



**Equitable Remedies for Elder Abuse: A Case Law Review**

**STEP Canada, Toronto Branch  
Elder Abuse and Ways of Protecting the Elderly  
18 October 2017**

by

Albert H. Oosterhoff,  
Professor Emeritus, Faculty of Law, Western University  
Counsel, WEL Partners

and

Kate Stephens  
Student-at-Law, WEL Partners

## I: INTRODUCTION

Elder abuse is an endemic issue in Canadian society, and one that is likely to increase in the coming years. The baby boomer generation, which represents almost one-third of the Canadian population,<sup>1</sup> is expected to inherit \$750 billion from their parents over the course of the next decade as they enter into seniority en masse.<sup>2</sup> All the while, advances in medical technology are allowing people to enjoy longer lives. This impending social change is troubling, as research indicates that financial abuse is among the most prominent forms of elder abuse.<sup>3</sup> In order to address the problem of elder abuse, the courts have applied equitable doctrines to remedy the financial exploitation of seniors and older adults in a civil context. This paper will provide a brief overview of the principles of equity most relevant to incidents of elder abuse, and their attendant remedies, followed by a review of cases from across Canada that employ those remedies.

## II: EQUITABLE DOCTRINES AND REMEDIES

Regrettably, Canadian lawyers often have a limited understanding of the historical origins of the Court of Equity, including how and why the principles underlying its development produces the widely known equitable doctrines and remedies so often advanced and sought in the courts. In brief, equity was born out of the need to

---

<sup>1</sup> Statistics Canada, *The Canadian Population in 2011: Age and Sex*, Catalogue No. 98-311-X2011003 (May 2012), retrieved from: < [http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-311-x/98-311-x2011003\\_2-eng.pdf](http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-311-x/98-311-x2011003_2-eng.pdf)>.

<sup>2</sup> Garry Marr, “Bequest boom’: Canadian parents will pass on \$750 billion to kids over next decade,” *Financial Post* (June 7, 2016), retrieved from: < <http://business.financialpost.com/personal-finance/parents-will-pass-on-750-billion-to-kids-over-next-decade>>.

<sup>3</sup> Canada, Department of Justice, *Crime and Abuse Against Seniors: A Review of the Research Literature With Special Reference to the Canadian Situation* (Ottawa: Ministry of the Attorney General, 2015), retrieved from: < <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/crim/toc-tdm.html>>.

rectify deficiencies in the common law. The King, through his representative, the Chancellor, was petitioned directly regarding matters relating to fraud and unfair dealing that the increasingly inflexible common law system was unable to accommodate. Since the amalgamation of the courts of common law and equity in the late 19<sup>th</sup> Century, the overriding principle has been that where rules of equity and the common law result in a conflict, equity will prevail.<sup>4</sup>

As a body of law based on the essential premise of fairness, equity developed fundamental maxims over time, notably:

- a) *Equity will not suffer a wrong to be without a remedy.*
- b) *He who seeks equity must do equity.*
- c) *He who comes into equity must come with clean hands.*
- d) *No one shall be permitted to profit by his own fraud.*<sup>5</sup>

Flowing from these maxims, equitable rules and doctrines have developed over time. These doctrines are often interrelated. In the case of elder abuse, the most common causes of action in equity arise out of the doctrines of unjust enrichment, breach of trust or fiduciary duty, undue influence, unconscionability, and equitable fraud.

### ***1. Equitable Doctrines***

Broadly speaking, *unjust enrichment* applies to situations where a party has been enriched at the expense of another. The test for unjust enrichment was summarized

---

<sup>4</sup> This principle was given statutory form. See *The Court of Queen's Bench Act*, C.C.S.M., c. C280, s. 33(4); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 96(2); *Judicature Act*, R.S.A. 2000, c. J-2, s. 15; R.S.N.B. 1973, c. J-2, s. 39; R.S.N.L. 1990, c. J-4, s. 107; R.S.N.S. 1989, c. 240, s. 43(11); R.S.N.W.T. 1988, c. J-1, s. 45; R.S.N.W.T. (Nu.) 1988, c. J-1, s. 45 (but see *Consolidation of Judicature Act* (Nunavut), S.N.W.T. 1998, c. 34, s. 42); R.S.P.E.I. 1988, c. J-2.1 (S.P.E.I. 2008, c. 20), s. 39(2). R.S.Y. 2002, c. 128, s. 29; *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 44; *The Queen's Bench Act*, 1998, S.S. 1998, c. Q-1.01, s. 52(2).

