EQUITABLE REMEDIES AND PREDATORY MARRIAGES

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Contents

I. INTRODUCTORY COMMENTS 2

Modern Forms of Equitable Relief 4

Equitable Maxims 4

Evolution of Equitable Remedies in Canada 6

II. AN OVERVIEW OF RELEVANT EQUITABLE DOCTRINES 7

1. Undue Influence 8

1.2. Unconscionability 14

1.3. No One Shall Profit from Wrongdoing 19

1.4. Unjust Enrichment 21

1.5. *Ex Turpi Causa Non Oritur Actio* 23

1.6. *Non Est Factum* 27

1.7. Statute as an Instrument of Fraud 28

III. OTHER RELEVANT REMEDIES 29

2.1. Civil Fraud / Tort of Deceit 29

2.2. Lack of Independent Legal Advice 30

III. CONCLUDING COMMENTS 33

I. INTRODUCTORY COMMENTS[1]

It is arguable that society has a collective obligation to protect older and vulnerable adults from exploitation and abuse. Having said that, predatory marriages represent a clear abuse of a trust-based relationship. As it has been described, "[m]arriage provides spouses with property rights to create a partnership based on respect and equality. In cases of predatory marriage, affection is supplanted by its illusion and the marriage is based on dependency, coercion, and a desire for financial benefit."[2]

In Canada, there is no specific legislation which regulates protections in respect of predatory marriages. Despite patterns which characterize the hallmarks of predatory marriages, there is a lack of cross-provincial uniformity on remedies. There have been several solutions proposed by Canadian scholars in years past. These include solutions such as changing the law regarding the validity of marriages by widening the range of individuals entitled to contest the validity of a marriage on the basis of coercion, fraud or undue influence after the death of one of the spouses.[3] Other suggested solutions include making the requisite capacity to marry stricter to "include the ability to appreciate the basic consequences of entering into the contract of marriage,"[4] limiting property rights gained through marriage, and to require criteria such that requisite capacity to marry extends to that required to manage one's person, property and testamentary capacity. Professor Oosterhoff also proposes a Predator Marriages Prevention Act.

Within, the use of equitable remedies as they pertain to predatory marriages, will be explored. To facilitate a fundamental understanding, this paper will begin with an overview of the law of equity, starting with its beginnings and evolution.

The History and Evolution of the Law of Equity

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[1] Authored by Kimberly A. Whaley, Principal of WEL Partners and Albert H. Oosterhoff, firm counsel, with the assistance of Brett Book and Law Student Oliver O'Brien.
[2] C.f. Wendy L Griesdorf, "Crazy in Love: Caregiver Marriages in the Context of Estate Disputes" (2005-2006) 25 *ETPJ* 315 at 315.
[3] Albert H Oosterhoff, "Consequences of a January/December Marriage: a Cautionary Tale" (1998-1999) 18 *ETPJ* 261 at 119; Albert H Oosterhoff, *Oosterhoff on Wills and Succession. Text, Commentary and Materials*, 7th ed (Toronto: Carswell 2011) at 324; Albert H Oosterhoff, "Predatory Marriages" (2013-2014) 33 *ETPJ* 24 at 60.
[4] Jordan M Atin, "Revocation of Wills by Marriage" (1998-1999) 18 *ETPJ* 13 at 26.

Equity is the body of law which was developed by the Court of Chancery in England before 1873. Its application was justified in that it "corrected, supplemented and amended the common law."[5] It has been described as a body of law which "softened and modified many of the injustices in common law, and provided remedies where at law they were either inadequate or non-existent."[6]

While it may be difficult to adequately describe the growth of equity over the centuries, the body of law can be described pursuant to specific periods of time. During the first period, the mediaeval period, the body of law centered around the Lord Chancellor of England, who was the head of the King's Council.[7] The Lord Chancellor received all manner of petitions addressed to the King, the King-in-Council, or to himself. The Statute of 1340 first described a 'Court of Chancery' alongside the older courts. The Lord Chancellor controlled the process of issuing writs. The Chancellor had both a common law and an equitable jurisdiction.[8] During the fourteenth century, however, great change came about and "[t]he courts of common law surrendered their discretionary powers, disavowed any reliance on conscience and opted for *rigor juris*."[9] As a result, common law courts began dispensing law according to the letter and issues surrounding conscience would be dealt with in Chancery.

During the second period of equity, known as the formative period, the separation between law and equity was strengthened and developed. While all Chancellors were formerly ecclesiastics, change was brought about in 1592 when Henry VIII appointed Sir Thomas More as his Chancellor. As Meager et al. explain, "[f]rom that time onwards the Lord Chancellor sometimes was, and sometimes was not, a lawyer; by the end of the period he was invariably a lawyer and but rarely was he an ecclesiastic."[10] It has been

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[5] See R.P. Meagher, J.D. Heydon, and M.J. Leeming, *Equity: Doctrines and Remedies*, Butterworths LexisNexis, Australia, 2002, p. 3 [Meagher et al.].
[6] *Ibid*.
[7] See T F Tout, *The Place of the Reign of Edward II in English History*, Manchester University Press, Manchester, 1914, pp 181-3 where the author describes the Lord Chancellor as "the King's natural prime minister"; the source of enormous ecclesiastical patronage; the head of the Chancery, which by 1300 had become a great department of state; and the keeper of the Great Seal.
[8] Meager et al., *supra* p. 5.
[9] *Ibid*., p. 6; *rigor juris* which is distinguishable from *gratia curios* (meaning favour of the court), means strictness of law.
[10] *Ibid*., p. 7.

noted that the formative period ushered in two important features: the growth of the injunction and the Court's recognition of trusts "by upholding the double use notwithstanding its apparent abolition by the Statute of Uses."[11]

The third period of equity demonstrates the systemization of equity. During this period, equity developed positive rules and principles, just as the common law had rules. During this period, Chancellors began a systematic classification of trusts, they developed the modern rule against perpetuities, outlined the doctrine of specific restitution, invented the equitable doctrines which governed contribution between co-sureties, invented the doctrine that allowed covenants to run with the land when they did not at law, and were generally successful in making equity into what it is today.[12] Between 1600 and 1900, three important heads of jurisdiction were conferred on the Chancery judges: bankruptcy, companies, and lunacy (conferring jurisdiction to deal with the person and not just the property of so-called lunatics).[13]

The United Kingdom abolished the separate jurisdictions of law and equity through the Judicature Acts of 1873 and 1875.[14] These Acts provide that where there is a conflict between them, the rules of equity will prevail.

Equitable Maxims

Through the development of the law of equity, courts have applied equitable doctrines and maxims which guide the court in exercising its discretion to grant equitable relief. Some of the more common equitable maxims include:

The clean hands maxim which is a requirement that 'those who come before equity must come with clean hands.' In other words, equity will not grant relief where the seeker has themselves committed a wrong. This maxim focuses on the past conduct of the seeker of equity. The most prominent example is seen through the defense of *ex turpi causa* which provides that a plaintiff cannot profit from committing a wrong and will be explored within.

[11] *Ibid*.
[12] *Ibid*., at p. 9.
[13] *Ibid*.
[14] *Judicature Act*, 1873 (UK), 36 & 37 Vict, c 66; and *Judicature Act*, 1875 (UK), 38 & 39 Vict, c 77.

