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PREDATORY MARRIAGES – EQUITABLE REMEDIES

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1. INTRODUCTION

In this article we shall discuss two New York cases in which the courts applied equitable principles to deny the surviving spouses of two predatory marriages the right to share in the deceased spouses' estates. Before doing so, however, we shall first provide a brief summary of the evil of predatory marriages.

We have previously presented papers and published books and articles about predatory marriages.[1] In this article we shall not mention again the Canadian cases involving predatory marriages,

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1. Kimberly A. Whaley, *The Lawyers Weekly*, July 25, 2014: "Challenging the Predatory Marriage"; Senior Solicitors Practitioners Forum: "Predatory Marriages, Legal Capacity to Marry and the Estate Plan" (May, 2014); *Whaley Estate Litigation Newsletter* (May, 2014), 4:2, "Predatory Marriages"; "Predatory Marriage Challengers have Limited Options", *The Lawyers Weekly*, September, 2013, vol. 19; CBA Southern Alberta Elder Law section: "Capacity to Marry, Predatory Marriages and the Practice Tips" (June, 2013); National Initiative for the Care of the Elderly (NICE) Knowledge Exchange, "Predatory Marriages: Its Consequences and Costs in Capacity Proceedings" (May, 2013); CCLA Solicitors Conference Montebello, "Predatory Marriages and Financial Abuse and Misuse of Authority Pursuant to POA's" (May, 2013); CBA New Brunswick, Mid-winter Public Forum on Elder Law, "Predatory Marriages and Financial Abuse and Misuse of Authority Pursuant to POA's" (February, 2013); CBA, Canadian Legal Conference, Vancouver: "Estate Planning for Fractured Families: Spousal Claims, Predatory Marriages and Protecting the Vulnerable Client in an Era of Rapid Social Demographic Change" (August, 2012); LSUC, CPD, the Six-Minute Estates Lawyer: "Predatory Marriages" (April, 2011); "How Predatory Marriages Affect Property and Estates", 30:13 *The Lawyers Weekly*, August 13, 2010.

except in passing, since we have discussed them in detail in our previous publications.

A predatory marriage is a marriage in which one person, by devious means, persuades another person, who is typically elderly, lonely, confused, and depressed, and who has failing mental and physical faculties, to enter into marriage, with the object of gaining power over and ultimately receiving the first person's property when the latter dies. The predator is typically a younger woman who befriends an elderly man for these nefarious purposes.[2] She may be his caregiver, be an employee of the retirement home in which he resides, or have met him as a seniors' function. She will often also persuade the hapless elderly man to grant a continuing power of property to her and to make a will in her favour too. Her motivation is greed, the love of money. Though we say the predator is typically female, we have seen similar devastating cases in our practice where the predator is male; however, comparatively the incidence is much lower.

The predatory actions often involve fraud, coercion, or undue influence, although these are not preconditions of this evil. What does typically take place in predatory marriage cases is that the woman is able to persuade the man to enter into marriage by the use of subterfuge and various stratagems, such as isolating the man from family members, performing all kinds of social and personal services for him, relieving the man's loneliness by spending much time with him, perhaps providing care-giving and housekeeping services, and so on.

Predatory marriages are a real evil in our society. And, as recent

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Albert H. Oosterhoff: "Every Child's Nightmare: January/December Marriages – The *Banton* Case" in the 1999 Annual Institute of Continuing Legal Education Proceedings, *Estates: The Outer Limits: Current Issues in Agency, Guardianship and Power of Attorney Law* (Toronto, Canadian Bar Association, January 28, 1999), Tab 3; "Marriage – Validity – Marriage between elderly man with Alzheimer's disease and younger woman invalid for lack of capacity" (2001), 20 E.T.P.J. 115; "Predatory Marriages" for The Law Society of Upper Canada, 14th Annual Estates and Trusts Summit (November 9 and 10, 2011), Day 1; "Predatory Marriages" (2013), 32 E.T.P.J. 24, pp. 24-63; "Predatory Marriages", for the National Initiative for the Care of the Elderly, 2013 Annual Conference (June 4, 2013).

Kimberly A. Whaley and Albert H. Oosterhoff: "Predatory Marriages", Carswell Webinar (June 4, 2013); "Predatory Marriages", interview by Adam Capelli on "Heirs and Omissions" program, Cable 14 TV (Hamilton Ontario), taped November 4, 2013.

2. This is the typical fact situation in the reported cases, and for that reason we have used gender-specific pronouns that match this situation in this article. Of course this kind of abuse can also arise when the roles are reversed and when the parties are of the same gender.

case law indicates, the incidence of such marriages is on the increase. They are an evil that needs to be addressed, because they cause emotional distress, break families apart and have serious economic consequences. When families contest the validity of such marriages the cost of the litigation is also significant.

As we demonstrated in our previous publications, family members face significant problems when they try to reverse a predatory marriage:

1. There is no effective way to determine capacity to marry at the time a marriage licence is applied for and granted.

2. The "test"[3] for capacity to marry is not rigorous. Case law holds that a marriage contract is a simple one that does not require a high degree of intelligence to comprehend. Thus, a person has capacity to marry if he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.

3. A marriage is void if one of the parties lacks capacity. Thus, anyone with an interest in the matter has standing to contest the validity of a marriage for lack of capacity. Consequently, children can contest a marriage on that ground. However, since the capacity test lacks rigour, the children are usually unsuccessful in having the marriage declared void on this ground.

