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Résumé de l'article

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Death Bed Marriages in the Commonwealth Caribbean

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ABSTRACT

This note deals with the validity of marriage in extremis *in Barbados. The author analyzes a 1975 High Court of Barbados decision on this question,* Kinneally *v.* Zazula, *in the context of Barbadian legislation, which is compared to the law existing in the Carribean Commonwealth countries.*

RÉSUMÉ

L'auteur prend occasion de la décision Kinneally *c.* Zazula, *rendue à la Barbade en 1975, pour traiter de la validité du mariage contracté* in extremis. *Il analyse cette décision à la lumière de la législation pertinente de la Barbade, qu'il compare avec le droit existant dans les autres territoires des Caraïbes membres du Commonwealth.*

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Introduction

The Barbados case of *Kinneally* v. *Zazula*[1] aptly illustrates the use of a little known, and even less used, facility which is to be found in the marriage laws of the Commonwealth Caribbean territories. This provision enables marriages to be solemnized in circumstances in which the usual formalities cannot be followed because of the severe illness of one of the parties at the time of the ceremony. Although the stated formalities are dispensed with the marriage is nevertheless valid and effectual for most purposes, provided a meaningful consent has been given; and in some territories such a marriage even revokes a previous will made by the testator. This type of marriage is variably referred to in the legislation of the area as a clinical marriage and a marriage *in articulo mortis;* or, as in Barbados, Bermuda, St. Lucia and Trinidad and Tobago, a marriage *in extremis*.

The Facts

Mr. James Kinneally, an American citizen and a Roman Catholic, was on a cruise through the Caribbean with Mrs. Alma Zazula when he took ill. He was sharing a cabin with her. Her daughter Joan, occupied an adjoining cabin. By the time the ship arrived in Barbados he was in a critical condition. He was removed by ambulance to the local hospital where he was placed in the intensive care unit. A local Roman Catholic Priest who had been summoned to administer the last rites to the dying man performed a marriage ceremony at his bedside some hours after his admission to hospital and shortly before he died the same night. His personal representatives, one of whom was his son by a previous marriage, petitioned the court for an order declaring the marriage null and void, and for the record thereof to be expunged from the Register of Marriages of Barbados, on the ground that at the time of the marriage the deceased had not been in a fit condition to give a valid consent. The court accepted the evidence of two medical practitioners and a nurse who were in attendance.[2]

> Sister Franklyn gave her evidence well and I accept it. I accept that the ceremony took place at about 9 o'clock. I accept the evidence of Dr. Haynes

1. (1975) 26 W.I.R. 29.
2. At p. 32.

and Dr. Clarke, both men of high professional standing with no personal interest in the matter. Dr. Haynes gave the opinion that on the basis of all the facts available to him and of his clinical observations, the patient would not have been in a position to appreciate that he was going through a ceremony or getting married or agreeing to get married. Dr. Clarke thought that when he saw the patient a few minutes before nine he was not in a condition to understand what was taking place. He went on to say that if the patient went through a marriage ceremony just after he left him he would not have understood what was taking place.

I accept these opinions and I find that at the time of the purported marriage Mr. Kinneally was not in a fit condition to be asked to consent to marriage and was incapable of understanding the significance of what was being done at his bedside or of a meaningful participation in the ceremony. In my view though Father Deane went through the normal ritual of the marriage ceremony he was following the form rather than the substance — an empty and meaningless formula since one of the participants was present essentially in body only. Sister Franklyn's version of the ceremony came in my view nearest to what must have transpired. She spoke of the patient being in an unconscious condition; of his never having spoken or repeated anything; of his never having nodded or shaken his head; of his not having done or said anything to indicate that he knew what was happening. She spoke of the part of the ceremony in which he was asked if he took the respondent for his wife. And of the priest asking him in a progressively louder voice whether he could hear him. And of an eventual muttering or groaning sound 'ohh'.

