at 702-704; *In re Guthery's Estate*, 226 Mo. App. 626 (1920) (decedent suffered a morning stroke, was married at 11 a.m., died at 7 p.m.: degree of capacity is irrelevant because marriage was merely voidable and could not be attacked by his administrator post-death); *Dibble v Meyer*, 280 P.2d 765 (Or. 1955) (marriage not subject to attack after the death of incompetent); *Re Karau's Estate*, 80 P.2d 108 (Cal. Ct. App. 1938) (marriage of incompetent held voidable, regardless of the degree of mental unsoundness, and thus not subject to attack after the decedent's death); *Matter of Estate of Fuller*, 862 P.2d 1037, 1038-39 (Colo. Ct. App. 1993) (children of decedent spouse lacked standing to challenge validity of marriage on grounds of consent even when father was terminally ill during marriage); *Hall v. Nelson*, 534 N.E.2d 929 (Ohio Ct. App. 1987) (son did not have standing to sue for annulment of father's marriage where marriage had taken place in hospital between father and live-in companion of 18 years, father had been hospitalized earlier that day because he had suffered massive coronary attack, and son brought complaint alleging lack of mental capacity and fraud after father's death about one month after marriage); *Vance v Hinch*, 261 S.W.2d 412 (Ark. 1953) (marriage of incompetent voidable and not subject to attack after her death); *Re Romano's Estate*, 246 P.2d 501 (Wash. 1952) (marriage merely voidable when either party is incapable of consenting); *In Succession of Baltimore*, 176 So. 684 (La. Ct. App. 1937) (validity of marriage could not be attacked by anyone after death of one party unless petition filed before death); *Bradford v Parker*, 99 N.E.2d 537 (Mass. 1951) (challenge to marriage based on incompetency must be filed during lives of both parties to marriage and mere fact that a conservator had been appointed during lifetime is irrelevant); *In Re De Conza's Estate*, 177 A. 847 (N.J. Misc. 1935) (marriage of incompetent is not void but voidable only); *Bryant v Townsend*, 221 S.W.3d 949 (Tenn. 1949) (marriage of an insane person who had not been so adjudged was voidable only: right to attack the marriage subsequently died with the person); *In re Estate of Santolino*, 895 A.2d 506 (N.J. Super. Ct. Ch. Div. 2005) (decedent's sister could not prevail on claim that decedent's marriage was a nullity because decedent was impotent, as right was voidable and decedent's right to void marriage did not survive his death); *In re Succession of Ricks*, 2003-2580 La.App. 1 (2004) (right to demand the nullity of a marriage is personal to the spouse whose consent was not free and does not pass on to his heirs); *Tabak v. Garay*, 655 N.Y.S.2d 92 (N.Y. App. Div. 1997) (plaintiff's status as relative of deceased husband did not establish interest to void deceased husband's marriage to defendant wife, and plaintiff thus lacked standing to bring action); *Arnelle v. Fisher*, 647 So.2d 1047 (Fla. Dist. Ct. App. 1994) (validity of forty-one day marriage to terminally ill husband, which allegedly resulted from wife's undue influence, could not be attacked following death of husband and, thus, husband's cousin lacked standing to pursue annulment of allegedly voidable marriage); *L.J. v. V.J.*, 6 Pa. D. & C.4th 363 (Pa. 1990) (marriages that are voidable may be annulled only by one of the parties to the marriage); *Simpson v Neely*, 221 S.W.2d 303 (Tex. Civ. App. 1949) (marriage of insane person voidable only, despite English common law to the contrary); *Gibbons v. Blair*, 376 N.W.2d 22 (N.D. 1985) (action to annul marriage on ground of fraud can only be brought by allegedly defrauded spouse while both parties to marriage are living); and *Succession of Jene*, 173 So.2d 857 (La. Ct. App. 1965) (right to contest validity of marriage on grounds of lack of consent is strictly personal to contracting parties and does not pass to their heirs).

<sup>71</sup> In North Carolina: "All marriages between . . . persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void". N.C. GEN. STAT. ANN. § 51-3 (West 2006). In Kentucky, individuals adjudged as incompetent fall statutorily into the void category. KY. REV. STAT. ANN. § 402.020 West 2006). In Alabama, a 1979 case held that the administratrix of her deceased mother's estate could seek to annul her mother's marriage on the ground that the marriage was void because her mother was intoxicated from before the marriage until her death. *Abel v. Waters*, 373 So.2d 1125 (Ala. Civ.