The law of equity also provides that ‘those who seek equity must do equity’. Said plainly, this is a requirement that the party seeking equitable relief must act fairly towards the person they are seeking relief against. This maxim addresses the future conduct of the party seeking equity.

Another common maxim provides that ‘equity regards as done that which ought to be done’. In other words, where a party is required to perform an obligation, equity applies and considers the parties in the relative positions they would have been if the obligation was performed. A clear example of this application is the performance of a contractual obligation.

‘Equity follows the law’ is another maxim and one that clarifies that equity does not replace statute law or common law but rather, equity is applicable where there is no remedy in statute or common law.

Finally, the maxim of ‘delay defeats equity’ provides that a party who delays in the enforcement of rights will not be able to seek equitable relief. This deals with the defense of laches. Here, the court will consider whether such a delay was excusable or justifiable.

As explained in Snell’s Equity,[15] these maxims “are not to be taken as positive laws of equity which will be applied literally and relentlessly in their full width, but rather as trends or principles which can be discerned in many of the detailed rules which equity has established.”[16] After explaining that “no logical division of these maxims is possible,” the text provides 12 common equitable maxims.[17]

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[15] John McGhee, *Snell’s Equity* (London, UK: Sweet & Maxwell Limited, 2000) [McGhee].
[16] McGhee, *supra* at 27.
[17] (1) Equity will not suffer a wrong to be without a remedy;
(2) Equity follows the law;
(3) Where there is equity, the law shall prevail;
(4) Where the equities are equal, the first in time shall prevail;
(5) He who seeks equity must do equity;
(6) He who comes into equity must come with clean hands;
(7) Delay defeats equity;
(8) Equality is equity;
(9) Equity looks to the intent rather than to the form;
(10) Equity looks on that as done which ought to be done;
(11) Equity imputes an intention to fulfill an obligation; and
(12) Equity acts *in personam*.

Common Forms of Equitable Relief

Some of the most utilized forms of equitable relief include:

- Declaratory orders (binding declarations of rights);
- Relief against penalties;
- Granting injunctions or specific performance;
- Specific restitution;
- Damages in equity;
- Rescission;
- Accounting;
- Rectification; and,
- Awards of financial compensation for breach of confidence.

In advancing a claim in equity, the party seeking equitable relief must first establish facts under which the law of equity applies.

Evolution of Equitable Remedies in Canada

In Canada, most provinces were formed *after* the promulgation of the UK Judicature Acts. This meant that most provinces did not have separate jurisdictions for law and equity. The province of Quebec, which relies on civil law, was an exception to this. In the few provinces which featured separate jurisdictions for law and equity, the idea of concurrent jurisdictions was developed over time.[18]

The Supreme Court of Canada's recognition of equitable doctrines is seen in two seminal decisions: *Canson Enterprises Ltd v Boughton & Co,.*[19] and *Hodgkinson v Simms*.[20]

The substantive fusion of equity and common law in Canada has been endorsed as was indicated by Justice La Forest's judgment in the *Canson* decision where the court stated:

> [i]n time the common law outstripped equity and the remedy of compensation become [somewhat] atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on

[18] See Leonard I Rotman, "The 'Fusion' of Law and Equity: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters", (2016) 2:2 *Canadian Journal of Comparative and Contemporary Law* 497 where the author describes how concurrent jurisdictions in Canada were developed in New Brunswick in 1854, Nova Scotia in 1856, Prince Edward Island in 1873, and Ontario in 1881.
[19] (1991), 85 DLR (4th) 129 (SCC) [*Canson*].
[20] (1994), 117 DLR (4th) 161 (SCC) [*Hodgkinson*].

its own terms, seems not particularly important where the same policy objective is sought.[21]

With respect to equitable remedies, legal scholar Jeff Berryman has suggested that Canadian courts have been required to respond to profound social changes, opining that "[i]n particular, the process of capital accretion, the transformation from manufacturing to a service and knowledge economy and increased technological sophistication demand new legal responses."[22] Furthermore, Berryman suggests that it is important to recognize that "[a]t the start of the new millennium Canada has emerged as a multi-cultural society with a plurality of political, religious, and cultural values, and with a commensurate complex statutory regime supporting competing visions of a virtuous life." He then goes on to suggest that the enactment of a *Charter of Rights and Freedoms* necessitated the "rapid creation of an interpretive jurisprudence by the Supreme Court of Canada." As a result, Berryman suggests that Canadians have essentially legalized social issues for resolution, fashioning the declaration of rights as between individuals and between government and individuals, creating a challenge for courts. In dealing with such a challenge and despite any statutory law providing guidance on these rights, courts are often left to fashion remedies from a general incitement to do what is "just and convenient."

It is within this incitement that it is proposed that equitable remedies may be able to intervene in an area of society and law where statutes provide little remedy – predatory marriages.

II. AN OVERVIEW OF RELEVANT EQUITABLE DOCTRINES

Potentially equitable remedies can be used to set aside a predatory marriage. To begin, it is important that the most common and applicable doctrine of undue influence is addressed. This equitable remedy is mentioned first because it has already been successfully applied in the face of predatory marriage cases in Canada.

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[21] *Canson*, *supra* at 137.

[22] Jeff Berryman, "Recent Developments in the Law Equitable Remedies: What Canada Can Do For You" (2007) 5:2 *Revue international sur le travail et la societe, Juillet*, 103 at 104.

1. Undue Influence

The equitable doctrine of undue influence is often relied on to set aside a Will or *inter vivos* gift procured by undue influence. The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions when an individual exerts such influence on the grantor/donor/testator that it cannot be said that the decision made was wholly independent.

We propose that the same doctrine, if proved, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the consequence of the marriage effectively results in a gift to the predator, and overall, presents an opportunity for financial gain.

It has been suggested, "[u]nlike testamentary capacity, which has been invariably based on criteria derived from *Banks v Goodfellow* undue influence has not been universally defined by the courts."[23]

Undue Influence has been conceptualized as a form of elder abuse in Dr. Elizabeth Podnieks' ground-breaking National survey on the abuse of the elderly in Canada. This survey, which determined that elder abuse occurred in about 40 per 1,000 older adults, was one of the few studies to examine the prevalence of undue influence based on a community sample of over 2,000 older adult Canadians.[24]

History / Evolution

In the 1885 decision of *Wingrove v Wingrove*,[25] Sir James Hannen provided the classic statement on undue influence, stating that, "[t]o be undue influence in the eye of the law there must be – to sum it up in a word – coercion. . .it is only when the will of the person

[23] Nathan Herrmann, Kimberly A. Whaley, Deidre J. Herbert, and Kenneth I. Shulman, "Susceptibility to Undue Influence: The Role of the Medical Expert in Estate Litigation" (2021) 1:8 *Can J Psy* 1 [Herrmann et al.].
[24] Herrmann et al., *supra*.
[25] (1885), 11 P.D. 81 [*Wingrove*]

who becomes coerced into doing that which he or she doesn't desire to do that it is undue influence."[26]

The current law applicable to modern *inter vivos* equitable influence was first established in 1887 with the English Court of Appeal decision in *Allcard v Skinner*[27] which held that coercion is not required to set aside an *inter vivos* wealth transfer, only unfair pressure or improper conduct that tricked or mislead a gift-maker.[28] As noted in Whaley & Poyser, *supra*, the language was more broad and flexible and "it was clear from the facts of that case that the merest puff of unfair pressure would be sufficient to declare a major gift to be voidable and reverse it."[29]