by the Supreme Court in *Kerr v. Baranow*, with Cromwell J., writing for the majority. He stated that a successful unjust enrichment claim must prove three elements:

1. The defendant was enriched;
2. The claimant suffered a corresponding deprivation; and
3. There is no juristic reason for the enrichment.<sup>6</sup>

In cases of elder abuse, unjust enrichment is a frequent cause of action, as individuals who prey on older adults may live in an older adult's home rent-free, make withdrawals from an older adult's accounts, or otherwise use an older adult's resources for personal gain.

*Breach of trust* is raised in cases where a beneficiary or putative beneficiary wants to assert an interest in trust property, or seek a remedy against a trustee for misappropriating or dealing improperly with trust property.<sup>7</sup> Breach of trust is therefore dependent on a relationship of trust existing as between the parties. A claimant in these circumstances can seek compensation for losses caused by the breach of trust, or, in the alternative, can seek the recovery of the trust property that was inappropriately managed by the trustee as well as damages. Breach of fiduciary duty is a related concept that applies in situations where one party owes fiduciary obligations to another, such as the duties owed by an attorney to the grantor of a Power of Attorney. As older adults are often beneficiaries of a trust, or grantors of a Continuing Power of Attorney for Property, the misappropriation of

---

<sup>5</sup> Kimberly A. Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014) 21 ETPJ 269, at p. 276.

<sup>6</sup> *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, rev'g 2009 BCCA 111, 2010 CarswellBC 241, aff'g 2007 BCSC 1863, 2009 CarswellBC 642. .

assets beneficially owned by older adults is a frequent form of elder financial abuse.

The concept of *undue influence* is readily applicable to instances of elder abuse. Older adults are often reliant on family members and caregivers for the provision of day-to-day necessities, leaving them vulnerable to threats and manipulation by those on whom they depend. Undue influence arises where through manipulation, coercion, or outright but subtle abuse of power, one individual dominates the will of another.<sup>8</sup> The courts will look at the relationship between the parties (such as a relationship of dependency) in making a determination about the existence or nonexistence of undue influence in a given case.

The doctrine of *unconscionability* is most commonly used as a means to set aside contracts or provisions therein that are an affront to the conscience of the courts. In instances of elder abuse, the unconscionability may arise from improvident contracts or transfers of assets. In *Morrison v. Coast Finance Ltd.*, Davey J.A. explained the doctrine of unconscionability as follows:

*[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger.*<sup>9</sup>

---

<sup>7</sup> Donovan W.M. Waters, Q.C., Mark R. Gillen, and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thompson Canada Limited, 2012), pp. 1270ff.

<sup>8</sup> *Dmyterko Estate v Kulikovsky* (1992), [1992] CarswellOnt 543.

<sup>9</sup> (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713.

Finally, the doctrine of *equitable fraud* is relevant in instances of elder abuse. Equitable fraud, unlike strict, or common law fraud, does not require intent to commit fraud on the part of a defendant; it requires solely that a defendant avail himself or herself of an advantageous situation that arises in the course of a transaction that causes unconscionable hardship to the claimant. As articulated by Binnie J., in *Performance Industries Ltd. v. Sylvan Golf & Tennis Club Ltd.*:

*McLachlin C.J.S.C. (as she then was) observed that “in this context ‘fraud or the equivalent of fraud’ refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud... Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained” (p. 37). Fraud in the “wider sense” of a ground for equitable relief “is so infinite in its varieties that the Courts have not attempted to define it”, but “all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken”.<sup>10</sup>*

Given this broad definition of equitable fraud, the doctrine is widely applicable in cases of elder abuse, where due to dependency, declining mental and physical health, coercion, etc., older adults may be taken advantage of by self-interested parties.

The above equitable doctrines are related yet distinct. They can be relied on to rectify cases of financial abuse of older adults. Equity demands a remedy for injustice. Generally speaking, the remedies that are awarded in equity are intended to restore a claimant to their position prior to suffering the injustice, or to prevent the occurrence of further injustices.

---

<sup>10</sup> 2002 SCC 19, 2002 SCC 19, [2002] 1 S.C.R. 678, at 39.