4. A marriage is merely voidable if it was obtained by fraud, duress, undue influence, and similar iniquities. Only the parties to the marriage, and only while both are living, have standing to contest the validity of the marriage on this ground. Thus, this is not an option for the children of the elderly man who was persuaded to enter the marriage by nefarious means.

5. Most Canadian wills statutes provide that a subsequent marriage revokes a prior will. Thus, if the elderly man had a valid prior will benefiting his family, that will is revoked and he will die intestate (unless he has the capacity and intent to do a new will and does so).[4] Under intestacy legislation in

3. Strictly speaking, it is not a test, but rather a consideration of factors to determine the requisite decisional capacity.

4. *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 68; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 15(a); *The Wills Act*, C.C.S.M., c. W150, ss. 16(a), 17;

force in the Canadian common law provinces, his new spouse will then be entitled to a significant share in his estate.[5]

This rule has never been part of Quebec law and has been reversed in recent statutes in Alberta[6] and British Columbia.[7] The rule is also not part of the law in most of the United States.[8] The *Uniform Probate Code 1969*[9] provides in §2-508 that a will is not revoked by a change in circumstances.

6. If the elderly man makes a new will in favour of his wife, the family do have standing to contest the validity of the will for lack of capacity and undue influence. They may well be successful, since the test for testamentary capacity is much

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R.S.N.B. 1973, c. W-9, ss. 15.1, 16; R.S.N.L. 1990, c. W-10, s. 9; R.S.N.S. 1989, c. 505, s. 17; S.S 1996, c. W-14.1, ss. 16(a), 17; R.S.N.W.T. 1988, c. W-5, s. 11(2)(a), (3); R.S.N.W.T. (Nu.) 1988, c. W-5, s. 11(2)(a), (3); R.S.Y. 2002, c. 230, s. 10(2)(a), (3). The statutory provisions are not identical. Some make provisions for marriage-like relationships and adult interdependent relationships, for example. Note also that s. 15 the New Brunswick Act gives the court power to give effect to a gift in a prior will in specified circumstances.

5. The surviving spouse is usually entitled to the entire estate if the deceased left no descendants. If there are descendants, the surviving spouse is entitled to a preferential share (typically $200,000 or $300,000), as well as a distributive share which varies with the number of children or issue of deceased children who survive the intestate. See *Intestate Succession Act*, R.S.A. 2000, c. I-10, ss. 2, 3, 12; C.C.S.M., c. I85, s. 2; R.S.N.S. 1989, c. 236, ss. 4 and 14; R.S.N.L. 1990, c. I-21, ss. 6 and 14; R.S.N.W.T. 1988, c. I-10, ss. 2, 4 and 12; R.S.N.W.T. (Nu.) 1988, c. I-10, ss. 2, 4 and 12; S.S. 1996, c. I-13.1, ss. 4, 5, 6, 8 and 17; *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, ss. 22, 24 and 32; *Estate Administration Act*, R.S.Y. 2002, c. 77, ss. 4, 82 and 90; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 87; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 44, 45 and 46; *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, ss. 20 and 21. It should be noted that, under some statutes, such as Manitoba's and British Columbia's, if the surviving issue are not the issue of the surviving spouse, the latter receives one-half of the estate regardless of the number of children or their issue survive the intestate.
6. *Wills and Succession Act*, S.A. 2010, c. W-12.2, s. 23(2)(a).
7. *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 55(2).
8. For a list of states that retain the revocation on death provision, see *1 Restatement 3d, Property: Wills and Other Donative Transfers* (St. Paul, Minnesota, American Law Institute Publishers, 1999), §4.1, comment q. The *Restatement* lists only 11 states which still have such a provision, *ibid.*, at p. 278.
9. Promulgated by the National Commissioners of Uniform State Laws and adopted by many states. Last amended in 2010 ("*Uniform Probate Code*"). The *Code* makes two exceptions, namely, for gifts to a beneficiary who kills the testator feloniously (§2-803), and, after a marriage is terminated, for testamentary gifts to the (former) spouse (§2-804).

stricter than the test for capacity to marry. However, the new wife will then still be able to claim her statutory entitlement on his intestacy.

7. The surviving wife also has extensive rights under family property legislation. This varies from province to province, but typically entitles her to make either an equalizing claim against his estate, or to claim assets of the estate.[10]

8. The surviving wife also has the right to make a claim for support against the estate.[11]

It is thus apparent that marriage has a very significant economic impact on the estate. And this has disastrous consequences for the elderly man's family.

In our previous publications we argued that, for this reason, the test for capacity to marry must be made more stringent and the revocation on marriage provision should be abolished. In addition, we argued that children and others with an interest in the matter should be given standing to contest a marriage for fraud, duress, undue influence, and similar grounds.

In this article we shall not discuss legal remedies, except incidentally. Instead, we argue that equitable remedies may be available to prevent the economic consequences of predatory marriages. It is to these that we now turn.

2. EQUITABLE REMEDIES

2.1. A Brief Introduction to Equity

Equity as a separate course has not been taught for years in Canadian law schools.[12] This is regrettable. Canadian lawyers are,

10. *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 21; S.N.W.T. 1997, c. 18, ss. 35 and 36(2); S.N.W.T. (Nu.) 1997, c. 18, ss. 35 and 36(2); R.S.O. 1990, c. F.3, s. 5(2); R.S.P.E.I., c. F-2.1, s. 6; *Family Property Act*, C.C.S.M., c. F25, Parts II and IV; S.S. 1997, c. F-6.3, Part VI; *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 4; *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 12.
11. *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7; *Dependants Relief Act*, R.S.A. 2000, c. D-10.5; C.C.S.M., c. D37; R.S.N.W.T. 1988, c. D-4; R.S.N.W.T. (Nu.) 1988, c. D-4; S.S. 1996, c. D-25.01; R.S.Y. 2002, c. 56; *Family Relief Act*, R.S.N.L. 1990, c. F-3; *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, Part V; *Testators Family Maintenance Act*, R.S.N.S. 1989, c. 465; *Wills Variation Act*, R.S.B.C. 1996, c. 490.
12. Albert Oosterhoff has fond memories of the Equity course taught by Ivan

of course, familiar with many nominative equitable remedies, such remedies for breach of trust, rescission of contracts, specific performance, rectification, injunctions, remedies for unconscionability, and others. But they often have no deeper understanding of their origins and of the principles that were formulated to produce such remedies.