States are split on the question of whether a marriage that can be challenged due to mental incapacity by a third party while the married couple is still alive (currently rarely allowed), can also be challenged by a third party after one or both of the married parties are dead.<sup>72</sup>

A related question is the validity of a marriage when one or both of the parties is intoxicated, thus rendering a party incompetent in a temporary way. This temporary incompetence is similar in nature to some deathbed marriage situations where the individual has historically been competent but is rendered temporarily incompetent by illness. Intoxication usually renders a marriage voidable and not void.<sup>73</sup>

Duress (or fraud) is the second leading ground for attacking a deathbed marriage. One might naturally think that if one party to a marriage were essentially forced to enter into a marriage – consent having been obtained by duress – it would be void given that consent would be very much lacking.<sup>74</sup> Oddly, this is not the case. Although there are a small number of very old (pre-1905) state law cases supporting the void categorization, modern courts (and even most older United States courts) have consistently held duress to yield voidable, not void, marriages.<sup>75</sup>

Many of the cases and most statutes mentioned above in relation to incompetence apply to duress and fraud as well. There appears, in fact, to be only one state

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App. 1979). New York has a unique rule that splits the ability to annul the marriage and the ability to defeat the property consequences of marriage. This rule is discussed later in Part VI and notes 111 and 112, *infra*.

<sup>72</sup> Compare *Dibble v Meyer*, 280 P.2d 765 (Or. 1955) (suit by incompetent's guardian to annul the latter's marriage abated upon the death of the incompetent prior to the decree and could not be revived, for "the cause of suit" did not survive) with *Quick v. Quick*, 571 N.E.2d 1206 (Ill. App. Ct. 1991) (where complaint seeking declaration of invalidity of alleged incompetent's marriage was filed prior to alleged incompetent's death, action survived death; term "sought" in statute providing that "[i]n no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage" did not mean that an action commenced before death could not be pursued after death) and *Clark v. Foust-Graham*, 615 S.E.2d 398 (N.C. Ct. App. 2005) (action to annul elderly husband's marriage to wife, initiated by husband's daughter as guardian *at litem*, could be maintained by guardian as estate's executrix following husband's death; action was commenced on husband's behalf prior to his passing, and substantial property rights hinged on the validity of the marriage).

<sup>73</sup> L.R.A. 1916C, *supra* note 28, at 703-704.

<sup>74</sup> Annotation, *Marriage to Which Consent of One of Parties was Obtained by Duress as Void or Only Voidable*, 91 A.L.R. 414, § I (2004).

<sup>75</sup> *Id.*; see also Robert C. Brown, *Duress and Fraud as Grounds for the Annulment of Marriage*, 10 IND. L.J. 473 (1935) (generally held that neither fraud nor duress nor both together would make marriage void; thus fraud and/or duress not grounds for collateral attack).

(Pennsylvania) that, by statute, treats incompetence<sup>76</sup> as rendering a marriage void, but fraud and duress as voidable.<sup>77</sup>

So why might courts and legislatures have moved away from the void characterization seen in England and some very old American common law to the current and widespread voidable characterization? A typical answer comes from a 1922 Florida supreme court case *Tyson v. State*.<sup>78</sup> In *Tyson*, the court held a marriage entered into under duress was voidable, not void.<sup>79</sup> The reasons, the court said, were “obvious” that

the legitimacy of children born of such marriages or of subsequent marriages of the parties and the inheritance of property which may be owned by them are among the cogent reasons for holding marriages attended by circumstances which may render their validity questionable as valid and binding until their invalidity is duly adjudicated.<sup>80</sup>

In a deathbed marriage situation, though, it is highly unlikely that children will be “born of the marriage,” negating the logic in cases like *Tyson* (which was not a deathbed marriage case) for deathbed marriage situations. There is also less of a need in modern society to “legitimize” children born pre-marriage with a subsequent deathbed marriage.<sup>81</sup>

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<sup>76</sup> 23 Pa. C.S.A. § 3304.

<sup>77</sup> 23 Pa. C.S.A. § 3305. I cannot imagine a rationale for treating duress and incompetence differently: to me, it makes no logical sense. Jurisdictions should either hold both to be void grounds or both to be voidable.