Section 10 of the *Marriage Act, 1949* which fell for interpretation in the case reads as follows:

10. If any person shall be very ill and likely to die and any Minister of religion of the district in which he lives shall be satisfied thereof, either from his own personal observation, or by the personal knowledge or by the certificate of the medical practitioner attending such person, if any such medical practitioner be in attendance, it shall be lawful for such Minister of religion without the licence or publication of banns required by this Act forthwith to solemnize marriage between the person who may be ill and the other person to whom he or she may be desirous of being married at the house where such person shall be ill as aforesaid at any hour of the day or night; and such marriage shall be valid to all intents and purposes whatsoever, unless there shall have been at the date of such marriage any lawful impediment to marriage between the parties, and such Minister of religion is hereby required forthwith to register such marriage in like manner as any other marriage solemnized by him.

The learned Judge posed the questions for determination thus:[3]

(1) Was the ceremony performed by Father Deane at Mr. Kinneally's bedside a marriage within the provisions of s. 10 of the Marriage Act, 1904 No. 9; was it a proper marriage *in extremis* as contemplated by the provisions of the section?

(2) In any case, was Mr. Kinneally in a condition physically and mentally, at the time, to enter the marriage contract and to understand the responsibilities

3. At p. 30.

> and obligations he was assuming? Could he in his state appreciate what it was all about and give his consent?

and he answered those questions in the following manner[4]:

> (i) The tenuous and fortuitous connection of Mr. Kinneally with Barbados could not properly be regarded as sufficient to bring the provisions of the section into play. As the provision stood, some meaning must be given to the word 'lives'.
>
> (ii) At the time of the purported marriage Mr. Kinneally was not in a fit condition to be asked to consent to marriage and was incapable of understanding the significance of what was being done at his bedside or of a meaningful participation in the ceremony.

The law which is currently in force reads as follows:[5]

> 35.(1) Subject to this section, a marriage officer or magistrate may solemnize a marriage without due publication of banns or a marriage licence or magistrate's certificate issued under Part IV in any place in Barbados and at any time where the marriage is between two persons one of whom he believes
>
> (a) from the certificate of a medical practitioner, if a medical practitioner has been in attendance on that person; or
>
> (b) from his own observation, if no medical practitioner has been in attendance on that person or it appears to him impossible to obtain in time the certificate of a medical practitioner who has been in attendance on that person,
>
> to be very ill and likely to die, and that person declares before the marriage is solemnized that he believes that he is at the point of death.
>
> (2) A marriage shall not be solemnized under subsection (1) unless both of the persons intending to marry signify their consent thereto in the presence of at least two witnesses.
>
> (3) Immediately after a marriage is solemenized under subsection (1) the marriage officer or magistrate solemnizing it shall make an entry thereof in the prescribed form in a properly bound register and in a duplicate original register provided by the Registrar and kept by the marriage officer or magistrate, as the case may be, for the purpose and such marriage officer or magistrate shall attach to the duplicate original register the certificate of the opinion of the medical practitioner or of his own opinion, as the case may be, that the person who is ill was likely to die.
>
> (4) A marriage solemnized under subsection (1) is void if any provision of this section is not complied with.
>
> (5) A certificate to be given by a medical practitioner, marriage officer or magistrate for the purposes of this section shall be in the prescribed form and the fee to be paid to a medical practitioner for such a certificate shall be such as may be prescribed.

Legislation similar to this is to be found in the laws of all the Commonwealth Caribbean territories, and in the course of this article it

4. At p. 31.
5. *The Marriage Act,* Cap. 218A.

will be interesting to note how differently this case may have been decided under the laws of those other territories.[6]

The current law in Barbados now permits such a marriage to take place "in any place in Barbados and at any time". The person must declare before the marriage is solemnized that he is on the point of death. Both persons must signify their consent to the marriage in the presence of at least two witnesses. Although no specific provision was made with respect to consent in the 1904 Act, no marriage can legally take place without the consent of the parties; and the learned Judge was quite right in declaring against the marriage, after having found that the deceased was not in a fit condition to understand what was being done at his bedside.

There is now no requirement that the person must have been living in Barbados, and consequently, that ground of the learned Judge's decision would have been decided differently under current legislation.