It is, therefore, well to provide a brief overview of the origin of equity. It developed because of defects in the common law. In the common law courts a person could get a remedy by obtaining a writ. Initially this system was flexible, so that writs were available for all kinds of injustices. However, by the late 13th century, the common law began to insist that all writs had to follow previously established patterns. In consequence, many putative litigants were denied access to justice. They began to petition the King to intervene on the ground that while the King had delegated judicial functions to the common law courts, he retained a residual power to do justice. It did not take long before the King began to refer such petitions to the Chancellor. The Chancellor was often the only literate member of the Privy Council and typically he was an ecclesiastic.

The Chancellor would then examine the matter and, if he found that an injustice had been done to the petitioner, he would grant a remedy. The Chancellor would not overrule the right that the defendant had at common law, but he would deny the defendant the ability to enforce that right. Equity acts *in personam*, *i.e.*, against the person. For example, when the use, the forerunner of the modern trust, became common in England, A might convey land to B "to the use" of C. C's rights were not protected at common law, which took no notice of the use. As far as it was concerned, B owned the fee simple. But if B denied the use and treated the land as his own, C could petition the Chancellor. The Chancellor would then question the parties and, if he found the injustice established, would declare that B was conscience-bound to live up to his promise to hold the land for C's benefit. Thus, the Chancellor assumed jurisdiction on the basis of conscience. B was putting his soul in peril and by his decision the Chancellor ensured that B's unconscionable act would not be permitted.

The well-known jingle of Sir Thomas More, L.C., "Three things are apt to be helpt in Conscience, Fraud, Accident and things of Confidence",[13] aptly describes the jurisdiction of chancery.

Cleveland Rand, retired puisne justice of the Supreme Court of Canada and Western University's first law dean.

13. See 1 Rolle's Abridgment – Henry Rolle, *Un Abridgment des plusiers Cases et*

"Conscience" means equity or chancery; "accident" refers to forfeiture and mistake; and "confidence" deals with fiduciary obligations, trusts, and breach of confidence. "Fraud" is the residual category and concerns all other circumstances that offend conscience.[14] It encompasses such diverse categories as: election, contribution, marshalling, part performance, relief against penalties, relief against undue influence, unconscionable transactions, and others.[15]

In time petitions were made directly to the Chancellor and in due course a body of equitable principles developed that were applied consistently. The Chancellor's jurisdiction was called equitable jurisdiction and eventually his court became known as the court of equity or chancery. Later, other chancery courts were added as well.

Of course, in due time procedures in chancery became ossified, just as those in the common law courts had become. Charles Dickens deals with this in his novel, *Bleak House*.[16] It describes a fictional case, *Jarndyce v. Jarndyce*, which was an interminable guardianship proceeding in chancery.

Later in the 19th century there were important reforms in equity and in the common law. In the second half of the 19th century, these reforms culminated in the fusion of the courts of common law and equity into one Superior Court of Judicature in England and all other common law jurisdictions. Since then, all superior courts of justice have concurrent jurisdiction in law and equity. There is, however, an important proviso, namely, that if there is a conflict between a rule of equity and a rule of common law, the rule of equity prevails.[17]

Part of the equitable principles that were developed consisted of what later became known as the maxims of equity. These maxims

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Resolutions del Common Ley, Alphabeticalment Digest desouth severall Titles (London, 1668), p. 374.

14. See R.P. Meagher, J.D. Heydon, and M.J. Leeming, *Meagher Gummow & Lehane: Equity Doctrines and Remedies*, 4th ed. (Sydney, LexisNexis, 2002), p. 450.
15. *Ibid.*
16. (London, Bradbury & Evans, March 1852 - September 1853).
17. 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).

did not acquire their present form until the 18th century. However, their principles had been applied by the Chancery courts for a long time before that.[18] Some of these maxims are:

(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.[19]

(d) No one shall be permitted to profit by his own fraud.[20]

It is, however, important to remember that these maxims do not amount to specific rules. Rather, they are a summary of the principles that underlie equity.[21] Hence, they cannot form the basis of an action in themselves, but they can be and are called in aid in specific claims for relief.