## ***2. Equitable Remedies***

In the most basic sense, an equitable remedy is awarded by the courts in order to right a wrong. There are a wide variety of equitable remedies that have been, or could be, applied in cases involving the financial abuse of older adults, viz.: constructive trust, restitution, equitable compensation, injunctive relief, equitable estoppel, rescission, equitable lien, equitable accounting, and remedies flowing from declaratory relief.

In the interest of brevity, and because the most relevant equitable remedies for elder financial abuse will be examined in greater detail in the case summaries below, the following are bare-bones definitions of the above:

### **i. Constructive Trust**

McLachlin, J., as she then was, writing for the majority in *Soulos v. Korkontzilas*, held that:

*constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain.*<sup>11</sup>

### **ii. Restitution**

In *Hodgkinson v. Simms*, the Supreme Court held that with respect to a remedy granted on the basis of restitution, a successful claimant should receive an award that reflects the *quantum* of the improperly taken asset, as well as any consequential losses that may have been incurred, less any benefits gained.<sup>12</sup>

---

<sup>11</sup> [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at 17.

<sup>12</sup> [1994] 3 S.C.R. 377, 1994 CarswellBC 1245, at 73.

Therefore, as the term implies, restitution is intended to restore an asset or benefit to the rightful owner. Restitution can also take on other remedial forms, such as an equitable lien or constructive trust.

iii. Equitable Compensation

Though there is some controversy as to the distinction between equitable compensation and common law damages,<sup>13</sup> equitable compensation is in principle a remedy intended to reimburse a claimant for losses unjustly incurred. Due to the doctrines of breach of trust and breach of fiduciary duty, equitable compensation is available in equity where it may not be in common law, as trustees and fiduciaries may not delegate their duties to third parties, save in specific circumstances, such as the retention of professional legal and financial services.

iv. Injunctive Relief

Injunctive relief is an equitable remedy that compels a party to perform or refrain from performing a certain action. It is available in equity where the common law could only award damages. Injunctive relief is available on an interim or interlocutory basis, as well as on an ongoing basis.

v. Specific Performance

Specific performance is closely related to injunctive relief, except that the role of an injunction is to prevent a party from taking a certain action, or directing a party to take a specific action. Specific performance is generally used in contract law to order a party to adhere to the terms of a contract. Specific performance is only

---

<sup>13</sup> See *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4<sup>th</sup>) 129 (SCC).



granted where the “peculiar and special value” of the property means that monetary damages cannot adequately compensate a claimant.<sup>14</sup>

vi. Rescission

Rescission is generally used in contract law to end a contract to put the parties back into their pre-contractual positions. An equitable rescission is thus *ab initio*, but is distinct from a contract that is void *ab initio*. In circumstances where rescission is required because of the malfeasance of one party, the court of equity may be less concerned in its judgment with restoring the responsible party to its pre-contractual position.

vii. Equitable Lien

An equitable lien is a remedy granting a proprietary interest in property, and is similar to a constructive trust. Generally speaking, an equitable lien serves as a charge against a property, and grants a party a proprietary interest, secured against the property, where they have been unfairly deprived of that interest.

viii. Equitable Accounting

An equitable accounting, also referred to an accounting of profits, requires one party to account for its use of certain funds. In *National Trust Co. v. H & R Block Canada Inc.*, Bastarache J. asserted that the true nature of an equitable accounting is to determine whether the claimant was deprived of money it should have received, and if so, to remedy that deprivation.<sup>15</sup>

---

<sup>14</sup> *Adderly v. Dixon* (1824), 1 Sim. & ST. 607, 57 E.T.R. 239 (Eng. V.-C.), at p. 240.

ix. Remedies Flowing from Declaratory Relief:

Declaratory relief is not a true remedy in and of itself; however, a declaration from the court is often sought as relief in matters of equity. For example, a claimant may seek to avoid a marriage, or a Power of Attorney based on undue influence, unconscionability, or breach of fiduciary duty. The relief flowing from such declarations, such as the avoiding of a marriage or Power of Attorney, does not fit neatly into any category of equitable remedies, but is generally restorative in nature.

### III: JURISPRUDENCE

#### 1. *Danilova v. Nityuk*<sup>16</sup>

The case of *Danilova v. Nityuk* involves several of the circumstances that can give rise to serious elder financial abuse. Mr. Danilov and Ms. Danilova (the “**Danilovs**”), surprisingly the plaintiffs in this matter, enticed Ms. Danilova’s mother and step-father, the Nityuks, to retire to Canada by presenting them with a document suggesting that their assets would be sufficient to provide them with a house and a comfortable retirement. The Nityuks thus liquidated their Russian assets, forwarded the funds to the Danilovs, and made the journey to Canada.