THE NECESSITY FOR CONSENT

By getting married, a man and a woman take on the most serious obligations they may ever have to fulfill during their lifetime; consequently they must be able to understand the meaning and purpose of this important obligation and be able to fulfill it. When a person gets married he in effect disposes of his whole future; and the fact that he may have acted under the impulse of a sentiment which clouds or precludes his reasoning, increases that risk. This is the reason why the law provides that minors cannot marry freely, and requires them to have the consent of their parents or guardians. The approval of these persons can be a guarantee against a headstrong decision.

Spouses who are too young may not have the necessary reasoning and experience required to manage a home and to bring up children. It is therefore a measure of social prudence to require for marriage that maturity of mind that age alone can supply. The law does not, in a peremptory manner, impose the condition of being of age of majority; but it does

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6. The relevant provisions to be discussed are: Anguilla (see St. Kitts-Nevis); Antigua — Cap. 347, ss. 25, 55 and Second Schedule; Bahamas — Cap. 88, ss. 20, 31 and Schedule M; Barbados — Cap. 218A, ss. 26, 35 and Second Schedule; Belize — Cap. 184, ss. 5, 6, 64; Bermuda — Title 27, Item 1, No. 25, ss. 15, 25 and Third Schedule; The British Virgin Islands — Cap. 235, ss. 25, 55 and Second Schedule; The Cayman Islands — Cap. 92, ss. 23, 36; Dominica — Cap. 191, ss. 30, 312, 61, 72; Grenada — Cap. 181, ss. 20, 21; Guyana — Cap. 45:01, ss. 31, 32, 65 and Second Schedule; Jamaica — *The Marriage Act,* ss. 24, 37; Montserrat — Cap. 299, ss. 25, 55 and Second Schedule; St. Kitts-Nevis — Cap. 325, ss. 28, 57 and Second Schedule; St. Lucia — Cap. 242, articles 85, 89, 112; St. Vincent — Cap. 151, ss. 23, 34; Trinidad and Tobago — Cap. 45:01, ss. 23, 24, 42; and The Turks and Caicos Islands — Cap. 75, ss. 14, 21 and Second Schedule.

lay down a minimum age below which it does not conceive that a minor has the power of appreciating in fact if the marriage should reasonably take place.

Generally therefore one can get married once he has reached what has been laid down as the legal age of puberty; but as long as the age of majority has not been reached, the marriage requires the consent of the parents or guardians. The part which, therefore, is played by the two conditions of capacity is not the same. Before the minimum age required for marriage has been reached the marriage may not take place; but after that date and before the age of majority has been reached, the marriage may take place provided the necessary consents have either been obtained or dispensed with.

What Consents Are Required

In Bermuda[7] and the Turks and Caicos Islands,[8] a marriage which is solemnized between persons who are under 16 years of age is void.[9] At common law a person attains the age of majority at 21 years, but legislation in many of the territories has reduced this to 18 years; so that the requisite consents must be obtained in respect of a person who is between the minimum age for marriage and the age of majority.[10]

The consent may be given orally or in writing.[11] In Anguilla, Antigua, Belize, the British Virgin Islands, Dominica, and St. Kitts-Nevis, where the person whose consent is required is present at the ceremony, his consent may be given orally and he should then sign the register as a token of his assent; if he is absent, the consent must be given in writing and is to be attached to the register.

No consent is required in respect of a widower, or widow, or of a divorced person in Barbados,[12] and perhaps in Guyana. Subsection 31(1) of the *Marriage Act* of Guyana provides that no marriage is to take place between persons who are under the age of eighteen years unless they are widows, widowers or divorcees, unless the appropriate

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7. S. 28.
8. S. 14.
9. In Anguilla and British Virgin Islands the minimum age is 21. For the minimum age in the other territories, see N.M. Forde, *Women and the Law*, pp. 10, 11 & 13.
10. The age of majority in the territories is as follows: *21 years* Anguilla, Antigua, Bermuda, British Virgin Islands, Dominica, Grenada, Guyana, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Turks and Caicos Islands; *18 years* Bahamas, Barbados, Belize, Cayman Islands, Jamaica and Trinidad and Tobago.
11. The person must be present and give his consent verbally in the Bahamas, the Cayman Islands, Grenada, Jamaica, St. Vincent and the Turks and Caicos Islands.
12. S. 26.

consents have been obtained. Subsection 65(3), however merely states that a marriage *in articulo mortis* shall not be solemnized where either of the parties is under eighteen years of age, and is not a widower or a widow, without the necessary verbal or written consents. It could of course be argued that divorcees could enter into clinical marriages without the necessary consents because of the strong and positive wording of the provisions of subsection 31(1); but there is certainly room for dissent, since the provisions relating to clinical marriage are to be found in a different part of the Act, and, it could be urged, that such persons could not have been intended to benefit from so fundamental a change by implication only.