<sup>78</sup> 90 So. 622 (Fla. 1922).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> In bygone eras (and in some cultures even today), it was of course quite important for children to be “legitimate.” Presumably, one instance where past deathbed marriages may have made some sense is the following: a man and woman were unmarried but had one or more children, and then with the death of one of the parties imminent, a marriage was performed in an attempt to legitimize past-born issue. An example of this was John Lyon-Bowes, the 10<sup>th</sup> Earl of Strathmore and Kinghorne, who had a “long affair with the commoner Mary Millner” that bore one son. Charles E. Hardy – *John Bowes and the Bowes Museum* (1970, reprinted 1982). The Earl married Mary on July 2, 1820, one day prior to his death. *Id.* This attempt to legitimize the son failed, as his primary title ended up passing to a younger male heir. *Id.*

For some of these illegitimate children, it was worth a high price indeed to legitimize his parents' union. Former infamous Venezuelan President Juan Vincente Gomez was reported to have “at least 50 bastards,” though “no shotgun was ever big enough to make [him] marry.” *Death of a Dictator*, TIME MAGAZINE (December 30, 1935). Reportedly, one of his illegitimate children was shot while “attempting to stage a deathbed marriage for his mother.” *Id.*

## V. Fundamental Right to Marry

The word “marriage” is not in the United States Constitution.<sup>82</sup> Indeed, it says precious little about regulating domestic relations generally.<sup>83</sup> These issues have traditionally been left to states.<sup>84</sup>

This does not mean, of course, that the Supreme Court has not decided issues relating to marriage, including finding a “fundamental right to marry,” *i.e.*, finding (and enforcing) a non-textual constitutional protection for marriage.<sup>85</sup> The Court started this line of reasoning in 1877 with the pronouncement that there was a “common-law right” to marriage.<sup>86</sup> During the height of the so-called *Lochner*<sup>87</sup> era, the Court said: “Without doubt, [constitutionally-protected liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as

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<sup>82</sup> Note that the proposed Federal Marriage Amendment would change this: “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” The Federal Marriage Amendment, S.J. Res. 40 (2004). This proposed amendment is not expected to pass Congress, however, any time soon given the current number of Democratic seats in both Houses.

<sup>83</sup> The full faith and credit clause of United States Constitution Article IV § 1 – requiring states to credit the “public acts, records, and judicial proceedings” [including marriages] of each other – is regarded as the lone Constitutional provision relevant to domestic relations.

<sup>84</sup> See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004).

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States” . . . . So strong is our deference to state law in this area that we have recognized a ‘domestic relations exception’ that “divests the federal courts of power to issue divorcee, alimony, and child custody decrees.”

See also *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>85</sup> For a very good summary of the Court's jurisprudence in this area, see Stephen L. Grose, *A Constitutional Analysis of Pennsylvania's Restrictions Upon Marriage*, 83 DICK. L. REV. 94 (1979).

<sup>86</sup> *Meister v. Moore*, 96 U.S. 76-81 (1877) (“Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the *mode* of entering into the contract, but they do not confer the right”).

<sup>87</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

essential to the orderly pursuit of happiness by free men.”<sup>88</sup> The Court went on to indicate in *dicta* that there surely could be some unconstitutional restrictions on marriage.<sup>89</sup>

Even after the *Lochner* era, the “right to marry” language in Court opinions kept flowing. In 1942, Justice Douglas wrote: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>90</sup>

Judicial decisions regarding marriage soon became entangled with privacy and reproduction jurisprudence. In the famous *Griswold* case, the Court struck down a state ban on the use of contraceptives by enunciating the “notions of privacy surrounding the marital relationship.”<sup>91</sup> This decision split off procreation from marriage by giving married individuals a constitutional right to prevention of conception.<sup>92</sup> In *dicta*, the opinion ended with language that has been widely quoted since:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an

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<sup>88</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>89</sup> *Id.*, at 401-2 (using as an example the arrangement in Plato's *Republic* where wives and children were held in common).

<sup>90</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>91</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1942).

<sup>92</sup> *Id.* Many years later in *Turner v. Safley*, 482 U.S. 78 (1987), the Court made this severance between marriage and procreation even clearer. Jamal Greene, case Comment: *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1996 (2005).

The *Turner* Court had to evaluate whether prisoners – prisoners! – with no procreative justification still have a fundamental right to marry, and it held unanimously that they do. The case demonstrates, therefore, that marriage is fundamental under the U.S. Constitution not because it provides a setting for heterosexual procreation but because it solemnizes a social relationship that individuals regard as fundamentally important.