By mid-1800's, gifts could be attacked in a variety of ways in England.[30] "Most of the equitable attacks featured a presumption that placed an evidentiary burden on the gift-recipient, and independent advice was useful in meeting the evidentiary burden." "In the case of equitable undue influence by relationship, the party attacking the gift would prove, first, that the wealth transfer was large and potentially impoverishing, and second, that there was a relationship of trust and confidence between the gift-maker, who was subservient in the relationship, and the gift-recipient who was dominant."[31]

While the two types of wealth transfers, probate and *inter vivos* can be thought of as two different spheres, the exception to this was mental capacity. To that end, it has been said that "[c]ommencing in the early 1800s and continuing to the present, courts in England have repeatedly stated that the general approach and principles governing capacity apply equally in both spheres."[32]

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[26] *Wingrove*, *supra* at 82.
[27] (1887), 36 Ch. D. 145 (C.A.) [*Allcard*].
[28] *Allcard*, *supra* at 181-183.
[29] *Ibid*., at 272.
[30] Kimberly A. Whaley and John E.S. Poyser, "Inter Vivos Versus Testamentary Undue Influence: Origins, Differences, and Recent Developments" (2021) 40:3 *ETPJ* 269 at 269 where the authors state that, "[t]he requirements for a valid gift were capacity, intention, delivery and acceptance. A gift could be attacked in a common law court by alleging that any one or more of those elements were not present. A gift could also be attacked in a common law court by alleging coercion or fraud. All of those attacks were based in the common law and rendered a gift void." [Whaley & Poyser].
[31] Whaley & Poyser, *supra* at 275.
[32] *Ibid*., at 278.

This history of undue influence therefore, featured the evolution of two sets of rules: one set, applicable to wills and other testamentary dispositions and the other set, applicable to gifts and other *inter vivos* dispositions. The rationale for this approach is simple and can be summed up by recognizing that, "[g]ifts during life are very different from gifts at death."

Testamentary undue influence is distinct from *inter vivos* undue influence.[33] Testamentary undue influence, which arose from common law courts (not a product of equity), is only available where overbearing coercive pressure has been brought to bear that effectively overcomes the free will of the testator. Whereas *inter vivos* undue influence, a tool developed in the courts of equity during the 1700s and 1800s, is available against a broader spectrum of conduct, it renders the gift or wealth transfer voidable, unlike testamentary undue influence which renders a wealth transfer void. Where it concerns the law of equity and the beginnings of undue influence, "[c]ourts of Chancery expressly adopted the role of protecting the living and championing the vulnerable."[34] Despite this distinction, courts have imported the principles of testamentary undue influence where the person making the gift or wealth transfer is on his or her deathbed.[35]

Modern Application of Undue Influence

Currently, equitable undue influence is seen as an attack on a gift, one which is based not on an absence of intent, but flawed intent. The person making the wealth transfer intends to make it but the attacker who seeks to overturn the wealth-transfer, attempts to convince the court that the transfer should be set aside as unconscionable or unfair. Where it can be proven, "equitable undue influence applies and renders a gift voidable given the presence of conduct that is wrongful or improper in some way."[36]

[33] John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p. 529 [Poyser].
[34] See Whaley & Poyser, *supra* at 272 where the authors explain that by 1875, courts of Chancery developed several tools to set aside major gifts, including unconscionable bargain (where the gift was the product of weakness), unconscionable procurement (where the gift is the product of an imperfect understanding), equitable fraud (where the gift was the product of a breach of an equitable duty), and equitable undue influence (where the gift was the product of unconscionable pressure, manipulation, or trickery).
[35] Poyser, *supra* at p. 529.
[36] *Ibid*., at 281.

The net is cast even more broadly where the transaction operates in the context of a relationship of trust and confidence, such as a predatory marriage. Here, the presence of such a special relationship has three effects:[37]

1. Predatory behaviour on the part of the dominant party or the smallest trace of unfairness on the part of the transaction sufficient for a finding that it is "undue" in the eyes of the law;
2. A relationship of trust and confidence can give rise to equitable duties, and duties can be breached by omission as well as commission – a dominant party who passively accepts a gift can be guilty of undue influence if they were under a duty to protect vulnerable gift-maker; and
3. Presence of such a relationship gives rise to an evidentiary presumption of undue influence.

In terms of culpability, courts describe impugned conduct as: pressuring, misleading, cheating, or overreaching. In terms of outcome, courts describe conduct that operates to preclude the gift-maker from the fair exercise of his or her independent judgment or free will. Older cases tend to rely on semantics involving culpability, and newer ones, outcome.

The leading Canadian cases of *Bradley v. Crittenden,*[38] and *Goodman Estate v Geffen*[39] outline some of the considerations that are attached to the two types of undue influence discussed further below.

Two types of Undue Influence

Undue influence in the *inter vivos* gift context has historically been divided into two types: actual undue influence and undue influence by relationship (also called presumed undue influence).[40]

As noted by Lord Justice Lindley in *Allcard v Skinner*:

> First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a done placed in some close and confidential relation to the donor …

[37] Whaley & Poyser, *supra* at 281.
[38] [1932] 3 D.L.R. 193, [1932] S.C.R. 552, 1932 CarswellAlta 75 (S.C.C.) [*Bradley*].
[39] (1991), (*sub nom. Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353, 42 E.T.R. 97, [1991] 5 W.W.R. 389, 80 Alta. L.R. (2d) 293, 127 N.R. 241 (S.C.C.) [*Geffen*].
[40] Whaley & Poyser, *supra* at 283.

> The second group consists of cases in which the position of the donor to the done has been such that it has been the duty of the done to advise the donor, or even to manage his property for him.[41]

To determine whether a given relationship triggers the presumption, courts apply a test which determines whether the 'potential for domination' naturally inheres in the relationship. This determination is highly fact specific and must be assessed on a case-by-case basis. In the 1800's the law focused on specific types of relationships that would normally qualify. Some examples include: solicitor and client, parent and child, and guardian and ward. According to Poyser "However, even those close, traditional relationships do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination,[42] such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child."[43]

In the 2018 decision of *Seguin v Pearson,*[44] the Ontario Court of Appeal confirms that the equitable presumption of undue influence has no application to wills and applies only where *inter vivos* wealth transfers are under consideration.

Proving Undue Influence

Actual undue influence occurs where an intention to gift is secured by unacceptable means. No relationship is necessary between the person making the gift and the person receiving it to attack a gift on the grounds of actual undue influence. Actual undue influence is not reliant on any sort of relationship, instead it is based in equity on the principle that "no one shall be allowed to retain any benefit arising from his own fraud or wrongful act."[45] In this regard, it is similar (but distinct) from the common law's duress

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[41] *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171; Poyser at p. 473. Note also that there is distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity, see Poyser at p. 478.

[42] See *Elder Estate v. Bradshaw*, 2015 BCSC 1266 (B.C. S.C.), at para. 108 where the court found that the bare existence of a relationship between a younger caregiver and an older adult was not sufficient to raise a presumption of undue influence:

> "The generic label caregiver does not necessarily denote a fiduciary relationship of potential for domination … The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship."