In Bermuda, Trinidad and Tobago, and St. Lucia, both parties must be of full age and otherwise legally competent to marry, so that the question of consent does not arise in these territories. But generally in so far as consents are concerned the territories may be conveniently divided into two groups. In the first group, which includes Belize, Dominica, the Cayman Islands, Grenada, Jamaica, St. Vincent and Trinidad and Tobago, the consents required are of the following persons in the order stated, viz.

(a) the father,
(b) if the father is dead, the lawfully appointed guardians,
(c) the mother, if unmarried,
(d) the guardian appointed by the Court.

In the second group which consists of Anguilla, Antigua, the Bahamas, Barbados,[13] Bermuda, the British Virgin Islands and the Turks and Caicos Islands, the consents which are required in respect of minors who have been born legitimate are:

(a) where the parents are living together or where they are divorced or separated but custody is given to each parent for part of the year: both parents;
(b) if both parents have been deprived of custody: the person to whose custody the infant has been committed;
(c) if the parents are divorced or separated: the parent who has custody;
(d) in cases of desertion: the parent who has been deserted;
(e) where one parent is dead and no guardian was appointed: the surviving parent;
(f) where the deceased parent appointed a guardian: the surviving parent and the guardian.

Where the infant is illegitimate,[14] consent is required from the mother or the person to whom the custody of the infant has been committed by the court. If the mother is dead, the guardian appointed by her.

13. This must now be read subject to the *Status of Children Act* of Barbados.
14. Except in Barbados where this concept no longer applies.

The *Status of Children Reform Act* has abolished the status of illegitimacy in Barbados[15] and the consents required are similar to those of the second group of territories with the following minor exceptions: in the case of (a) above, either parent; no specific provision is made for cases of desertion; and provision is specifically made for cases in which either of the parents being *non compos mentis* in which case the Barbados legislation also takes note of the prevailing social conditions in the Caribbean by permitting an "acknowledged guardian" to give consent.

Where the consent cannot be obtained because a person who is required to give it is incapable of so doing, or is out of the State, or cannot be found in the State, or is otherwise unavailable, the Marriage Officer is permitted in some territories to dispense with that consent if there is any other person whose consent is also required. Where there is no such other person, the Head of State or the Court may dispense with the necessity of obtaining any consent.[16] And where a person whose consent is required refuses, or unreasonably withholds it, either party to the intended marriage may apply to the Court for an order dispensing with the consent.

In Anguilla, Dominica and St. Kitts-Nevis, the Marriage Officer may use his discretion and solemnize the marriage if the person whose consent is required by law is absent, inaccessible or *non compos mentis,* or if he thinks that the consent is being unreasonably withheld, and that the condition of the dying person does not permit of the delay which would be involved on petitioning the High Court to dispense with the consent; but in such a case the minor's parent or guardian may petition the court for annulment of the marriage within three months of its celebration, on proof that the marriage is not one to which the court would have consented if the matter had come before it in the first instance.

In the Bahamas, the Cayman Islands, Dominica, Grenada, Jamaica and the Turks and Caicos Islands, provision is made for securing the property of a minor, other than a widow or widower, who has entered into such a marriage without the necessary consent having been first obtained. In such a case, the person of full age is not to take any benefit in any way whatsoever from the property of the minor whether by way of community of property,[17] will, gift or transfer; nor is any stipulation made by the adult in any ante-nuptial contract to be valid or of any effect.

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15. Act 32 of 1979. For similar legislation in some of the other territories, see: Belize, Ordinance 32 of 1980; Jamaica, Act 36 of 1976; St. Vincent, Ordinance 18 of 1980; and Trinidad and Tobago, Act 17 of 1981.