*Id.* *Turner* also de-linked marriage from privacy because prisoners do not enjoy constitutionally-protected privacy rights. Carlos A. Ball, *Symposium: Gay Rights after Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1202 (2004).

association for as noble a purpose as any involved in our prior decisions.<sup>93</sup>

The *Loving* case two years later in 1967 finally made it explicit: the Due Process Clause includes marriage as a constitutional liberty because “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>94</sup> As had become a pattern in the Court’s decision, the reference to the “freedom to marry” was absolutely *dicta*.<sup>95</sup>

Over the next eleven years, the Court referenced the right or freedom to marry multiple times<sup>96</sup> before Justice Marshall wrote what is now considered to be *the* right to marry case.<sup>97</sup> In *Zablocki*, the Court overturned a state statute denying a marriage license to anyone not current on child support payments.<sup>98</sup> Marshall said that the state must not prevent poor people from marrying,<sup>99</sup> distinguishing *Califano*<sup>100</sup> (upholding a federal law terminating Social Security benefits if one married a person ineligible for the same benefits) by indicating that the government may impose “reasonable regulations that do

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<sup>93</sup> *Griswold*, *supra* note 91, at 485-86.

<sup>94</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>95</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (*Loving* “could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause); see also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 81 (1989) (“But for this expansive rhetoric, which . . . went beyond what the decision of the case at hand actually required, *Loving v. Virginia* would have been an unremarkable application of the Equal Protection Clause . . . .But with this language, the case casts doubt on the validity of much state regulation of marriage.”).

<sup>96</sup> See *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971) (court fees may not be used to prevent poor persons from filing for divorce); see also *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“[O]nly personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy . . . . [This personal privacy] right has some extension to activities relating to marriage . . . .”); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (“The Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Fourteenth Amendment”); and *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (“The individuals’ freedom to marry and reproduce is ‘older than the Bill of Rights’”). But see *Califano v. Jobst*, 434 U.S. 47 (1977) (federal government is allowed to penalize a person for marrying, upholding federal law terminating Social Security benefits if one married a person ineligible for the same benefits).

<sup>97</sup> *Zablocki*, *supra* note 95.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 386-87.

not significantly interfere with decisions to enter into the marital relationship . . .”<sup>101</sup>  
Important for our purposes was Marshall's statement that the “Social Security provisions [in *Califano*] placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discourage[d] . . . any marriages.”<sup>102</sup>

While government is normally prevented from interfering with practices often associated with the personal aspects of marriage (sexual behavior, childrearing, living arrangements), government has a long-recognized right to adjust and regulate the *consequences* of marriage (intestacy, testate inheritance, child support, divorce). *Zablocki*, then, provides a constitutional overlay with which any proposed deathbed marriage solution must comply. Solutions that prevent or severely limit deathbed marriages, or retroactively revoke the legitimacy of the marriage itself, may be suspect under Marshall's reasoning.<sup>103</sup>

On the other hand, solutions that sever the property consequences of marriage from the legitimacy of the marriage itself seem to meet what I am calling the *Califano* exception to *Zablocki*.<sup>104</sup>

## VI. Solutions

*It is but reasonable that these unhappy persons, who are prohibited by law from making any binding contract for the merest pecuniary trifle, should be protected from the effects of a covenant of so high a nature, which never could be entered into by the other party without some base or sinister design. If it would be hard that the issue of such marriages should*

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<sup>100</sup> See *Califano*, supra note 96.

<sup>101</sup> *Id.* at 386.

<sup>102</sup> *Id.* at 387 n.12.

<sup>103</sup> Note that if ever challenged under *Zablocki*, New York's approach – referenced in Part VI (B) and notes 111 and 112, *infra* – might well be struck down.

<sup>104</sup> One such example can be found in *In the Matter of the Estate of Buel Epperson*, 679 S.W.2d 792 (Ark. 1984), *cert. denied Epperson v. Estate of Epperson*, 471 U.S. 1017 (1985). In an opinion written by the now-infamous Webb Hubbell when he was Chief Justice of the Arkansas Supreme Court, the court ruled a statute constitutional, against a fourteenth amendment equal protection challenge, that precluded a spouse from asserting a dower or curtesy right by taking against a will unless that spouse had been married to the decedent continuously for a period in excess of one year. *Epperson* at 793. “Individual and government interests in this limitation include discouragement of deathbed marriages, and the classification bears a rational relationship to that objective.” *Id.* at 794.