[43] *Stewart v. McLean*, 2010 BCSC 64 (B.C. S.C.); *Modonese v. Delac Estate*, 2011 BCSC 82 (B.C. S.C.), at para. 102, affirmed 2011 CarswellBC 3463 (B.C. C.A.).

[44] (2018), 36 E.T.R. (4th) 1, 2018 CarswellOnt 5617, 290 A.C.W.S. (3d) 898, 2018 ONCA 355 (Ont. C.A.).

[45] *Allcard*, *supra* at 171.

doctrine. The conduct which amounts to actual undue influence often happens when the influencer and the victim are alone. This, unfortunately, makes it difficult to produce direct evidence, however, actual undue influence can be proven by circumstantial evidence.[46]

The onus to prove actual *inter vivos* undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities. No higher standard is ever applicable.[47]

Presumed undue influence on the other hand, does not depend on proof of reprehensible conduct. It should be noted, however, that the presumption of undue influence is an evidentiary tool while the doctrine of undue influence is a substantive challenge originating in the courts of equity.

Once a presumption of undue influence is established, the onus shifts to the person alleging a valid gift to rebut it. This presumption casts an evidentiary burden, not a legal one. The legal burden is always on the person who is alleging undue influence but the party defending the gift can bring evidence to convince the court not to make a factual inference against the gift. The person alleged to have exerted such influence can produce evidence to rebut the presumption of undue influence.

The giftor, must be shown to have entered the transaction as a result of his or her own "full, free and informed thought."[48] In order to be successful in attacking a gift based on presumed undue influence, the transaction of gift must be a substantial one.

The presumption of undue influence can be rebutted by showing: [49]

1. No actual influence was used in the particular transaction or the lack of opportunity to influence the donor; [50]
2. The donor had independent legal advice or the opportunity to obtain independent legal advice;[51]
3. The donor had the ability to resist any such influence;[52]

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[46] Poyser, *supra* at p. 492.
[47] *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.
[48] *Geffen v. Goodman Estate* at para. 45.
[49] *Zeligs v. Janes*, 2015 BSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97.
[50] *Geffen*, *supra* at p. 370; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121 [*Longmuir*].
[51] *Geffen* at p. 370; *Longmuir*, *supra* at para. 76.
[52] *Calbick v. Warne*, 2009 BCSC 1222 at para. 64.

4. The donor knew and appreciated what she was doing;[53] or,
5. Undue delay in prosecuting the claim, acquiescence, or confirmation by the deceased.[54]

In the United States of America, a minority of states have enacted legislation which explicitly allows for post-death challenges to a marriage's validity on the grounds of undue influence. In 2010, Florida closed a statutory loophole for predatory marriages, introducing amendments to the state's Probate Code, allowing an interested party to initiate a challenge to a marriage within four years of the decedent's death.[55] In Texas, changes to that state's Estate Code took effect on January 1, 2014. These changes allow an interested person, within one year, to challenge the validity of a marriage that began no more than three years before the decedent's death.[56] Finally, in California, changes to the state's Probate Code presume fraud or undue influence when a donative instrument makes a gift to a caregiver who began a marriage with the grantor while providing services to the grantor or within 90 days of the cessation of such services and the relevant document was executed less than six months into the marriage.[57]

1.2. Unconscionability

The doctrine of unconscionability is typically used to set aside a contract that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts. And, while it is closely related to undue influence, it is separate and distinct. A claim of undue influence attacks the sufficiency of consent.

Unconscionability on the other hand, arises when unfair advantage is gained by an unconscientious use of power by a stronger party against a weaker. To be successful, such a claim will need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker party, which resulted in the victim under the power of the stronger party and proof of substantial unfairness of the bargain. This creates

[53] *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29.
[54] *Longmuir*, *supra* at para. 76.
[55] Florida 2010 – Fla. Stat. § 732.805 (1).
[56] Tex. Est. Code § 123.102.
[57] Cal. Prob. Code § 21380 (a) (4).

a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just, and reasonable.[58]

The current test for unconscionability in Canada was established in the recent Supreme Court of Canada decision of *Uber Technologies Inc v. Heller.*[59] In *Uber Technologies*, a two-step test was affirmed and held to apply when deciding whether a contract should be set aside. The test requires:

1. Inequality of bargaining position; and
2. Proof of an improvident bargain.

In other words, the court requires for there to be circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from the inequality of bargaining power.[60]

In the case of *Uber Technologies*, the Court held that an arbitration clause in a contract between a food delivery service and one of its drivers was unconscionable and therefore not enforceable. First, because the term, like the contract, was imposed without any possibility of negotiation by the delivery driver. Second, because the anticipated costs of arbitrating such a dispute would require the driver to commence arbitration in a foreign country and at a highly disproportionate cost, especially given the income the driver would typically receive from the contract. The arbitration clause was not enforceable on the more general grounds that the high costs associated with the arbitration would strip the driver of their ability to have any dispute properly adjudicated and was therefore against public policy.[61]

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party on the ground that there is an inequality of bargaining

[58] *Morrison v. Coast Financial Ltd*. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713. See also the case of *Smith v. Croft* 2015 CanLII 3837 (ONSCSM) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at $18,000 from an elderly neighbour with dementia for $2000.00.
[59] 2020 SCC 16 [*Uber Technologies*].
[60] See *Hunter Engineering Co. v Syncrude Canada Ltd*, 1989 CanLII 129 (SCC).
[61] Halsbury's Laws of Canada – Contract (2021) by Swan, Adamski at HCO – 144.

power. As such, it would be an improvident bargain if the predator spouse was entitled to all the spousal property and financial benefits that come with marriage.

The decision in *Juzumas v Baron*[62] provides a thorough analysis of unconscionability in a case of a predatory relationship of financial exploitation involving an older adult who was taken advantage of by a caretaker. In *Juzumas*, the plaintiff was 89 years old at the time the events took place. He was described as a man of Lithuanian descent with limited English skills. The plaintiff was befriended by the respondent in 2006. Described as a woman of 65 years old, she visited him at his home and suggested that she help with housekeeping. She then began visiting 2-3 times per week and offered to provide services to ensure the plaintiff would not need to move to a nursing home. She was provided a monthly salary in exchange.

The defendant eventually convinced the plaintiff to get married under the guise that she would become eligible for a widow's pension following his death. To this end, she promised to live in the home and take care of him. The plaintiff agreed.

The defendant was described by the plaintiff's tenant and neighbour as "abusive, controlling and domineering." The plaintiff, defendant and her son all attended a lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property.

In the decision, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[63] Justice Lang also found that the plaintiff had been under the influence of emotional exhaustion, or, over-medication at the time the meeting took place, and that this may have been because the defendant was drugging his food.[64]

The plaintiff brought a claim to set aside the transfer and to divorce – the requested relief was granted as the transfer was tainted at least by undue influence and unconscionability.

[62] 2012 ONSC 7220 [*Juzumas*].
[63] *Juzumas*, *supra* at para. 84
[64] *Juzumas*, *supra* at paras. 63 and 92.

Unconscionability Analysis

The decision referenced John McCamus,' *The Law of Contracts* which addresses the "cluster of doctrines" which apply "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[65] The cluster of doctrines includes undue influence and unconscionability and, as explained by McCamus, if any one applies, the weaker party has the option of rescinding the agreement.