16. This person is defined as someone who has brought up the minor, or who has supported him for at least three years immediately preceding the intended marriage. In the Bahamas, Barbados, Belize, the Cayman Islands, Grenada, Guyana, Jamaica, St. Vincent and the Turks and Caicos Islands, all such cases must be referred to the court.

17. This reference to community of property is only to be found in the Dominica Act.

In order to enforce this provision and to prevent the adult from deriving any interest or pecuniary benefit from such a marriage, the parent or guardian whose consent has not been given to such a marriage may take proceedings; and the court is empowered to order and direct that all the minor's property be secured under its direction for the benefit of the minor and/or the issue of the marriage, in such a manner as it thinks fit.[18]

It is indeed strange to find a reference to community of property in legislation in Dominica, since this is a purely civil law concept and there is no trace of evidence that civil law ever applied in that country even during the short and intermittent periods of French rule. Community of property does however obtain in St. Lucia on marriage, and is defined by the *Civil Code* as the common interest of a man and his wife in certain of their property, and is established by law by the mere fact of their marriage, in the absence of any stipulation to the contrary.

WHO CAN PERFORM CEREMONY

The officiating officer who performs the ceremony must be a "marriage officer", defined in the provisions of the Acts as a Minister of Religion or a Magistrate.[19] The officiating officer is empowered to perform the ceremony without the due publication of banns[20] or of a marriage licence or marriage certificate if both of the parties who intend to marry are able to and actually signify their consent in the presence of at least two witnesses other than the marriage officer himself. In Bermuda one of the witnesses must be a medical practitioner.[21]

It would seem that generally any marriage officer may perform the ceremony; but in St. Lucia and in Trinidad and Tobago the dying person must be a member of the religious communion or denomination to which the marriage officer belongs.

Although the purpose of the legislation is to eliminate as much as possible the formalities required for marriage in favour of expediency, it is suggested that this special requirement is nevertheless a very useful

18. In the Bahamas, Grenada and Jamaica only the Attorney General (in the Cayman Islands the Clerk of the Court) may apply to the court by way of information.

19. In St. Lucia either a Minister of Religion or a District Registrar; they are both described as "Status Officers".

20. When the amendment to the *Marriage Act* which would empower Ministers of religion to perform such marriages in Barbados was being debated in the House of Assembly, it was discovered that both the Bill which had reached the House from the Legislative Council, and Webster's dictionary spelt the word "banns" with one "ban", whereas Chambers dictionary had the word spelt with two "n"s by pointing out that the Book of Common Prayer used "banns" and that in any case Webster was an American dictionary. See Vol. 7 Legislative Debates of Barbados Session 1891-92 pp. 33/4.

21. S. 25(2)(b).

provision in that it better enables the marriage officer to exercise his judgment in the matter as, in the environment of a small island state, he may have been well acquainted with the parties, or at least one of them.

Earlier Barbados legislation which was interpreted in *Kinneally* v. *Zazula* had provided that the Minister of Religion had to be of the district in which the deceased lived. In delivering his judgment, however, Williams J. has this to say on the interpretation of the word "lives":

> Some may remain at home. Others may go into a nursing home. Others again may be in hospital. And they may be confined in these places for periods of varying length. And I can see no reason for regarding a person in a nursing home or in hospital as *ipso facto* not living there or for denying that a nursing home or a hospital can be a house for the purposes of the section. Each case must depend on its circumstances.
>
> Was Mr. Kinneally then living at the hospital when he was married? The circumstances are these. His planned visit to Barbados had been merely one in a series of brief excursions from his cruise ship. By chance he became seriously ill near Barbadian waters and had to be rushed to hospital in an ambulance. There he remained in a critical condition for some hours until his death later in the night, a total of five or six hours at a hospital as a result of an emergency in an island which he had intended to visit briefly as a tourist. In my judgment such a tenuous and fortuitous connection with Barbados could not properly be regarded as sufficient to bring the provisions of the section into play. If the section had contemplated such circumstances, if that had been the intention of Parliament, more appropriate language could and should have been used and the minister of religion given the power to solemnize the marriage could have been a minister of religion of the district in which the ill person was or happened to be. As the provision stands, some meaning must be given to the word 'lives'.
>
> In an Australian case *Hughes* v. *Hughes* Napier J. said these words (at p. 282):
>
> 'The natural meaning of the word live is to abide or reside with some degree of permanency or for an indefinite period'.
>
> I would be unjustified in seeking to extend this meaning to cover the case of a dying man hospitalised here for five or six hours as a result of an emergency arising when he was on his way through the Caribbean as a passenger on a cruise ship.