For a number of reasons, however, I do not support such a bright-line rule in deciding property consequences. I argue only for the ability of heirs to have standing to challenge the property rights of a marriage after the death of one of the parties within a reasonable period of time after the marriage.

*be deemed bastards, it would be as much so that human beings without reason, or their families, should be the victims of the artifice of desperate persons who might be willing to speculate on their misfortunes.*<sup>105</sup>

### A. Possible Solutions

There are numerous potential solutions that might address the “problem” of deathbed marriages, and the attendant consequences of property disposition at death, including: (1) requiring more safeguards in the marriage process itself to help deter undue influence and ensure sufficient capacity (requiring more witnesses, videotaping of the ceremony, the attendance of medical professionals, the assignment of mandatory guardians *at litem*); (2) increasing the capacity required to marry, perhaps to the level of testamentary capacity; (3) shifting to a presumption of incapacity if one party dies within a certain amount of time after the wedding; (4) adopting Uniform Probate Code elective share principles that give a surviving spouse very little or nothing by right if the marriage lasts less than a certain amount of time;<sup>106</sup> and (5) prohibiting weddings in hospitals and similar facilities. Certainly, there are likely many more options along these lines.

One simple solution listed above that should be discussed in a bit more detail is to require some period of time that the union must last in order to receive the property rights flowing from the marriage. For example, in some circumstances, the federal government uses one year as the appropriate balance: in order to receive federal social security surviving spouse benefits, the couple must have been validly married for a year.<sup>107</sup> Some states have similar rules.<sup>108</sup>

The reasoning behind such policies seems both fiscal (the time requirement tends to limit the number of claims) and deterrent in nature (decreasing the incentive for an end-of-life marriage designed simply to obtain this and other financial benefits flowing from being married). While good reasons undoubtedly exist, this type of bright-line solution smacks of being arbitrary and would be over-inclusive. There are many reasons why people die, and it is probably the exception rather than the rule that both parties to a marriage would know that death was imminent. Certainly for unforeseen deaths, there seems no legitimate policy argument supporting the automatic revocation of marital property rights if one of the parties lives less than a certain amount of time. (Indeed, the social security code should probably be revisited in this regard.)

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<sup>105</sup> *In Middleborough v. Rochester*, 12 Mass. 363 (1815).

<sup>106</sup> Uniform Probate Code §§ 2-204 through 2-207 (1990).

<sup>107</sup> See 24 U.S.C. §§ 416(b)(2), (c)(1)(E), (f)(2) and (g)(1)(E). There are several other ways to qualify as well. For example, the one-year requirement is waived if surviving and decedent spouses have at least one child together. See 24 U.S.C. §§ 416(b)(1), (c)(1)(A), (f)(1) and (g)(1)(A).

<sup>108</sup> For example, Minnesota state law requires that a public employee be married for a year before certain survivor benefits will be paid. MINN. STAT., § 353.657, subdivision 1 (2006).

States should not rush to change the fundamental system of requirements they have in place to determine the validity of marriages, and it is quite possible that many of the above solutions may face federal and state constitutional challenges as violative of the “fundamental right to marry.”

The recommended solution proposed below, on the other hand, does not require such fundamental changes, nor does it infringe on one's right to marry. It suggests only a change in the standing requirements as to who may sue and when, leaving intact the body of a state's laws – both statutory and judge-made – surrounding the requirements for, and validity of, marriages.

And finally, why exactly should there be anything preventing one of proper capacity, under no duress or other physical or mental impairments (all key points to my argument), to marry on their deathbed for the *sole* reason of providing all the property rights that flow from marriage to a beloved other? As the Supreme Court of Washington put it in 1927:

Much stress has been laid by the appellant upon the claimed fact that the marriage alone almost conclusively shows incompetency upon the part of the decedent. It is said that for a woman who is in her last sickness to marry a man [thirty] years her junior is, to say the least, unnatural. But this must depend upon the circumstances of the case. We have already noticed that for several years he had lived most of the time at her home; that he had cared for her during all of her sickness; that she was not on good terms with her relatives in this country; that she did not wish them to inherit any of her property; that she had expressed a desire that Donohue should have it all; and that for several years she had wished to marry him. *Under such circumstances it would not be unnatural if she desired to marry him for the sole purpose that he might inherit through her.* Instances of such conduct, while not common, are not at all unknown. Marriage sometimes takes place upon the death bed of one of the parties, with full knowledge of the participants that neither of them will ever be able to be a spouse in other than name, and that for a very short space of time, perhaps but a few minutes. But the right to contract such a marriage, if the mind is capable of contracting, has never been denied.