Justice Lang, referencing McCamus, held that the doctrine of unconscionability gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power.[66]

In holding that the transaction must be set aside, Justice Lang concluded that at the time of executing the transfer, the plaintiff was 91 and in failing health. He was vulnerable and in fear of being abandoned to a nursing home. He signed the transfer under the domination, control, and intimidation of the defendant as well as the undue influence of her son. The plaintiff did not have the benefit of legal advice nor could he understand the irrevocable nature of the document he signed. As a result, Justice Lang was of the view that the inequality of the bargaining power and the unfairness of the transaction rendered it unconscionable.

Similarly, In *Sanders v. Canada's Choice Investments Inc*.,[67] a 78-year-old woman who lived alone with Alzheimer's in her semi-detached home on a modest income of less than $60,000 per year was taken advantage of in a predatory mortgage lending scheme.

The plaintiff alleged that starting in May of 2021, strangers visited her home and, through a series of misrepresentations and pressure tactics, persuaded her to take out a $500,000 one-year loan secured by a first mortgage on her home. She commenced an action through her litigation guardian asserting that the mortgage is unconscionable, that she

[65] John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p.378 [McCamus].
[66] McCamus, *supra* at 424-25; see also *Mundinger v. Mundinger*, 1968 CanLII 250 (ON CA), [1969] 1 O.R. 606 (C.A.), at p. 609; and *Ferraton v. Shula* [2012] O.J. No. 5613 (S.C.), at paras. 59-62.
[67] 2023 ONSC 195 [*Sanders*].

was induced to sign the mortgage through fraudulent misrepresentations, and that she did not have the capacity to contract.

She brought a motion for an injunction to prevent the lenders from taking any steps to enforce the mortgage until trial. The injunction was granted since the court was satisfied the plaintiff made out a strong *prima facie* case both that the mortgage is unconscionable and that she was induced to enter into it through fraudulent misrepresentations.

Unconscionability Analysis

The court concluded that equity will set aside contracts for unconscionability on grounds far weaker than those required to prove incapacity at common law. Here, the court agreed with the view expressed by Professor Stephen Waddams, in The Law of Contracts,[68] that the law of mental incompetence is usefully assimilated within the general doctrine of unconscionability and that, "relief is available on grounds of unconscionability where undue advantage is taken of weakness of intellect and, a fortiori, in cases of more serious incompetence." The court also looked to the recent decision in Uber Technologies Inc. v. Heller,[69] holding that the purpose of unconscionability is to protect vulnerable persons in transactions with others.[70] It was also held that:

> Equity allows courts to respond where the facts surrounding a transaction have undermined the traditional assumptions that underpin the common law of contract. Courts have regularly intervened to provide relief from improvident contracts where flaws in the contracting process led to unfair bargains.[71]

The decision in *Sanders* reiterated that under Canadian law, unconscionability requires only two elements: an inequality of bargaining power; and, a resulting improvident bargain.[72] The *Sanders* decision looked at both of these elements and held that:

> [73] An *inequality of bargaining power* exists when one party cannot adequately protect their interests in the contracting process. This may result from

[68] Stephen Waddams, *The Law of Contracts*, 8th ed. (Toronto: Thomson Reuters Canada, 2022), at §662 to 663.
[69] 2020 SCC 16, 447 D.L.R. (4th) 179, at para. 54 [*Uber*].
[70] *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at pp. 405 and 412; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426, at p. 462, per Dickson C.J., and p. 516, per Wilson J.; *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226, at p. 247; see also *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 43.
[71] *Sanders*, *supra* at para. 69.
[72] *Uber*, *supra* at para. 65.

a claimant's purely cognitive, deliberative, or informational capabilities that preclude a worthwhile judgment as to what is in the claimant's best interest. These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract. A common example of inequality of bargaining power is where only one party could understand and appreciate the full impact of the contractual terms, creating a type of cognitive asymmetry. This may occur because of personal vulnerability or because of disadvantages specific to the contracting process. Unequal bargaining power can be established even if the legal requirements of contract formation are otherwise met. In such circumstances, weaker parties may be vulnerable to exploitation in the contracting process and courts can provide relief from an improvident bargain: *Uber*, paras. 66 to 72.

[74] An *improvident bargain* is one that unduly advantages the stronger party or unduly disadvantages the more vulnerable party at the time the contract is formed. The terms of the agreement are to be assessed in light of the surrounding circumstances at the time of contract formation including the market price and the position of the parties. The court should consider, for example, if the price of goods or services in the contract departs significantly from the usual market prices: *Uber*, at paras. 73 to 79.

1.3. No One Shall Profit from Wrongdoing

Instead of the remedy of attacking the validity of the marriage itself, another tool that could reasonably be applied in attacking the injustice of predatory marriages is challenging the predator spouse's right to inherit from the older adult's estate either under a Will or under legislation. Seeking a declaration that the predator spouse is barred or estopped from inheriting is a remedy based in public policy. "No one shall profit from his or her own wrongdoing" is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased's will, on the deceased's intestacy, or otherwise. Canadian courts have found that the property does pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.[73] It is also clear that a beneficiary will not inherit if the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,[74] or where a testator was

[73] *Lundy v. Lundy* 1895 24 SCR 650.
[74] *Kenell v. Abbott* 31 E.R. 416].

coerced by the beneficiary into making a bequest.[75] The comparable common law principle is *ex turpi causa non oritur actio.*

Two New York decisions provide a compellable analysis of these concepts and their applicability to predatory marriages. The facts in *In the Matter of Berk,*[76] and *Campbell v. Thomas,*[77] are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult when capacity was an issue. After the older person's death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to the greater of 1/3 of the estate or $50,000). The children of the deceased argued that the marriage was "null and void" as their father lacked capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court declaration and as such, not void *ab initio.* The predatory spouse maintained her statutory right to a share of the estate.

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This principle, often referred to as the "Slayer's Rule", was first applied in in New York in *Riggs v. Palmer*,[78] to stop a murderer from recovering under the Will of the person he murdered. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that might otherwise flow from his wrongdoing. New York courts have also used this rule to deny a murderer the right to succeed in any survivorship interest in his victim's estate.

The court recognized that while the actions of the predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits sought was, however, even more direct. A murdering beneficiary is already able to benefit from his victim's estate when he commits the wrongdoing, but it was the

[75] *Hall v. Hall* (1868) L.R. 1 P.& D. 48].
[76] *In the Matter of Berk,* 71 A.D. 3d 710, NY: Appellate Div., 2nd Dept., 2010.
[77] *Campbell v. Thomas,* 897 NYS2d 460 (2010).
[78] *Riggs v. Palmer*, 115 N.Y. 505,511 [1889].

wrongdoing itself (the predatory marriage) that put the spouse in a position to obtain benefits. The court held that the predator spouse should not be permitted to benefit from this wrongful conduct any more than a person who coerces his way into becoming a beneficiary in a Will.

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements and this principle should also be available to be used to invalidate a predatory marriage.