As mentioned above, fraud is the large residual jurisdiction of equity. Equitable fraud is not the same as common law fraud, which requires an actual intention to deceive, or a reckless indifference to the truth or falsity of a representation.[22] Equitable fraud is different. It does apply to actual deceit in cases in which equity has exclusive jurisdiction. But it applies also to situations in which the defendant has acted in innocence or ignorance of the obligations equity imposes on her.[23] Thus equity insists that all transactions must be not merely fair, but "open and fair, and free from all objections."[24] In substance, equitable fraud "is a failure to act as equity would like one to act."[25]

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18. Meagher *et al.*, *supra*, footnote 14, p. 85.
19. Discussed, *e.g.*, in *Tinsley v. Milligan*, [1994] 1 A.C. 340, [1993] UKHL 3 (U.K. H.L.), in which the party making a resulting trust claim had defrauded the English Department of Social Services. She succeeded in her claim because she did not have to rely on the illegality, but based her claim on the fact that she contributed to the purchase price and did not have to rely on the presumption of advancement.
20. The comparable common law principle is: *ex turpi causa non oritur actio*, *i.e.*, a disgraceful matter cannot be the basis of an action.
21. Meagher *et al.*, *supra*, footnote 14, p. 85.
22. *Derry v. Peek* (1889), 14 App. Cas. 337, 5 T.L.R. 625 (U.K. H.L.).
23. *Nocton v. Lord Ashburton*, [1914] A.C. 932, at p. 954, *per* Viscount Haldane, L.C.
24. *Lewis v. Hillman* (1852), 3 H.L. Cas. 607, 10 E.R. 239 (U.K. H.L.), at p. 630 (H.L. Cas.) and p. 249 (E.R.), *per* Lord St. Leonards.
25. A.H. Oosterhoff, Robert Chambers, and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto, Thomson Reuters Canada/Carswell, 2014), §10.2, p. 710.

2.2. Equity and Predatory Marriages – New York Cases

This brings us to the question how equity can assist heirs who have been deprived of their rightful inheritance as a result of a predatory marriage. We submit that equity can assist them under the rubric of equitable fraud and, if the facts support it, the heading of undue influence.

Equitable fraud was the underlying basis for granting relief in two New York cases that involved predatory marriages. In both cases one of the spouses clearly lacked capacity to marry and so, if the cases had arisen in Canada, the heirs would most likely have been successful in having the marriages declared void.[26] However, special legislation in New York appeared to preclude that remedy.

The first case is *Campbell v. Thomas*,[27] a decision of the New York Supreme Court, Appellate Division, Second Department. In 2000, Howard Thomas was diagnosed with severe dementia that was attributable to Alzheimer's disease, and with terminal prostate cancer. He had known the defendant, Nidia Thomas, and had a relationship with her for 25 years. He had named her as one of the beneficiaries of his retirement account. Howard's daughter was his primary caregiver. She took a one-week vacation in February, 2001 and left Howard, then 72 years old, in the care of Nidia, who was then 58 years old. In the course of that week, Nidia secretly married Howard. Then she caused Howard's bank account to be changed into a joint account in both their names. She also had herself named as the sole beneficiary of Howard's retirement account. Howard died in August 2001. When they discovered what had happened, Howard's three children brought an action against Nidia in the Supreme Court in which they sought to have the marriage declared void for lack of capacity and to reverse the changes made by Nidia to Howard's assets. They also alleged undue influence, conversion and fraud on the part of Nidia. The evidence of Howard's advanced dementia, from family members and his medical doctors, was overwhelming.

Meanwhile, Howard's eldest son obtained probate of Howard's will and was granted letters of administration with the will annexed. The will directed that the estate should be divided equally among Howard's three children. However, in 2003, Nidia filed a right of election. Most of the states have enacted legislation that gives a

26. See, *e.g.*, *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 2000 ABQB 530 (Alta. Q.B.).

27. 73 A.D.3d 103, 897 N.Y.S.2d 460 (N.Y., 2010). Followed in *Matter of Edwards*, 121 A.D.3d 336 (N.Y., 2014), which involved a felonious killing.

surviving spouse the right to an elective share out of the deceased spouse's estate. The elective share varies with the duration of the marriage.[28] The Surrogate's Court proceedings were stayed, pending the outcome of the Supreme Court proceedings.

The Supreme Court denied the plaintiffs' motion for summary judgment, as well as Nidia's cross-motion. However, the Appellate Division allowed the plaintiff's appeal and remitted the matter to the Supreme Court.[29] The Supreme Court then made an order in 2007 in which it: (a) granted judgment against Nidia for the moneys contained in the bank account when it was made joint; (b) declared that Nidia had no legal rights as the spouse of Howard; and (c) directed that title to the retirement account should be put in the plaintiffs' names. Nidia appealed.

Under §140 of the New York *Domestic Relations Law*,[30] any person with an interest may bring an action to annul a marriage on the ground that one party was mentally ill. The action may be brought while the mentally ill person is living, after the person's death, and during the life of the other party to the marriage. However, §§5-1.1-A and 5-1.2(a) of the *Estates, Powers and Trusts Law*[31] provide that a spouse is considered a "surviving spouse" with a right of election against the estate of the deceased spouse, "unless the court is satisfied that a final judgment of divorce, of annulment or declaring the nullity of a marriage . . . was in effect when the deceased spouse died." The effect of the latter provisions "appears to render the right of family members to obtain a post-death annulment largely illusory."[32] It meant that, technically, Nidia had a legal right to an elective share as a surviving spouse.

