
**THE MARRIAGE MOMENT:
“WE INHERIT NOTHING TRULY, BUT WHAT OUR
ACTIONS MAKE US WORTHY OF”¹**

Fredrick E. Vars^{*}

In its landmark *Obergefell v. Hodges*² decision, the United States Supreme Court held that same-sex couples have the same right to marry as others.³ “[M]arriage is essential to our most profound hopes and aspirations,” the Court declared.⁴ This is certainly true for many people, but marriage is not an unmitigated good. Like all things, it can be abused. As the right to marry expands, the potential for such abuse ought to be narrowed.

In particular, suppose an elderly person is completely dependent upon a nurse. The nurse pressures the patient into executing a will leaving everything to the nurse. After the patient dies, the family challenges the will on undue influence grounds, and likely wins.⁵ But suppose instead the nurse pressures the patient to marry. Marriage, too, can be set aside on undue influence grounds, but in most jurisdictions not after a spouse has died.⁶ The unscrupulous nurse keeps the ill-gotten spousal share.

Obergefell has increased the potential for this type of abuse. A recent Illinois case illustrates.⁷ A same-sex partner allegedly exerted undue influence over several years to become the sole beneficiary of William Drewry’s trust.⁸ Drewry’s family’s undue

^{*} Professor, University of Alabama School of Law. Yale (J.D.); Princeton (A.B.). Thanks to Alan Durham, Heather Elliott, and Albert Lopez for comments on earlier drafts.

1. George Chapman, in *THE NEW DICTIONARY OF THOUGHTS* 23 (Tryon Edwards ed., 1957).

2. 135 S. Ct. 2584 (2015).

3. *Obergefell*, 135 S. Ct. at 2604.

4. *Id.* at 2594.

5. *See, e.g.,* Puckett v. Krida, Nos. 21-170, 8287, 01-A-01-9403-CV-0010, 1995 WL 316263 (Tenn. Ct. App. May 25, 1995). Some states have even enacted statutes creating a presumption of undue influence for gifts to caretakers. Robert Barton, et al., *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, PROB. & PROP., May–June 2015, at 22, 23.

The doctrine of undue influence in particular is not without critics. *See, e.g.,* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245 (2010); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997). Defending every variety of will contest is obviously beyond the scope of this Essay. My argument is that the permissible grounds for challenging in probate a will and a marriage should be nearly the same.

6. *See* Hoffman v. Kohns, 385 So. 2d 1064, 1069 (Fla. Dist. Ct. App. 1980) (holding that marriage cannot be voided because of undue influence after the death of a party); *see also* Rodenhiser v. Duenas, 818 N.W.2d 465, 471–73 (Mich. Ct. App. 2012) (noting that only a spouse while both spouses are alive can claim fraud and duress in order to set aside a marriage); W. W. Allen, Annotation, *Right to Attack Validity of Marriage after Death of Party Thereto*, 47 A.L.R.2d 1393, 1407 (1956) (same). For a recent state survey, *see* Robert W. Goldman, *Post-Death Divorces*, in SEVEN DEADLY CLAIMS, CW001 ALI-CLE 399 (Steven K. Mignogna ed., 2014).

7. *In re* Estate of Drewry, No. 1–12–0129, 2013 WL 6687255 (Ill. App. Ct. Dec. 17, 2013).

8. *Id.* at *1–2.

influence claim—including alleged deceit, isolation, and abuse of a power of attorney—survived a motion to dismiss.⁹ During this period the couple wed in Canada. Had that marriage been recognized in Illinois, the partner might have kept the spousal share even if undue influence were found and the trust invalidated.

Here is my proposal: a person who procures a marriage solely to receive advantages at death and through misconduct that would support a will contest should not be treated as a spouse for purposes of intestacy, the elective share, or other death benefits.¹⁰

Marriage has impacts beyond life. Indeed, the named plaintiff in *Obergefell* wanted nothing more than to be listed as surviving spouse on his husband's death certificate.¹¹ A marriage's invalidity should also transcend death for purposes of inheritance.

To be clear, the proposed change is to probate law, not to family law. It is not a new avenue for annulment; it merely relies in part on traditional will contest doctrines to determine who counts as a "spouse" for purposes of inheritance. A marriage held ineffective for succession may be effective for other purposes.

Consistent with this proposal, one New York court allowed a posthumous undue influence challenge to a marriage:

Nidia procured the marriage itself through overreaching and undue influence. Nidia should not be permitted to benefit from that conduct any more than should a person who engages in overreaching and undue influence by having himself or herself named in the will of a person he or she knows to be mentally incapacitated.¹²

Florida has recently enacted a statute along the same lines.¹³

New York and Florida have it mostly right, but will contest doctrines should not be transplanted into the marriage context without some pruning. Because marriage impacts more than inheritance and often has many motives, my proposal is more limited. Under the present proposal, only wrongdoers who procured marriages *solely* for death benefits would be disqualified.¹⁴

People should remain free to marry with their eyes open to the fact that an inheritance may be part of their partner's motivation. Marrying for money has a long tradition and should not itself invalidate the union. But a court deciding who will benefit from one spouse's death should not allow itself to be complicit in the other

9. *Id.* at *7–10.

10. See Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 KY. L.J. 275, 298 (2007–2008) (proposing a similar reform, but limited only to challenges based on lack of testamentary capacity); *In re Estate of Laubenheimer*, 833 N.W.2d 735, 753 (Wis. 2013) (allowing posthumous capacity challenge to marriage). See generally Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1 (2010) (defending incapacity challenges to wills, but arguing for a high standard of proof).

11. 135 S. Ct. at 2594–95.

12. *Campbell v. Thomas*, 897 N.Y.S.2d 460, 471 (N.Y. App. Div. 2010).

13. FLA. STAT. ANN. § 732.805 (West 2015).

14. The pathmarking case on this point recognized the same limitation. See *Patey v. Peaslee*, 131 A.2d 433, 436 (N.H. 1957) (per curiam) (stating that a constructive trust would be available if the alleged wrongdoer procured the marriage "solely to obtain the decedent's property").

spouse's wrongful scheme hatched and executed solely to gain an inheritance.

The present proposal derives not from a purely mechanical analogy to will contests, but rather from the equitable principle that one should not be allowed to profit from one's wrongdoing. As early as 1957, the New Hampshire Supreme Court in *Patey v. Peaslee*¹⁵ articulated essentially the same test on precisely the same foundation.¹⁶

Sadly, *Patey* was long neglected and continues to be so. A 2003 Alaska Supreme Court case concluded that *Patey* "has never been followed under similar circumstances since it was issued in 1957."¹⁷ A fairly comprehensive 2014 review of states summarized an earlier opinion in the *Patey* case, but did not even reference the key decision.¹⁸ The New York case quoted above correctly grounded its holding in this equitable principle, though without citing *Patey*.¹⁹

It may be harder now for jurisdictions to reverse course and adopt the present proposal than it would have been if they had followed *Patey* earlier. On the other hand, Americans' attention is focused on marriage more intensely than at any time in recent memory. One way to respect the recently expanded institution of marriage is to deny death benefits in wrongfully procured ones.

15. 131 A.2d 433 (N.H. 1957).

16. *Patey*, 131 A.2d at 436.

17. *Riddell v. Edwards*, 76 P.3d 847, 855 (Alaska 2003).

18. *Goldman*, *supra* note 6.

19. *Campbell*, 897 N.Y.S.2d at 471