The Nityuks were retired, did not speak English, and were heavily reliant on the Danilovs to become established in Canada. However, shortly after receiving the Nityuk’s life savings, Mr. Danilov lost most of the funds on the stock market without informing the older couple. The Danilovs also purchased a house with the Nityuk’s funds, which they subsequently moved into with the Nityuks when the

---

<sup>15</sup> 2003 SCC 66, 2003 CarswellOnt 4443, at 41.

younger couple's financial situation became dire. Therefore, in short order, the Nitiyuk's went from expecting a comfortable retirement with a place of their own, to living with the Danilovs, who began to exert complete control over the financial lives of both couples. When the relationship eventually broke down, the Nitiyuks moved into social housing with the assistance of an advisor at the local YMCA.

Subsequently, the Danilovs brought an action for, *inter alia*, breach of contract, negligence, and conspiracy, while the Nitiyuks brought a counterclaim for fraud, misrepresentation, unjust enrichment, breach of contract, and breach of fiduciary duty. The Danilov's claim was dismissed, and Mulligan J. ordered that the Danilovs pay the Nitiyuks \$277,318 for the constructive trust claim, which included the funds for the house the Nitiyuks were forced to move out of, as well as punitive damages totaling \$25,000, and pre-judgment interest.

The case highlights the special vulnerability of seniors who may be new to Canada and have limited English language skills. The Court granted the Nitiyuks an equitable remedy tied in *quantum* to the funds they advanced to the Danilovs, and which they expected would be used to provide for a comfortable retirement close to family.

## **2. *Fowler Estate v. Barnes*<sup>17</sup>**

The decision in the *Fowler Estate* case relies on the doctrine of undue influence to rescind a deed of conveyance granted by an older adult, Ms. Fowler, to her granddaughter and her granddaughter's common law spouse. Ms. Fowler passed away on May 3, 1996, after having suffered a stroke in March of 1995 and another

---

<sup>16</sup> 2017 ONSC 4016, 2017 CarswellOnt 10034.

stroke approximately a month before her death. Ms. Fowler conveyed the property on November 16, 1995, in between her two strokes.

After Ms. Fowler's death, the executor of Ms. Fowler's estate brought an action to set aside the deed of transfer on the bases of lack of mental capacity or undue influence, as the conveyance was contrary to the wishes with respect to the disposition of the property in Ms. Fowler's will. The Court held that the presumption of undue influence arose due to the circumstances at the date of transfer, and the relationship between the deceased and the transferees, and held that the presumption was not rebutted.

The Court, in granting the executor of Ms. Fowler's estate rescission of the contract conveying the property, awarded the granddaughter and her common law spouse \$8,000 representing the value of renovations they made to the deceased's home. Therefore, the Court awarded the equitable remedy of rescission of the deed with terms, on the basis of undue influence by the transferees with respect to Ms. Fowler.

### ***3. Granger v. Granger***<sup>18</sup>

In *Granger v. Granger*, a son who lived with his mother for thirty years, on the understanding that he would receive an interest in her house upon her death, was denied such an interest by his sister, who moved back home in 2012 and transferred title of the home to herself and her mother as joint tenants under the authority of a Continuing Power of Attorney for Property. The transfer was for \$2 consideration.

---

<sup>17</sup> 1996 CarswellNfld 169 (SC TD).

The sister and mother brought a successful application for a writ of possession to evict the brother and his common law spouse, and subsequently, the son brought a counter-application challenging the validity of the Power of Attorney and asserting a beneficial interest in the property. The matter was converted into a trial of an issue as to whether son was entitled to the remedy of constructive trust or damages. At the trial level, the judge dismissed the son's claims.

The Court of Appeal, in reversing the decision of the trial judge, awarded the son equitable damages in the amount of \$438,113 to be recovered from the proceeds of the sale of the home on the basis of unjust enrichment and undue influence by the sister, finding that a proprietary estoppel claim by the son was premature as he had never asserted a present interest in the property.

This case is an unfortunate example of an older parent caught in the middle of a battle between siblings, and with her assets depleted as a result. All too often, the litigation of the financial abuse of elders fails fully to restore the older adult to their previous financial position, and involves disputes between family members that are upsetting and disruptive to an older adult living out their supposedly golden years.

