The Capacity To Divorce: How "With It" Do You Need to Be to Get Divorced?

This past summer, in the case of *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, the California Court of Appeal affirmed the Trial Court's decision which held that the level of capacity required to end one's marriage is, much like the capacity required to start one's marriage, subject to a relatively low bar.

In *Greenway*, Joann Greenway appealed the Trial Court's ruling which found that her husband, Lyle Greenway, was mentally capable of filing for divorce. The Parties had been married for 48 years and Lyle was 76 at the time, and in poor health. Nevertheless, Lyle filed legal separation from Joann based on irreconcilable differences. Joann objected to ending the marriage or dividing the marital estate valued at several million dollars. She argued that Lyle was not mentally competent to maintain a dissolution of marriage action.

After reviewing written arguments and hearing testimony from the Parties, their three adult children, and four healthcare professionals who had evaluated Lyle's mental state, the Trial Court concluded that Lyle was mentally capable of making a reasoned decision to end his marriage and granted his request for status-only dissolution.

In her appeal, Joann argued, *inter alia*, that the evidence of Lyle's capacity to enter into a dissolution of marriage was insufficient to support the Trial Court's ruling.

In making its decision, the Court of Appeal pointed out, "The experts all agree that Lyle...has [at least some level of] dementia. The question is, however, not whether Lyle has dementia, but whether his impairment is such that he no longer has the capability of making a reasoned decision to end his marriage."

The Court of Appeals observed that the determination of a person's mental capacity is fact specific and must be measured on a sliding scale depending on the issue at hand. On the high end of the scale is the mental capacity required to enter contracts, followed by testamentary capacity, and, at the low end of the scale, marital capacity. Id at 637.

The Court of Appeals noted that there is a "...large body of case authority reflecting an extremely low level of mental capacity needed before making the decision to marry or execute a will." Although marriage arises out of a civil contract, case law has recognized that marriage is, "...a special kind of contract that does not require the same level of mental capacity of the parties as other kinds of contracts.." Id at 640. Further, the Court of Appeal points out that, "...even a person under a conservatorship, who is generally without contractual power, may be deemed to have marital capacity." Id at 640 (citing *Prob. Code* § 1900).

Likewise, the Court of Appeals also pointed at that Probate Code § 810 provides that there is a , "...rebuttable presumption affecting the burden of proof that all persons have the

capacity to make decisions and to be responsible for their acts or decisions." Thus, the burden of proof required to determine that a person lacks the capacity to marry or dissolve their marriage, is quite high.

Greenway has taken the holding in *Andersen v. Hunt*, 196 Cal. App. 4th 722 (2011) one step further. In *Anderson*, the Court held that the standard of capacity to marry cannot simply be a set of facts that are plugged into a route equation, and that in evaluating mental capacity to marry, a Court should evaluate the person's ability to "appreciate the consequences of the particular act he or she wishes to take." The *Greenway* case takes this reasoning and applies it to the standard of capacity required to dissolve ones marriage, as well.

Greenway is an important case because it highlights the fact that the right to marry is an important fundamental right which the Courts aim to protect. This case underscores the concept that the capacity required to make the decision to divorce must be, like the capacity required to make the decision to marry, held to a very low standard. The Courts and the legislature have again and again upheld the notion that proving incapacity to marry, and now incapacity to divorce, must be explicitly proven.