This is why the Appellate Division turned to equitable remedies. First, it stated that a statute should not be applied in such a way that it is being used as an instrument of fraud. It noted that honouring the surviving spouse's right of election, when her very status as spouse was procured by overreaching or undue influence, would encourage many such predatory marriages.[33] To avoid this result, the court can grant relief on the basis of the equitable principle that "[n]o one shall be permitted to profit by his own

28. See *Uniform Probate Code*, *supra*, footnote 9, §2-202,
29. *Campbell v. Thomas*, 36 A.D.3d 576, 828 N.Y.S.2d 178 (N.Y., 2007), appeal after remand 73 A.D.3d 103, 897 N.Y.S.2d 460 (N.Y.A.D. 2d, 2010).
30. 2013 New York Consolidated Laws, *Domestic Relations*, art. 9, Action to Annul a Marriage or Declare it Void.
31. 2013 New York Consolidated Laws, *Estates Powers and Trusts Law*, art. 5, Family Rights.
32. *Campbell*, *supra*, footnote 29, at p. 115 (A.D.), p. 469 (N.Y.S.).
33. *Campbell*, *supra*, footnote 29.

fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[34] The wrongdoer is deemed to have forfeited the benefit that would accrue to her from her wrongdoing.[35]

The court then reviewed the facts and concluded:[36]

> Taken together, the foregoing facts provide ample support for an inference that Nidia was aware of Howard's lack of capacity to consent to the marriage, and took unfair advantage of his condition for her own pecuniary gain, at the expense of Howard's intended heirs. Thus, Nidia procured the marriage itself through overreaching and undue influence. Nidia should not be permitted to benefit from that conduct any more than should a person who engages in overreaching and undue influence by having himself or herself named in the will of a person he or she knows to be mentally incapacitated. By her conduct, Nidia has forfeited any rights that would flow from the marital relationship, including the statutory right she would otherwise have to an elective share of Howard's estate.[37]
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> . . . . .
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> Thus, Nidia wrongfully altered Howard's testamentary plan in her favor, just as surely as if she had exploited his incapacity to induce him to add her to his will and bequeath her one third[38] of his estate. Under such circumstances, equity will intervene to prevent the unjust enrichment of the wrongdoer.

The court also noted that this result is also compelled by the need to protect the integrity of the courts, for a court must not allow itself to be used as an instrument of wrong. Further, it noted that the equitable doctrine pursuant to which Nidia forfeited her right of election does not negate the legislation, but complements it, for the Legislature could not have contemplated the circumstances presented in the case when it enacted the legislation.[39] The purpose of §5-1.2 of the *Estates, Powers and Trusts Law*[40] is to prevent a person from disinheriting his or her spouse. But the court was confident that the Legislature did not intend the legislation to

34. *Campbell*, *supra*, footnote 29, p. 116 (A.D.), p. 469 (N.Y.S.), citing *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (N.Y. 1889), at p. 511 (N.Y.); and *In re Lonergan's Estate*, 63 N.Y.S.2d 307 (N.Y. Sur. 1946).
35. *Campbell*, *supra*, footnote 29, p. 116 (A.D.), p. 470 (N.Y.S.).
36. *Campbell*, *supra*, footnote 29, pp. 118-119 (A.D.); p. 472 (N.Y.S.).
37. *Campbell*, *supra*, footnote 29, pp. 117-118 (A.D.), p. 471 (N.Y.S.) (internal citations omitted).
38. *I.e.*, the amount of her elective share.
39. *Campbell*, *supra*, footnote 29.
40. *Supra*, footnote 31.

provide shelter for a person who seeks to profit from a non-consensual marriage.[41] Accordingly, the court dismissed Nidia's appeal.

However, it varied the order made by the Supreme Court in 2007. It noted that Nidia's share of Howard's retirement account that he gave to her before his death could not be forfeited. Hence the Appellate Division ordered that the beneficiaries of that account should be restored to their positions as they existed before Nidia improperly changed the beneficiary designations for the account in 2001. This holding accords with the following *dictum* of Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Assn.*:[42]

> In a word, I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights.

The second case is *Matter of Berk*.[43] This decision was released at the same time as *Campbell*. Irving Berk was a successful businessman. He named his two sons co-executors of his estate. He left his estate to his two sons and four of his grandchildren. In time his physical and mental health began to fail and he was wheelchair bound. In 1997, the family hired Hua (Judy) Wang as his live-in caretaker. The evidence of family, friends, and physicians showed that she was abusive to Irving and that he was afraid of her. In 2005 Irving was diagnosed as suffering from dementia and being incapable of entering into binding contracts. In that year Hua, who was then 47 years old, secretly married Irving, who was then 99 years of age. She did not inform his family of the wedding. The evidence of friends and family indicated that he was not lucid or aware of his circumstances and that he and Hua never displayed any affection toward each other. Irving died a year after the marriage.

The sons applied for probate and Hua petitioned the Surrogate's Court to determine the validity of her right to take an elective share of Irving's estate. She moved for summary judgment and the court

41. *Campbell*, *supra*, footnote 29, p. 121 (A.D.); p. 473 (N.Y.S.).
42. (1891), [1892] 1 Q.B. 147 (Eng. C.A.), at p. 159. To the same effect, see *Hegedus Estate v. Paul (Guardian of); Garbe v. Alberta (Public Trustee* (1998), 24 E.T.R. (2d) 176 (Alta. Surr. Ct.); *Re Gore* (1971), 23 D.L.R. (3d) 534, [1972] 1 O.R. 550 (Ont. H.C.); *Re Bowlen Estate* (2001), 207 D.L.R. (4th) 175, 2001 ABQB 1014 (Alta. Q.B.). For a contrary view, see *Re Missirlis* (1970), 15 D.L.R. (3d) 257 (Ont. C.A.); *Re DWS (deceased)*, [2001] 1 All E.R. 97 (Eng. C.A.). See also text and cases at footnotes 60, 65, and 68, *infra*.
43. 71 A.D.3d 883, 897 N.Y.S.2D 475 (2010, N.Y.S.C., A.D.2d).

granted her motion and dismissed the sons' counterclaims. The court found that Hua had established that she was Irving's spouse when he died. Thus she satisfied the requirements of the *Estates, Powers and Trusts Law*.[44] The sons appealed to the Appellate Division.