The world at large may look askance at such a union, but the law, which does not concern itself with the incongruity thereof, looks only to the question of legal obstacles, and, if

none there be, must sanction it as within the rights of the parties to contract if they see fit.<sup>109</sup>

### *B. Recommended Solution*

States and the federal government create, generally by statute, all of the property rights associated with marriage. Presumably, government could sever these rights from a marriage under certain prescribed circumstances, leaving the marriage intact but stripping away the property consequences.<sup>110</sup> New York state, in fact, does just this (though in a different way than I would recommend). While there are many grounds for annulling a marriage in New York that make a union void and not voidable (allowing heirs to challenge a marriage post-death),<sup>111</sup> the surviving spouse's right to elect against the will or take via intestacy is not disturbed even if a marriage is annulled post-death.<sup>112</sup> I would argue, however, that the opposite should be true for policy reasons, and as pointed out in Part V note 103, *supra*, if New York's approach were ever challenged by a clever attorney using *Zablocki*, it might well be ruled unconstitutional.

Two classes of individuals should have standing to contest the property consequences of a marriage after the death of one of the spouses. First are the heirs under state law, *i.e.*, those individuals who would take some portion of the decedent's property if she died intestate (without a will). Second, if the decedent died with a valid (or arguably valid) will, then those individuals who take property under the will would also have standing.

In no instance would this proposal allow an action to nullify the marriage itself. I would simply allow post-death attacks on the property consequences flowing from the marriage.

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<sup>109</sup> *In re Donahue's Estate. Norling v. Heintz et al.*, 255 P.370 (Wash 1927) (emphasis added).

<sup>110</sup> This has been done for various reasons throughout history, including one very interesting deathbed marriage legislative effort – detailed in Appendix 3 – in colonial Hong Kong near the close of the nineteenth century. In modern America, a handful of states have bestowed many of the state-law based marital property consequences of marriage to same-sex couples who enter into civil unions that are not recognized as marriages as that term has been traditionally used.

<sup>111</sup> *See* N.Y. Dom. Rel. § 140 (suit to annul a marriage based on mental incompetence, fraud, duress, or consent by force may be maintained by a relative of the impaired party even after the death of said party).

<sup>112</sup> *See Bennett v. Thomas*, 327 N.Y.S.2d 139 (N.Y. App. Div. 1971) (even where decedent's sons, suing individually and as executors of their mother's estate, alleged with sufficient proof a cause of action to avoid their mother's marriage to her surviving husband, this would not defeat the surviving husband's election right) (citing EPTL 5-1.2(a) (1)).

As discussed above,<sup>113</sup> most states stratify required capacity into three categories: (1) contractual capacity (highest); (2) testamentary capacity (middling); and (3) marital capacity (lowest).

If the plaintiff can show by an appropriate evidentiary standard that the decedent spouse did not have testamentary capacity (middle level of the three) at the time of the marriage, then all property consequences flowing from the marriage would be invalidated, including, but not limited to, the elective share (which is relevant in all separate property jurisdictions but Georgia<sup>114</sup>). If the decedent dies without a valid will, then she will be deemed, for the purposes of determining property rights, to have died intestate and unmarried. If she dies with a valid<sup>115</sup> will, then the elective share law (or community property law) will not be applicable, and the decedent will again be deemed to have died testate and unmarried for purposes of determining property rights. Obviously, any other contractual documents executed during this state of diminished capacity will be void as well, since all would likely require a higher level of capacity than testamentary capacity. This might include the execution of a trust, deed, or a document purporting to make a gift.

The logic for such a regime flows as follows: If the decedent spouse did not have testamentary capacity, she could not have executed a valid will. If one cannot understand the property consequences of a will, then one cannot understand the property consequences that flow from marriage (though one may very well understand other less complicated consequences of marriage).

If, on the other hand, the decedent is adjudged to have had testamentary (middling) capacity but not contractual (highest) capacity, then the property benefits flowing from marriage such as the elective share should be allowed. If the decedent spouse had the ability to understand and execute a will (even if she did not in fact execute a will), then in theory she would have had the ability to understand the property consequence of marriage. This approach would not, however, validate any documents executed during the time of the marriage that require contractual (highest) capacity. This would include the execution of trusts, deeds, gift instruments, etc.