1.4. Unjust Enrichment

Unjust enrichment describes a circumstance where one person is enriched at the expense of another in circumstances that the law sees as unjust. While the application of unjust enrichment is relatively new, the concept itself can be traced back to Roman law and the maxim *nemo locupletari potest aliena iactura* or *nemo locupletari debet cum aliena iactura* which means "no one should be benefited at another's expense."

The principle of unjust enrichment is well developed in Canadian law, initially largely in the context of co-habitational property disputes. It is part of the equitable remedy of restitution.

Test

In *Kerr v Baranow*[79] the SCC reiterated the existing principles of unjust enrichment and reaffirmed that where unjust enrichment established, the first remedy to consider is always a monetary award.[80] The Court in *Kerr* established a framework that ought to be followed in deciding similar cases:

1. Have the elements of unjust enrichment (enrichment and a corresponding deprivation in the absence of a juristic reason) been made out?
2. If so, are monetary damages adequate to address the unjust enrichment, keeping in mind bars to recovery and special ties to the property that cannot be remedied by money?
3. If the above answer is yes – should the monetary damages be quantified on a fee-for service basis or a joint family venture basis? and,

[79] 2011 SCC 10 [*Kerr*].
[80] *Kerr*, *supra* para 48.

4. If, and only if monetary damages are insufficient, is there a sufficient nexus to a property that warrants impressing it with a constructive trust interest? (*Martin v Sansome*, 2014 ONCA 14, 118 OR (3d) 522, para 52).

Remedies

Since it has been consistently held in case law and affirmed in *Kerr v. Baranow; Vanasse v. Seguin*, that "the courts 'should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases."[81]

The two available remedies for unjust enrichment remain unchanged by the Court: the remedial constructive trust, and, a monetary remedy in *quantum meruit* (sometimes referred to as "value received" or "fee-for-service").[82]

The constructive trust (proprietary) remedy is available where a monetary award would be inappropriate or insufficient and there is a link or causal connection between their contributions and the acquisition, preservation, maintenance, or improvement of the disputed property. The *quantum meruit* remedy is typically available where the unjust enrichment constitutes the provision of unpaid services. In *Rawluk v Rawluk*[83] the Supreme Court of Canada held that the statutory scheme for the equalization of property on breakdown of a marriage does not completely supersede the remedial constructive trust.

In the New York case of *Campbell*, the Appellate Division noted that because the predatory spouse altered the older adult's testamentary plan in her favor, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.[84] The principle of unjust enrichment could also be available to be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the older adult's property.

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[81] *Kerr v. Baranow*, *supra* at para 34, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 997 per McLachlin J. (as she then was) and also 1023 per Cory J.
[82] *Ibid*., at para 56.
[83] [1990] 1 SCR 70 [*Rawluk*].
[84] *Campbell*, *supra* at 119.

In the 2021 Australian decision of *Ip v Chiang*,[85] a predatory marriage as between an incapable older adult and a younger woman was declared a nullity. The court also impressed any interest in the deceased's property in addition to the proceeds of its sale with a constructive trust for the benefit of the estate. In that case a young woman tricked the deceased, an elderly cognitively impaired widower, into transferring his principal asset through entry into what the court described as a "sham" process of marriage, separation, property settlement and divorce.[86]

Proving Unjust Enrichment

To be successful in unjust enrichment, one must satisfy a three-part test:

1. that the defendant was enriched;

2. that the plaintiff suffered a corresponding deprivation; and,

3. that the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.[87]

1.5. *Ex Turpi Causa Non Oritur Actio*

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"[88] or "illegal, wrongful or of culpable immorality"[89] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. The principle comes from the Latin maxim "no cause of action may be founded on an immoral or illegal act."[90] While this doctrine is similar to the doctrine known as the forfeiture or slayer rule, it is wider in scope.

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[85] [2021] NSWSC 822.
[86] The defendant in *Ip* arranged a second marriage as between the incapable older adult and one of her former mother-in-law's all for the purpose of securing title to the Deceased's property.
[87] See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 SCR 834 (SCC); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).
[88] *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.
[89] *Hall v. Hebert* 1993 2 S.C.R. 159.
[90] Lincoln Caylor and Martin S. Kenney, "*In Pari Delicto* and *Ex Turpi Causa*: The Defence of Illegality – Approaches Taken in England and Wales, Canada and the US." (September 2017) 18:3 *Business Law International* 259. [Caylor and Kenney].

History

The earliest reported decision dealing with *ex turpi causa* is the English decision of *Everett v Williams*,[91] also known as the *Highwayman's Case*. In that case, the plaintiff sued his "business partner," alleging that he did not receive his fair share of the partnership's proceeds. The complaint was particularly ambiguous[92] and the Court of Exchequer determined that the business itself was robbery, and that the claim amounted to a dispute between two 'highwaymen.'[93] The claim was ultimately dismissed, the lawyers held in contempt of court, and the parties themselves were later arrested and hanged.

Approximately fifty years later, in *Holman v Johnson*, Lord Mansfield articulated the illegality defence as one which is grounded in public policy, stating that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[94]

Application in Canada

The application of *ex turpi causa* has been strictly limited in Canada. In 1993, the Supreme Court of Canada in *Hall v Herbert*[95] held that the defence should only be invoked sparingly and that "[i]t's use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal act or wrongful act, or to evade a penalty prescribed by criminal law."[96] In *Hall*, the plaintiff was injured in a motor vehicle accident while driving his friend's car under the influence of alcohol. He unsuccessfully brought a claim against his friend for allowing him to drive the car while intoxicated.

The doctrine was addressed in the 2006 Alberta Court of Appeal decision in *O'Meara v Hall*,[97] a case which dealt with the issue of whether a father should be prevented from sharing in an award to his child's estate as his negligence had allegedly caused the child's

[91] *Williams v Everett* (1725) 104 ER 725 (*sub nom The Highwayman's Case* (1889) 9 LQR 197).
[92] In *Williams*, *supra*, the complaint was for 'dealing for commodities with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch.'
[93] A highwayman was a robber who stole from travellers on the road, often by horse.
[94] *Holman v Johnson* (1775) 98 All ER 1120 at 1121.
[95] [1993] 2 SCR 159 [*Hall*].
[96] *Hall*, *supra*, at para. 25.
[97] 2006 ABCA 86 [*O'Meara*].

death. The Court cited *Re Bowlen (Estate)*[98] for the proposition that where a beneficiary is criminally responsible for the death of a testator, the beneficiary is excluded from a gift for reasons of public policy. In *O'Meara* it was suggested that the respondent parent was *contributorily* negligent, however, counsel was unable to offer authority for the proposition that a holding of contributory negligence was sufficient to bar the respondent from recovery.

The Supreme Court of Canada revisited the doctrine of *ex turpi causa* in it's 2008 decision in *British Columbia v Zastowny.*[99] In that case, the Court held that there is only one justification for the application of the doctrine: the preservation of the integrity of the legal system. In *Zastowny*, this justification was found to encompass two important components:

1. The court will not permit a person to profit from his or her wrongful conduct; and
2. The court will not allow a person to evade a penalty prescribed by law.