The Appellate Division followed *Campbell*,[45] the decision in which had just been released, and allowed the appeal. The court held that the evidence presented by the sons on the motion for summary judgment was such that a trier of fact could properly determine that Hua, knowing that Irving was mentally incapacitated and was thus incapable of consenting to marriage, deliberately took unfair advantage of him in order to obtain pecuniary advantage. Accordingly, the court held that the matter should be tried.

3. ANALYSIS

Although equitable remedies have not, to our knowledge been used in the context of predatory marriages, we believe that such remedies ought to be explored in this context. The principles and remedies discussed in the New York case are, in fact, quite familiar to us in other contexts. We mention the following:

1. *Undue Influence.* The equitable doctrine of undue influence is often relied on to set aside a will that was procured by undue influence.[46] The existence of undue influence is sufficient for equity to intervene. Significantly, in *Allcard v. Skinner*,[47] Lord Lindley L.J.

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44. *Supra*, footnote 31.
45. *Campbell*, *supra*, footnote 29.
46. See, *e.g.*, *Crompton v. Williams*, [1938] 4 D.L.R. 237 (Ont. H.C.); *Re Marsh Estate* (1991), 41 E.T.R. 225 (N.S. C.A.); *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.), additional reasons (1998), 164 D.L.R. (4th) 176 at 244 (Ont. Gen. Div.) (costs); *Banton v. CIBC Trust Corp.* (1999), 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138 (Ont. Gen. Div.), additional reasons (1999), 182 D.L.R. (4th) 486 at 500 (Ont. S.C.J.), affirmed (2001), 197 D.L.R. (4th) 212 (Ont. C.A.), leave to appeal refused (2001), 276 N.R. 395 (note) (S.C.C.), affirmed (2001), 197 D.L.R. (4th) 212 (Ont. C.A.), leave to appeal refused (2001), 276 N.R. 395 (note) (S.C.C.) (liability of trust to reimburse expenses) (ordering payment of amount to trustees) (Ont. S.C.J.); appeal of *Banton v. CIBC Trust Corp.* (2001), 197 D.L.R. (4th) 212, 53 O.R. (3d) 567 (Ont. C.A.), leave to appeal refused (2001), 276 N.R. 395 (note) (S.C.C.); *Hall v. Hall* (1868), L.R. 1 P. & D. 48.
47. (1887), 36 Ch. D. 145 (Eng. C.A.), at pp. 182-183, quoted by Wilson J. in *Goodman Estate v. Geffen* (1991), (*sub nom.* Geffen v. Goodman Estate) 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353 (S.C.C.), at p. 220 (D.L.R.).

described the basis of equity's interference as follows: equity does not set aside gifts because "it is right and expedient to save persons from the consequences of their own folly", but because "it is right and expedient to save them from being victimized by other people." Admittedly, in a predatory marriage, the weaker party may not make actual gifts to the predator, but the consequence of the marriage effectively results in a gift to the predator. Hence, if undue influence is proved, a predatory marriage can be set aside on that ground.[48]

2. *Unconscionability.* The doctrine of unconscionability is typically used to set aside contracts that offend the conscience of a court of equity. A recent case, *Buccilli v. Pillitteri*,[49] is illustrative. The plaintiff's late husband operated a family business with her brother-in-law, Pat Pilliteri, and another person. The plaintiff inherited her husband's one-third interest in the family business. She transferred the interest to her sister-in-law, Christina Pilliteri, in 2001 by a written transfer agreement. Later Christina transferred the interest to her husband and the third partner in equal shares. The plaintiff then sued to set aside the transfer agreement and to restore her to her original position. The plaintiff had not received any financial statements of the business and was not informed of the value of her interest. She also had no independent legal or business advice before she executed the transfer agreement. The trial judge ordered that the agreement be set aside on four grounds: undue influence, breach of fiduciary duty, misrepresentation, and unconscionability. With respect to the latter ground, the trial judge held that unconscionability was established by the inequality in the bargaining positions of the parties and by the improvident bargain.

However, unconscionability is not restricted to the law of contracts. It is closely related to undue influence. As stated by Davey J.A. in *Morrison v. Coast Finance Ltd.*:[50]

48. More recent cases in which undue influence has been found have emphasized the circumstances of the inequality of the parties' bargaining power in that one party is in a position of trust or power and the other weaker and vulnerable. See, *e.g.*, *Gironda v. Gironda*, 2013 ONSC 4133 (Ont. S.C.J.), additional reasons 2013 ONSC 6474 (Ont. S.C.J.).
49. (2012), 84 E.T.R. (3d) 208, 2012 ONSC 6624 (Ont. S.C.J.), additional reasons 2013 ONSC 328 (Ont. S.C.J.), additional reasons 2013 ONSC 1537 (Ont. S.C.J. [Commercial List]), affirmed (2014), 96 E.T.R. (3d) 6, 2014 ONCA 432, 2014 CarswellOnt 7121 (Ont. C.A.), additional reasons related to costs 2014 ONCA 498 (Ont. C.A.).
50. (1965), 55 D.L.R. (2d) 710 (B.C. C.A.), at p. 713.

> The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; 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 must repel by proving that the bargain was fair, just and reasonable.

In *Juzumas v. Baron*[51] the court considered the doctrine of unconscionability and ultimately used it to set aside the transfer of property to the predator's son. The court's reliance on this doctrine is reflected in the following excerpt:[52]

> The doctrine of unconscionability similarly gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power . . . Since I conclude that the transfer of the property, on its face, is improvident, and that there was an inequality of bargaining power in favour of Yevgeni [the son] (and Galina [the predator]), the onus falls on Yevgeni to establish the fairness of the transaction. Neither Yevgeni nor Galina discharged this burden.