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<sup>113</sup> MARITAL CAPACITY < TESTAMENTARY CAPACITY < CONTRACTUAL CAPACITY – See discussion in Part IV and note 65, *supra*.

<sup>114</sup> See generally, Turnipseed *supra* note 12.

<sup>115</sup> To be valid, of course, the will must have been signed at a time when the testator had testamentary capacity, which, as discussed, is generally greater than marital capacity. Thus, if the will in question is signed roughly at the same time as the marriage and the testator is adjudged not to have had the capacity required under my approach (testamentary capacity), then by definition the will is invalid. Of course, in some circumstances in some jurisdictions, it is possible that a prior will signed at a time when the testator did have the requisite testamentary capacity would then be revived. See, e.g., DUKEMINIER ET AL., *supra* note 11, at 267-69.

Finally, if the surviving spouse wins the battle and the decedent spouse is adjudged to have had contractual capacity, then no property consequences of the marriage should be disturbed and all documents executed during this time should be validated.

In any of the above scenarios, there should be some sort of statute of limitations for challenging the property consequences of marriage. In determining the proper length of time, there is a balancing between certainty of property distributions in an estate and equity to the heirs who, perhaps, should not be expected to act immediately upon the marriage or death of, for example, a parent. Perhaps a year from the date of the marriage (not the death) would be an appropriate balance. Of course, the property consequences of the marriage may be challenged during the lives of both spouses as well as after the death of a spouse.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) should work to prepare a model act for adoption by the states and the District of Columbia.

This proposed solution would negate any “fundamental right to marriage” arguments since the marriage would remain valid. This solution also does not disturb a state’s long-established body of law surrounding a marriage’s requirements and validity.

## VII. Conclusion

*There is no greater inequality than the equal treatment of unequals.*<sup>116</sup>

Individuals on their deathbeds have just as much right to marry as anyone, and if competent and under no duress, the parties to the marriage certainly should have protection under the law. This protection should be appropriately shaped to avoid harassment of widows and widowers.

Having said that, I simply cannot see a valid argument for not allowing a decedent-spouse's heirs (those who would take the decedent's property if he or she died unmarried and intestate) and beneficiaries (those who would take under the decedent's valid will, if any, absent a spousal election) the right to challenge the property consequences of a suspect marriage based on traditional grounds that might naturally flow from a deathbed marriage.

It is only reasonable that these poor people, who may well not have the legal capacity to make a contract for the smallest monetary value, and their heirs and beneficiaries should have state protection against a surviving spouse taking some or all of the decedent's property: protection against a surviving spouse who might seem to have few legitimate motives to enter into a deathbed marriage.

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<sup>116</sup> ANTON MENGER, *DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN* 30 (4<sup>th</sup> ed., 1908).

The current incentives are off kilter. A greedy potential spouse has every incentive to try to find a minister or officer of the law willing to marry them off to a wealthy sick person and no legal incentives not to try it. Upon the death of one of the spouses, the marriage becomes set in stone with no person other than the surviving spouse – no matter how ugly the situation – given standing to seek redress in a court of law. Allowing, in an appropriate way, heirs and beneficiaries to challenge the property consequences of a suspect marriage puts in place the proper disincentives to think twice before attempting to take advantage of one of feeble mind and spirit.

If the property consequences are allowed to stand, victims will continue to abound in deathbed marriage situations where consent is lacking: the decedent, her family, and society generally. Just imagine how you would feel losing an expectancy in such circumstances.

Let each state legislature enact such a deathbed marriage act sooner rather than later. Only then can the ghosts of the Herbert Hafts, and their heirs and beneficiaries, finally rest in peace.

## Appendix 1 – Harper’s Weekly Deathbed Marriage Cartoon



Harper's Weekly provided the following explanation of the cartoon:

The Death-Bed Marriage of Greeley's Liberal-Republicanism to The Daughter of Democracy took place at the Democratic National Convention in Baltimore on July 10, 1872, and was duly celebrated in this grim caricature. Longtime Republican Horace Greeley kneels to take, for better or worse, the moribund hand of the Democratic Party, which has nominated him as its presidential candidate. The sarcastic use of “Nigger” in the subtitle refers to an 1868 Nast cartoon, “Would You Marry Your Daughter to a Nigger?” which wondered if the anti-black Democratic Party might nominate civil rights veteran, Salmon Chase. (They did not.) Here, the term refers to Greeley, the former abolitionist, and underscores the abandonment of his principles.