#### ***4. Servello v. Servello***<sup>19</sup>

The case of *Servello v. Servello* is a further case that demonstrates the vulnerability of older adults to abuse where they have limited English and financial knowledge. In this case, a son transferred title of his mother's property into joint tenancy between him and his mother shortly after the death of his father. The son

---

<sup>18</sup> 2016 ONCA 945, 2016 CarswellOnt 19659.

<sup>19</sup> 2014 ONCA 434.

told his mother, who spoke limited English, that she was signing a document that would allow him to protect her and care for her as she aged.

The mother only discovered the transfer after she attended at the registry office with her daughter, and sought to have the property transferred back into her name as sole owner. The son refused, and so the mother brought a claim to void the transfer. The son brought a counter-claim for a beneficial interest in the property and restitution, based on the improvements he had made to the property over the years, which included the addition of a workshop he used as a means of generating income.

The Court of Appeal upheld the decision of the trial judge, finding that the transfer was void based on the contractual doctrines of mistake and *non est factum*, as the mother had no idea what she was signing. Interestingly, while it was found that the son had made improvements to the property and might otherwise be entitled to an equitable remedy, the courts dismissed his claim due to his lack of clean hands, based on the misrepresentations he made to his mother and his staunch refusal to transfer the property back to her, which meant that the matter had to be litigated, causing his mother considerable stress and anxiety.

### ***5. Stewart v. Stewart***<sup>20</sup>

In this case, the plaintiff, her son, and daughter-in-law jointly acquired property where they lived in separate dwellings for a number of years. One year after the plaintiff prepared a power of attorney and will in 2003, the plaintiff transferred her

---

<sup>20</sup> 2014 BCSC 766.

half interest in the land to her son and daughter-in-law for no consideration, but continued to reside in her home until moving to an assisted living facility in 2009.

After the transfer of her interest, the plaintiff, and her daughters, continued to pay a portion of the expenses related to the property. The plaintiff's daughters were appointed joint committees of their mother's person and affairs in 2012, and after finding evidence that their mother was waiting for payment from her son with respect to the transfer of her interest in the property, the committees brought an action for a declaration of trust and compensation.

The Court held that the transfer constituted unjust enrichment, as the plaintiff conferred the benefit with the expectation that her son would compensate her when financially able. The plaintiff was awarded a sum equal to half of the appraised value of the land, while the defendants received an equitable set-off for the improvements they made to the property after their mother moved into the assisted living facility.

#### **6. *Waruk v. Waruk*<sup>21</sup>**

The case of *Waruk v. Waruk* is notable in particular as it involves injunctive relief granted in circumstances of elder abuse. *Waruk* was an appeal by Laura Birtwhistle of a judgment dismissing her application to set aside an injunction enjoining her from visiting her grandmother, Lynne. Laura and her mother, Audrey, had travelled to Vancouver to assist in Lynne's care. Audrey sought to be appointed Lynne's committee of the person. Lynne's husband, Mr. Waruk, and her son also sought to be appointed committees of her estate and person.

---

<sup>21</sup> 1996 CarswellBC 2463 (CA).

Laura and Audrey began making claims alleging that Mr. Waruk mistreated Lynne. They became increasingly disruptive at the hospital where Lynne was residing. They strongly objected to Mr. Waruk visiting Lynne, at times engaging in physical confrontations. Laura was asked to leave the hospital under threat of arrest after alleging that Mr. Waruk would poison Lynne. After Lynne returned home with Mr. Waruk, Laura was denied entry and began banging on the windows and doors of the home. The family conflict was extremely distressing to Lynne.

The Court of Appeal, in continuing the injunctive relief against Laura, chose not to interfere with the discretionary order of the trial judge to grant the injunctive relief.

#### **IV: CONCLUSION**

The financial abuse of the elderly is a pervasive and insidious problem that is already under-reported, and likely to worsen in scope as Canada's population ages and receives large inheritances from preceding generations. The Court of Equity has developed several doctrines and remedies that can assist in rectifying financial abuse of the elderly in the civil context where the requirements of fairness merit the intervention of the justice system. All too often, the abuse is carried out by those on whom an older adult is reliant, and the law must make ongoing efforts to protect the interests of older adults as technological and societal changes leave them increasingly vulnerable to predators.