In *Zastowny*, the plaintiff was an inmate who had been sexually assaulted by a prison guard while incarcerated. In addition to seeking and being awarded general and aggravated damages, the plaintiff was awarded compensation for past and future wages. On appeal, the Court denied the compensation for past and future wages, essentially reasoning that this was a situation where the integrity of the justice system would be compromised if the court rewarded the plaintiff for conduct that it had previously punished.[100]

The doctrine, as demonstrated by caselaw, is also applicable in situations involving fraudulent transactions. The 2014 decision in the case of *Tran v Kerr*[101] held that the doctrine applies "where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct or would permit evasion or rebate of a penalty prescribed by the criminal law."[102] The court in *Tran* held that if the doctrine applies, the loss remains where it originally fell, and that a loss cannot be shifted beyond the party who first bears

[98] 2001 AbQB 1014.
[99] 2008 SCC 4 [*Zastowny*].
[100] Caylor and Kenney, *supra*.
[101] 2014 ABCA 350 [*Tran*].
[102] *Tran*, *supra* at para. 28.

it. The *Tran* decision also held that "[t]he application of [*ex turpi causa*] in a particular case must depend on the public policy underlining it, the proximity of the illegality to the claim, the gravity of the claimant's conduct, and other relevant factors."[103] The case of *Tran* surrounded the liability of a lawyer involved in a fraudulent real estate transaction and whether the lawyer was liable for the losses of the ultimate purchaser, a straw buyer.[104]

The lawyer in *Tran* was unsuccessful in raising the defence. Ultimately, the court's decision signals that "in the case of indemnification for losses related to fraud, the doctrine will bar the claim if the party acted with (1) fraudulent intent, or (2) was willfully blind to the circumstances."[105]

Recently, the doctrine was explored in the 2019 Ontario case of *Aviva Canada Inc. v 1843538 Ontario Inc. et al.*[106] In that case, the insurer set up an investigation of the auto collision industry amidst allegations of fraudulent activity. To this end, Aviva bought and intentionally damaged two cars and had an independent appraiser assess the damages. They took the cars to a random body shop, but not before equipping the vehicles with hidden video recording devices. Aviva confirmed that body shop employees had added unnecessary repairs to written appraisals submitted to Aviva. The body shop unsuccessfully brought a Rule 21 motion to dismiss the claim based on *ex turpi causa*. On appeal of the motion decision, the Ontario Court of Appeal held that the motion judge did not err in refusing on the Rule 21 motion to dismiss the claim and upheld his decision that it was not plain and obvious the respondent had either committed criminal mischief or an act of fraud and misrepresentation warranting the application of the doctrine.[107]

Arguably, a Court should not assist a predatory spouse to recover the benefits from a marriage that was obtained through the predator's devious, unscrupulous, and anti-social

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[103] *Ibid*.
[104] A 'straw buyer' is an individual who pretends to be a legitimate buyer for a property but in reality, is in collusion with another criminally inclined individual to further a mortgage scam. In *Tran*, the straw buyer was a recently arrived immigrant to Canada who spoke little English and was unaware that they were being used as a straw buyer. The lawyer made no efforts to determine whether this was a legitimate purchaser.
[105] Peter Amrhein, "Indemnification and Real Estate Fraud: The Use of ex turpi causa non oritur actio in *Tran v Kerr*" (November 10, 2014), *TheCourt.ca*, accessed online: http://www.thecourt.ca/indemnification-and-real-estate-fraud-the-use-of-ex-turpi-causa-non-oritur-actio-in-tran-v-kerr/
[106] 2019 ONSC 3874.
[107] See *Aviva Canada Inc. v 1843538 Ontario Inc.*, 2020 ONCA 581 at para. 4.

means. The unscrupulous predator should not be entitled to financial gain arising from the "anti-social" or "immoral" act of a predatory marriage. A predatory spouse alters an older adult's life and testamentary plan by claiming entitlements in the same manner as if he/she coerced the testator to add his/her name to a Will. In allowing a predatory spouse to benefit from the financial gains derived from a predatory marriage, it is arguable that the integrity of the justice system would be compromised.

1.6. *Non Est Factum*

The equitable principle of *non est factum*, Latin for "it is not [my] deed", is a defense available to someone who has been misled into executing a deed or signing a document which is fundamentally different from that which he intended to execute or sign.[108] It is part of a "special category of the law of mistake and is extremely narrow in scope"[109]. The mistake must have been as to the essential nature of the transaction, rather than as to its terms, "a mistake as to the legal effect of those terms by the signatory or by his legal adviser will not suffice".

The Supreme Court of Canada's decision in *Marvco Color Research Ltd. v. Harris,*[110] is the governing authority in Canada on *non est factum*.

In *Marvco*, the question before the Court was which of two parties was to bear the burden of the fraud of a third. The Court concluded that as between an "innocent" third party and one who is careless in the execution of a document, the careless party should bear any loss resulting from his or her own carelessness. In that case, the respondents signed a security agreement, in favor of the appellants, securing the performance of another transaction. The respondents did not read the document. They relied upon misrepresentations as to its nature made to them by one of the covenantors whose performance was being guaranteed by the document in question. Relying on that document, the appellants released one of the covenantors from liability under a mortgage he had given to them.[111]

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[108] Andrews & Millet, *Law of Guarantees*, (4th ed) (London: Sweet & Maxwell, 2001) at 104.
[109] *Ibid.*
[110] 1982 CanLII 63 (SCC).
[111] *Farrell Estates Ltd. v. Win-Up Restaurant Ltd*., 2010 BCSC 1752 at para. 85.

The principles of *non est factum*, as formulated in the weight of the authorities, can be summarized as follows:

1. The burden of proving *non est factum* rests with the party seeking to disown their signature. For a person of full capacity, the application of the doctrine must be kept within narrowly prescribed limits.

2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.

3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.[112]

1.7. Statute as an Instrument of Fraud

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of predatory marriages. In the context of trusts of land, the *Statute of Frauds*[113] provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. However, equity will not allow the Statute to be used as an instrument of fraud and the court will direct that the property is held on a constructive trust for the beneficiary if the oral express trust is proved.

As a marriage is based on and sanctioned by legislation, a predator essentially relies on statute to enforce a claim. In a predatory marriage, the predator spouse's claim is therefore fraudulent because the predator persuaded their spouse by dubious means to enter into the marriage. As a result, a court of equity should not permit the statute to be used in this way and should restore the property the predator received to their rightful heirs.

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[112] *Ibid*., at para. 100.
[113] (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9; RSNS 1989, c 442, s5; RSO 1990, c.S.19, s.9.

The *Statute of Frauds* holds that a declaration or trust of land is void unless proved by writing signed by the maker. If it is not in writing and the beneficiary seeks to have the trust enforced, the transferee may plead the Statute and claim to be absolutely entitled to the property. However, equity will not allow a statute to be used as an instrument of fraud and will allow that trust to be proved. If the beneficiary does prove it, the court will direct that the transferee holds title upon constructive trust for the beneficiary.

III. OTHER RELEVANT REMEDIES

There are other remedies that may not be as common as the remedies previously mentioned. However, each case comes with its own set of unique facts and will require its own interpretations and application of relevant remedies. There is no 'one size fits all' approach to responding to a predatory marriage. As such, the following remedies may also be helpful in the face of a predatory marriage.