In the left-foreground the Democratic/woman's dowry of “Fraudulent Votes,” “Stuffed Ballot Boxes,” and “Tammany Ring Money Stolen From the People” is

stacked in crates and boxes. Complementing the unhappy couple, an equally mismatched and grotesque wedding party of grieving Tammanyites, Democrats, and embittered Liberal Republicans are gathered to endure the moment. Behind Greeley on the right, Whitelaw Reid is holding the former editor's trademark white hat and coat; the pocket of the latter contains a publication, "The Recollections of a Busy-Body, By H. G."

The longhaired figure on the far right is Theodore Tilton, editor, evangelist, and lecturer. In his jacket pocket is a book, *Life of Mrs. Woodhull*, a biography Tilton had written about Victoria Claflin Woodhull. She was an outspoken advocate of women's rights and free love, who in 1872 became the first woman nominated for president (running on the ticket of the Equal Rights Party). Shortly before the election, she revealed evidence of an affair between Tilton's wife and the Rev. Henry Ward Beecher, perhaps the most popular and well-known evangelist in the country. The scandalous revelations led to one of the nation's most widely-reported and sensational trials.<sup>117</sup>

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<sup>117</sup> John Adler [Publisher], *Cartoonist Thomas Nast v. Candidate Horace Greeley: the Election of 1871 in Harper's Weekly*, <http://nastandgreeley.harperweek.com/SubPages/cartoon-1872-mediumB.asp?UniqueID=17&Year=election>.

## Appendix 2 – George Orwell’s Deathbed Marriage

Writer George Orwell married Sonia Brownell, a woman fifteen years younger than Orwell, on his deathbed. The marriage “prompted a frisson of suspicion among friends.”<sup>118</sup> Sonia was apparently quite the character. She “had slept her way around London's intellectual haut monde” and was at Orwell's side “wearing an extravagant ring of rubies and diamonds bought with one of [Orwell's] blank cheques.”<sup>119</sup> Orwell had a son from a previous marriage, the mother of whom had died unexpectedly.<sup>120</sup> Thus, instead of Orwell's royalties from *Animal Farm* and *1984* passing to his son, they went to Sonia (though the latter point is a complex tale in itself).<sup>121</sup> Carroll summarized Sonia's activities around the time of Orwell's death as follows:

Famously, of course, while Orwell was dying, Sonia was drinking with her former beau, the painter Lucian Freud. Since then she has been portrayed as more of a merry widow than a grieving one: setting off for the Riviera when her husband's body was barely cold, to pursue the real love of her life, the French philosopher Maurice Merleau-Ponty; frittering Orwell's fortune on failed affairs and booze, dying a destitute and bitter drunk.<sup>122</sup>

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<sup>118</sup> Tim Carroll, *A Writer Wronged*, THE SUNDAY TIMES, August 15, 2004.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

### Appendix 3 – Separation of Validity of Marriage from Marital Property Rights in Colonial Hong Kong

Apparently, it was very common for European men who were economically active in Hong Kong during this era to keep a paid mistress.<sup>123</sup> Indeed, one police estimate in 1880 stated that seventy to eighty percent of women in Hong Kong were prostitutes or “women of easy virtue.”<sup>124</sup> Many dying men would marry their mistress “to make up for their past misdeeds as they prepared to meet their maker.”<sup>125</sup> The Attorney General of Hong Kong put into place a regime that appeared to sever the relationship between marriage and the property consequences thereof:

The rule in this colony and in England is that a marriage revokes a will. The Secretary of State has directed that if this Ordinance was introduced there should be a provision inserted that a deathbed marriage should not have the effect of revoking a will. The Secretary of State has not exactly stated what his reasons are but I could very well imagine myself that a man might be under the influence of religious fervour and do possibly what his religious advisers or priests may tell him is his duty, and it is thought fit that a marriage under such circumstances should not revoke any previous provision which he had made possibly in good health for the benefit of his family or relatives.<sup>126</sup>

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<sup>123</sup> [www.blogthetalk.com/2005/12/hong-kongs-deathbed-marriages.html](http://www.blogthetalk.com/2005/12/hong-kongs-deathbed-marriages.html).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*