Belief of Marriage Officer or Magistrate

The Marriage Officer or Magistrate must himself believe that the party concerned is very ill and likely to die. This belief, unlike that of the person himself, is capable of being tested objectively; since it should be based either on the certificate of a medical officer who has been in attendance on that person, or from the officiating officer's own observation where no medical officer has been in attendance or where it appears impos-

sible to obtain such a certificate in time.[22] And both the medical practitioner and the officiating officer may be cross-examined in order to satisfy this requirement of objectivity.

In St. Lucia and Trinidad and Tobago the witnesses must also believe that the person is in a dying state; and in some territories[23] the certificate of the medical practitioner, or of the marriage officer who performed the ceremony that in his opinion the sick person is at the point of death, is to be in the form indicated in the statute, and must be attached to the Register.

In most of the territories it would appear that any two persons may be married in those circumstances even if they have not known each other before. So that for example a person who is ill in hospital could lawfully enter into a ceremony of marriage with an infant nurse if the necessary consents are obtained.

But in the Bahamas, St. Vincent and the Turks and Caicos Islands, the parties must have lived in unlawful connection before such a marriage may be solemnized. This is an eminently sensible provision, since the object of such legislation should be to permit a marriage to take place where the persons had previously known each other and had engaged in some sort of close relationship.

ONLY ONE MUST BE ILL

In most of the territories such a marriage should not be solemnized where both parties are ill and on the point of death, for it is provided that the marriage must be between two persons one of whom it is believed is very ill and likely to die; but in Bermuda, St. Lucia and Trinidad and Tobago such a marriage can be solemnized even where both parties to the intended marriage are at the point of death.

The person who is ill must declare, before the marriage is solemnized, that he believes that he is at the point of death.[24] Such a declaration, it is submitted, must be clear and unequivocal, and at the very least it must come from the mouth of the person himself. A mere grunt in answer to a question specifically put may not be sufficient.

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22. In Bermuda the opinion must be that of a medical practitioner; but in Grenada, Jamaica, St. Lucia, St. Vincent, Trinidad and Tobago and the Turks and Caicos Islands, it must be that of the Marriage Officer himself, since no provision is made for medical certificates to be given.

23. Anguilla, Antigua, Barbados, the Bahamas, the British Virgin Islands, Belize, the Cayman Islands, Dominica, Grenada, Montserrat and St. Kitts-Nevis.

24. In Bermuda it is specifically provided that the person must be able to understand the material parts of the ceremony.

Earlier Barbados legislation did not require such a declaration, nor is it now required in the Bahamas, the Cayman Islands, Bermuda, Grenada, Jamaica, St. Lucia, St. Vincent, Trinidad and Tobago and the Turks and Caicos Islands, and it is suggested that such a declaration adds little to the requirement of consent. If the words of the statute are to be properly satisfied it would be essential that the person indicates in no uncertain terms that he believes that he is at the point of death; but that belief can scarcely add anything to that of the Magistrate or Marriage Officer or medical practitioner; although it may tend to re-inforce it.

Where Marriage Can Take Place

The marriage can take place in any place. It need not be at the persons' normal place of abode. It could be at a hospital, on a ship in the harbour within territorial waters, or, it is submitted, even in an ambulance on the way to hospital.

Submissions were made on the meaning of two phrases used in the section: "any minister of religion of the district in which he lives" and "at the house where such person shall be ill". What is the meaning of "lives" and "house"? Can a hospital be a house? And does a person live in a hospital? Williams J was of the view that

> [. . .] in giving effect to this section the various life-styles of those who are sick must be taken into account. I do not think that we should assume that Parliament in making provision for death-bed marriages would ignore the various circumstances under which persons spend their last days.
>
> Some may remain at home. Others may go into a nursing home. Others again may be in hospital. And they may be confined in these places for periods of varying length. And I can see no reason for regarding a person in a nursing home or in hospital as *ipso facto*, not living there or for denying that a nursing home or a hospital can be a house for the purposes of the section. Each case must depend on its circumstances.