We submit that the statements of Davey J.A. in *Morrison* and of the court in *Juzumas* can be applied also to predatory marriages. In those situations, one of the parties takes unfair advantage of the other by an unconscientious use of power by the first against the second, weaker party. If a bargain is a necessary ingredient of unconscionability, then the marriage contract is such a bargain. Consequently, a predatory marriage can be declared void for unconscionability.

3. *Using a Statute as an Instrument of Fraud.* This principle is also a familiar one. It is used, for example, in the context of oral trusts of land. The *Statute of Frauds*[53] provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. However, if such a trust has not been reduced to writing and the

51. 2012 ONSC 7332 (Ont. S.C.J.).
52. *Juzumas v. Baron*, *supra*, footnote 51, para. 13.
53. (1677), 29 Car. 2, c. 3, s. 7. And see, R.S.N.B. 1973, c. S-14, s. 9; R.S.N.S. 1989, c. 442, s. 5; R.S.O. 1990, c. S.19, s. 9.

beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. Equity intervenes in those circumstances because it will not allow the Statute to be used as an instrument of fraud. Thus it will allow oral evidence to be adduced to prove the fraud and direct that the property is held on trust for the beneficiary. Some cases call the trust express,[54] but this is incorrect, for that would be enforcing the trust in direct conflict with the Statute and equity never does that. Other cases hold the trust to be a resulting trust.[55] That will work if the transferor and the beneficiary are one and the same, since a resulting trust returns the property from whence it came. But it will not work if the beneficiary is a third person, as in a situation in which A transfers property to B upon oral trust for C. In that case the only effective and proper remedy is the constructive trust, since it is not restricted to sending the property back to the transferor, but can send it forward to the intended beneficiary.[56]

The principle is also used in the context of secret trusts. Modern wills legislation requires that testamentary dispositions be in writing and signed by the testator in the presence of two witnesses.[57] When a secret trust is created, there is a valid disposition in favour of the intended trustee, since it is contained in a duly executed will. However, the secret trust is invalid, because its terms are not in writing. Thus, the wills legislation prevents the invalid trust from being effective. However, equity will intervene by allowing oral evidence of the trust and impressing a constructive trust in the same terms as the failed express trust on the property. It operates on the trustee's conscience and will not allow the trustee to break his or her promise to the testator. Instead, it enforces the promise by way of a constructive trust. In doing so, equity does not, therefore, enforce the express trust, since that would conflict with

54. See, *e.g.*, *Rochefoucauld v. Boustead* (1896), [1897] 1 Ch. 196 (Eng. C.A.).
55. See, *e.g.*, *Bannister v. Bannister*, [1948] 2 All E.R. 133 (Eng. C.A.).
56. See, *e.g.*, *Neale v. Willis* (1968), 19 P. & C.R. 836 (Eng. C.A.); *Langille v. Nass* (1917), 36 D.L.R. 368 (N.S. C.A.); *Re Densham*, [1975] 3 All E.R. 726, [1975] 1 W.L.R. 1519 (Eng. Ch. Div.). In *Densham*, the constructive failed however, because it arose by way of voluntary settlement and was void against the creditors of one of the purchasers. See generally Oosterhoff, *et al.*, *supra*, footnote 25, §12.3.2, s. 14.
57. See *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 60; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 3 and 4; *Wills Act*, C.C.S.M, c. W150, ss. 3 and 4; R.S.N.B. 1973, c. W-9, ss. 3 and 4; R.S.N.L. 1990, c. W-10, s. 2; R.S.N.S. 1989, c. 505, s. 6(1)(a); R.S.N.W.T. 1988, c. W-5, s. 5(1); R.S.N.W.T. (Nu.) 1988, c. W-5, s. 5(1); S.S. 1996, c. W-14.1, s. 7; R.S.Y. 2002, c. 230, s. 5(1); *Wills and Succession Act*, S.A. 2010, c. W-12.2, s. 14; *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 37.

the legislation. It enforces the promise by a constructive trust because it will not allow the legislation to be used as an instrument of fraud.[58]

We submit that the principle that one may not use a statute as an instrument of fraud can be applied also to predatory marriages. A marriage receives its imprimatur from legislation.[59] The predator relies on the statute to enforce her claim. However, her claim is fraudulent because she persuaded the husband by devious means to enter into the marriage. A court of equity should not allow the statute to be used in this way, but should restore the property the predator received to the rightful heirs.

4. ***No One Shall Profit from His or Her Own Wrong.*** This principle 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. In these circumstances, 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.[60] The principle is applied in a variety of situations. Thus, it applies when a beneficiary perpetrates a fraud on a testator in order to obtain a legacy by that fraud,[61] a beneficiary murders a testator,[62] an heir murders a person who dies intestate,[63] a person

58. See, *e.g.*, *Ottaway v. Norman*, [1972] Ch. 698, [1972] 2 W.L.R. 50 (Ch. D.); *Jankowski v. Pelek Estate* (1995), 131 D.L.R. (4th) 717, 10 E.T.R. (2d) 117 (Man. C.A.). See generally Oosterhoff, *et al.*, *supra*, footnote 25, §12.4.1.

59. See, *e.g.*, *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C. 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, c. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

60. See *Rasmanis v. Jurewitch* (1969), [1970] 1 N.S.W.R. 650 (N.S.W. S.C.), which involved a husband who killed his wife. He held certain real property in joint tenancy with his wife and a third person. The court held that the husband took one-half of his wife's interest upon constructive trust for the third person, with the result that the husband and the third person held the one-third interest as tenants in common, but the joint tenancy continued as to the other two-thirds.