2.1. Civil Fraud / Tort of Deceit

In a claim of civil fraud, the courts will apply a subjective test to determine whether the plaintiff's reliance and consequent action based on the defendant's misrepresentation has been established. In a civil fraud action based in tort, damages are the remedy available to the plaintiff. Their award is restricted to those losses caused by the defendant's fraudulent misrepresentation. The required elements to qualify and succeed in an action of civil fraud are as follows:

1) A false representation made by the defendant;
2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
3) The false representation caused the plaintiff to act (inducement); and,
4) The plaintiff's actions resulted in a loss.[114]

A recent application of the test for civil fraud was in the case of *Costanza v. Desjardins Financial Security Life Assurance Company*.[115] In the case, a 13-year-old plaintiff sought a declaration that his insured late father's life insurance policy was valid and binding on

[114] *Bruno v. Hyrniak* 2014 SCC 8 at para. 21.
[115] 2023 ONCA 54 (CanLII)

the insurer, Desjardins. The insurer refused to pay the policy because they alleged that the insured made a material and fraudulent misrepresentation on his initial application for insurance.

The insurer submitted that the insured misrepresented on his application that he had not been convicted or pled guilty to a criminal offence in the three years prior to his application. On the initial insurance application, one question asked whether the applicant had been convicted of a criminal offence in the last three years. They argued that the insured was convicted of a criminal offence, assault causing bodily harm, 2 years, 9 months, and 29 days prior to the day the insured submitted their application.

The Court was not satisfied that the insured was convicted or pled guilty to the criminal offence and even if he had, the insurer had not proven the insured's fraudulent intent to prove civil fraud. The time period of the alleged offence fell on the edge of the three-year time frame of the question, and it was in the realm of possibility that the insured had made an honest mistake in calculating the time since the offence. As such, the Court was not satisfied that any misrepresentation by the insured was done knowingly or recklessly.

The Court held that the insurer had failed to establish, on the balance of probabilities, actual fraud by the insured. The Court concluded that the insurer had not proven on a balance of probabilities that the insured had obtained the life insurance policy through material misrepresentation or fraud, and thus the policy was valid and payable to the plaintiff.

2.2. Lack of Independent Legal Advice

In general terms, Independent Legal Advice ("ILA"), is provided by an outside lawyer who is unrelated to the client's matter, associate parties, or the lawyer, and who does not have a conflicting interest. The role of a lawyer providing ILA is to provide legal advice that is objective and unbiased regarding a decision the individual is facing. The outside lawyer, therefore, is only retained for the limited purpose of providing ILA so that the individual appreciates the nature and consequences of a decision to be made.

Typically, the need for ILA arises because a lawyer is in a conflict of interest. The lawyers' *Rules of Professional Conduct* outline circumstances in which a lawyer should or must recommend or require that a client obtain ILA.[116]

We propose that the older adult in predatory marriages is often deprived of the opportunity to seek and obtain ILA before marrying. A lack of ILA is an oft-considered factor in the setting aside of domestic contracts. Whether such arguments could be extended to set aside the marriage itself is a consideration worthy of a court's analysis.

According to Mark Cornish, "the law in Ontario effectively prioritizes the primacy and finality of domestic contracts, making them *prima facie* enforceable with the onus on the party wishing to set out in s. 56 (4) of Ontario's *Family Law Act*."[117]

In the context of domestic contracts, fairness can be broken down into two important categories: procedural fairness and substantive fairness. Cornish shares that, "… procedural fairness would include the opportunity and ability to negotiate, the provision of full financial disclosure on behalf of both parties, the absence of threats or pressure, and the presence of independent legal advice."[118] On the other hand, "substantive fairness is achieved when the substance of the agreement, at formation, complied substantially with the general objectives of the *Divorce Act* or *FLA*."[119]

In the 2004 Supreme Court of Canada decision in *Hartshorne v Hartshorne*,[120] a wife obtained ILA and subsequently signed a marriage agreement on her wedding day. The agreement significantly limited her entitlement to property sharing in the event she and her husband separated. Despite being signed in British Columbia where legislation specifies the courts' role in the division of assets on marital breakdown is to ensure fairness, the SCC upheld the contract.

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[116] See Law Society of Ontario, "Independent Legal Advice versus Independent Legal Representation" 2022, *Law Society of Ontario*, accessed online:
[117] See Mark Cornish, "Case Comment: McCain v McCain and Barton v Sauve: A New Approach to Autonomous Domestic Contractual Bargaining in Ontario" (2019) 32:1 *Canadian Journal of Family Law* 195 at 197 [Cornish].
[118] *Ibid*., at 199.
[119] *Ibid*.
[120] 2004 SCC 22 [*Hartshorne*].

In explaining why such an autonomy interest-driven decision was reached, Bastarache J. held that:

> [I]n a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement.[121]

Four years later, the Ontario Court of Appeal in the decision of *LeVan v LeVan*[122] rendered a judgment which, unlike the SCC decision in *Hartshorne*, focuses on fairness-driven concerns. In that case, a wealthy future husband wanted his future wife to enter a marriage contract which shielded his assets in the event of a separation.[123] At issue was the fact that the future wife had received ILA but had been sent to the lawyer who had connections to the future husband's family. As a result, the Court of Appeal held that the future wife did not receive effective ILA. The decision in *LeVan* sets up a two-step process for courts to follow when deciding to set aside a domestic contract in Ontario:

The party seeking to have the domestic contract or provision thereof set aside must show (1) that one of the conditions in the FLA s. 56 (4) exists and, if so, (2) why the court *should* exercise its discretion to set the domestic contract aside.

As the decision in *Hartshorne* demonstrates, sometimes "even independent legal advice, which presumably would bring the risks of a particular domestic contract or provision thereof to the forefront of the party's mind, is often not enough to convince a party to refuse to sign."[124]

Courts have consistently held that "*marriage is something more than a contract.*"[125] Thus, there could well be judicial reluctance to extend contract law concepts and use them as a vehicle to set aside actual marriages, as opposed to simply setting aside marriage contracts. It is unclear whether such arguments extend to parties other than those to the

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[121] See *Hartshore*, *supra* note 102 at para. 67.
[122] 2008 ONCA 388 [*LeVan*].
[123] See *LeVan*, *supra* note 106 at paras. 7, 9 – 11.
[124] Cornish, *supra* at 212.
[125] See *Ciresi (Ahmad) v. Ahmad*, 1982 CanLII 1228 (ABQB); *Feiner v. Demkowicz (falsely called Feiner),* 1973 CanLII 707 (ONSC); *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075; *Iantsis v. Papatheodorou*, 1970 CanLII 438 (ONCA); *J.G. v. S.S.S.*, 2004 BCSC 1549; *Torfehnejad v. Salimi*, 2006 CanLII 38882 (ONSC) at para. 92; and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 (H.L.).

marriage. If the victim dies, such arguments may be difficult to pursue. However, parties such as children of the older adult are impacted by the union. This is a different approach to that of cases where capacity is challenged on the grounds of incapacity and the marriage is then declared to be void *ab initio,* since these unions can be challenged by other interested parties.[126]

III. CONCLUDING THOUGHTS

The clear abuse of a trust-based relationship that predatory marriages represent require specific statutory solutions.

Unfortunately, in Canada, there is no specific legislation which regulates the issue of predatory marriages. Within this void, there is a lack of common law remedies which deal with the issue.

The use of equitable remedies, therefore, is a proposal which seeks to close this void and may prove to be useful in the face of a predatory marriage.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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[126] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para. 73