When Must Marriage Take Place

Such a marriage should be solemnized at any time, that is at any hour of the day or night. The permissible times for the solemnization of marriages in Barbados is between 6:00 a.m. and 9:30 p.m.; but it is specifically provided that neither the marriage officer nor the magistrate is under any obligation to solemnize a marriage before 9:00 a.m. or after 6:00 p.m.[25]

25. Ss. 27(1)a and 31(1).

The Barbados provision makes it quite clear that the marriage may take place at any time of the day or night. In the other territories this aspect of the matter has not been directly addressed; and it would seem, therefore, that despite the obvious urgency contemplated by the statutes, such a marriage must be solemnized at the regular times. It could, however, be argued that this would negate the very circumstances which the statute seems to intend to provide for.

REGISTRATION OF MARRIAGE

Immediately after the solemnization of such a marriage the officiating officer must himself and the two witnesses sign a certificate deposing to the fact that the formalities prerequisite to the celebration of such a marriage have been complied with. This declaration must be transmitted to and filed by the Registrar of Marriages in a special register; and on the due observance of all the relevant conditions the marriage is held to be good and effective in law.

REVOCATION OF WILL

The general rule is that every will made by a man or a woman is revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real and personal estate thereby appointed would not in default of such appointment pass to the persons entitled under an intestacy.

Section 177 of the *Law of Property Act, 1925* provides that wills made after 1925 and expressed to be made in contemplation of marriage are not revoked by the solemnization of the marriage contemplated. This provision has been adopted in Barbados,[26] Belize,[27] and Trinidad and Tobago.[28] The provisions in Barbados and Trinidad and Tobago are identical with that of the *Law of Property Act;* but the Belize provision speaks about the contemplation of marriage generally. In *Sallis* v. *Jones*[29] it was held that mere reference to marriage generally by the testator in his will in the following words: "this will is made in contemplation of marriage" was not enough to bring section 177 of the U.K. Act into operation. It is submitted however that the wording of the Belize legislation lease is open to a much wider interpretation, sufficiently wide, it is suggested, to prevent such a will from being revoked in that country.

26. See e.g. *The Barbados Succession Act.*
27. Cap. 195, s. 16.
28. Act 27 — 1981, s. 12.
29. (1936) p. 43.

Marriage revoked even wills made in contemplation thereof;[30] but it seems that marriage does not revoke a privileged[31] will.[32]

In Barbados, Belize, the Cayman Islands, Guyana and Jamaica this general rule applies with respect to clinical marriages as no legislation provides to the contrary. It is specifically provided in the other territories however, that such a marriage does not operate to revoke a will,[33] and of these Dominica, St. Lucia and Trinidad and Tobago have placed the matter beyond dispute by enacting this prohibition both in the legislation pertaining to wills,[34] as well as in that which regulates marriages.[35]

Conclusion

It is quite clear that the historical origin of these provisions is religious. The revised *Code of Canon Law* which came into force in January 1983, and which has been described as the fundamental legislative document of the Roman catholic Church "based on the judicial and legislative heritage of revelation and tradition", addresses itself to this question in Canons 1079 and 1116.[36] Canon 1079 permits a parish priest, when danger of death threatens, to grant dispensation to his parishioners wherever they are residing and to other persons who are actually present in his territory, from observing the usual form of the celebration of a marriage.

This right of dispensation has not however gone unchallenged; and in fact it was the subject of some bitter acrimony between the Church and the Civil authorities in both St. Lucia and Trinidad when attempts were made to regulate the law relating to civil marriage. After the *Civil Code of St. Lucia* had been completed and deposited in the Registry of that island for inspection, one of the grounds on which the Roman Catholic

30. *In the Goods of Cadywold,* (1858) 1 Sw & Tr. 34.
31. *Wood* v. *Gossage,* (1921) p. 194, overruling by implication.
32. *In the Estate of Wardrop,* (1917) p. 54.
33. Anguilla — see St.- Kitts-Nevis.
Antigua — Cap. 87, s. 18.
Bahamas — Cap. 88, s. 31.
Bermuda, s. 25.
B.V.I. — Cap. 81, s. 18.
Grenada — Cap. 181, s. 31.
Montserrat — Cap. 84, s. 18.
St. Kitts-Nevis — Cap. 84, s. 18.
St. Vincent — Cap. 151, s. 34.
Turks & Caicos Islands — Cap. 75, s. 21.
34. Dominica — Cap. 215, s. 19; St. Lucia, art. 829 C.C.; Trinidad & Tobago, Act 27 of 1981, s. 12.
35. Dominica — Cap. 191, s. 61(7); St. Lucia, art. 112(4) C.C.; Trinidad and Tobago — Cap. 45:01, s. 42(4).
36. See generally *The Code of Canon Law, 1983.*

clergy were apposed to the provisions relating to civil marriage was that it failed to give due recognition to marriage *in extremis*.[37]

Although an Order-in-Council of September 1838[38] which had been proclaimed in the island in december of the same year did not recognize marriage *in extremis,* the Catholic priests continued to celebrate those marriages on the strength of dispensations by the Archbishop in defiance of the provisions of the law. So that even after the *Civil Code* was promulgated in 1879 without recognizing *marriage in extremis,* the practice continued unabated. The attitude of the Roman Catholic clergy in Trinidad followed the same pattern, but the protestatives of the Church were more persistent in that country; and this resulted in the passage of amending legislation in 1865 whereby deathbed marriages with no legal effects were allowed, and the priests performing them were no longer to be subjected to the threat of civil penalties.[39]

In Jamaica which has no recorded history of foreign law the relevant provision was initially introduced in the *Marriage Law* (15 of 1879) and provided that it was lawful for a marriage officer to solemnize a marriage without a certificate of notice or bonus where the marriage was between two person who had lived in unlawful connection, and one of whom was in *articulo mortis*.[40] But Law 25 of 1897 removed the proviso that a "death-bed" marriage was allowable only between a couple who had lived together as man and wife. This "strange limitation" as it was referred to was removed.[41]

Whatever its origins, there is no doubt that this legislation has proved to be of immense value to many individuals, particularly in the lower segment of society, who have for one reason or another made the decision to get married rather late. But in its very nature such a marriage presupposes the existence of some relationship between the parties; and it is a pity therefore that it is only in the Bahamas, Grenada, St. Vincent and the Turks and Caicos Islands that there still remains a requirement that the parties must have lived in unlawful connection. There is now no requirement in Barbados that the marriage officer must be of the same district in which the deceased lived. Here again this is unfortunate for it opens the door to the celebration of a marriage between persons who may not have previously known each other by a marriage officer who knows even less of either party.

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37. See N.J.O. LIVERPOOL, "History of St. Lucia Civil Code", (1983) 14 *R.G.D.* pp. 402 *et seq*.

38. By this Order-in-Council a law of marriage was enacted for British Guiana (now Guyana), Trinidad, St. Lucia, the Cape of Good Hope and Mauritius; those British territories has previously operated "foreign" systems of law.

39. Donald WOOD, *Trinidad in Transition: the years after Slavery,* London, Oxford N.P., 1968, chapter 10, pp. 190-211.

40. C.O. 137/489 31 March 1879.

41. C.O. 137/581 30 May 1897.

In Bermuda the marriage would have failed both because it was not witnessed by a marriage officer and also as the learned Judge found Mr. Kinneally was unable to understand one of the material parts of the ceremony. The Trinidad provision to the effect that the witnesses must believe that the person was in a dying state, may have been satisfied because of the medical condition in which Mr. Kinneally was taken to the hospital, but on the facts as found by the learned Judge, it is doubtful if the deceased was in a fit position to declare, before the marriage, that he believed that he was on the point of death.

Finally, since the marriage has the effect of revoking a will only if it takes place in Barbados, Belize, the Cayman Islands, Guyana and Jamaica, litigation of this matter may have been avoided had the marriage been solemnized in one or other of the remaining thirteen Commonwealth Caribbean territories.