61. *Kennell v. Abbott* (1799), 31 E.R. 416, 4 Ves. Jun. 802 (Eng. Rolls Ct.). It should be noted that the benefit must have been obtained by fraud. If it was obtained without fraud, equity will not intervene. See, *e.g.*, *Bolianatz Estate v. Simon* (2006), 264 D.L.R. (4th) 58, 2006 SKCA 16 (Sask. C.A.), leave to appeal refused (2006), 382 W.A.C. 329 (note) (S.C.C.), in which a beneficiary had been stealing from the testator. He was convicted of fraud and ordered to make restitution. However, the court held that he was not disentitled to a legacy under the will, since he did not commit fraud to obtain the legacy.

commits murder to prevent the execution of a will and thereby benefits from the death,[64] a joint tenant kills the other joint tenant,[65] a beneficiary of social insurance benefits kills the insured,[66] or a beneficiary of an insurance policy kills the insured.[67] So also, a person who is entitled to a remainder interest, and who kills a life tenant, holds the accelerated portion of the interest upon constructive trust.[68]

Accordingly, we submit that this principle can also be used to invalidate a predatory marriage.[69]

5. *Unjust Enrichment.* In *Campbell*,[70] the Appellate Division noted also that because Nidia wrongfully altered Howard's testamentary plan in her favour, equity will intervene to prevent the unjust enrichment of the wrongdoer.[71]

The principle of unjust enrichment is well-known in Canadian law. It was developed, initially at least, largely in the context of co-habitational property disputes. The action in unjust enrichment

62. *McKinnon v. Lundy* (1895), 24 S.C.R. 650 (S.C.C.).
63. *Nordstrom v. Baumann* (1961), 31 D.L.R. (2d) 255, [1962] S.C.R. 147 (S.C.C.); *Re Missirlis* (1970), 15 D.L.R. (3d) 257, [1971] 1 O.R. 303 (Ont. Surr. Ct.); *Re Gore*, *supra*, footnote 42; *Re Charlton* (1968), 3 D.L.R. (3d) 623, [1969] 1 O.R. 706 (Ont. C.A.) .
64. *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168 (1949).
65. *Re Gore*, *supra*, footnote 42; *Schobelt v. Barber* (1966), 60 D.L.R. (2d) 519, [1967] 1 O.R. 349 (Ont. H.C.); *Singh Estate v. Bajrangie-Singh* (1999), 29 E.T.R. (2d) 302, [1999] O.J. No. 2703 (Ont. S.C.J.).
66. *R. v. National Insurance Commissioner, Ex Parte Connor* (1980), [1981] 1 All E.R. 769 (Eng. Q.B.).
67. *Cleaver v. Mutual Reserve Fund Life Assn.* (1891), [1892] 1 Q.B. 147 (Eng. C.A.); *Re Gore*, *supra*, footnote 42; *Brissette v. Westbury Life Insurance Co.* (1992), 96 D.L.R. (4th) 609, [1992] 3 S.C.R. 87 (S.C.C.).
68. See Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, *Scott and Ascher on Trusts*, 5th ed. (Boston, Aspen Publishers/ Wolters Kluwer, 2007), §493. In these circumstances the court is required to determine the life expectancy that the life tenant would have enjoyed.
69. It should be noted that there may also be legal principles that could potentially be used to deny a predator the economic fruits of a predatory marriage. We have already mentioned the common law principle, *ex turpi causa non oritur actio*. See footnote 20, *supra*. It is founded in public policy and is apt to bar a plaintiff's claim if the plaintiff seeks to profit from acts that are "anti-social." See *Hardy v. Motor Insurers' Bureau*, [1964] 2 All E.R. 742 (Eng. C.A.), leave to appeal refused [1964] 1 W.L.R. 1155 (U.K. H.L.). It can also be used to bar a claim, both in contract and in tort, that is "illegal, wrongful or of culpable immorality." See *Hall v. Hebert* (1993), 101 D.L.R. (4th) 129, [1993] 2 S.C.R. 159 (S.C.C.).
70. *Campbell*, *supra*, footnote 29.
71. *Campbell*, *supra*, footnote 29, at p. 119 (A.D.), p. 472 (N.Y.S.).

requires that the plaintiff must satisfy a three-part test: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) 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.[72] If the test is satisfied, the plaintiff is entitled to restitution. The preference is for monetary relief, but if an order for monetary relief is inadequate, a constructive trust may be imposed. However, such a trust can only be imposed if there is a causal link between the enrichment and the property claimed by the plaintiff.[73]

We submit that the principle of unjust enrichment can also be used to invalidate a predatory marriage and, thus, to restore the property that the predator would receive to the rightful heirs. The existence of the marriage ought not to be considered a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the man's property.

4. CONCLUSION

Our courts have not so far indicated that they are prepared to change the assessment criteria used to measure capacity to marry. It would be desirable if these were changed, since they were developed in a time when the economic consequences of holding a marriage valid were minimal. In contrast, today a spouse has very significant rights in the property the other spouse while both are living and when one of the spouses dies. Further, the science of demographics tells us that our society is aging at an accelerating pace, which will lead to an increase in the incidence of predatory marriages. Failure to change the "test" for capacity to marry will thus likely lead to an increase in cases involving predatory marriages brought before the courts and a continuing injustice to the rightful heirs of deceased spouses.

In the alternative or in addition, we submit that the Canadian courts should consider applying equitable principles and remedies to predatory marriages. The application of these principles and remedies in this context is desirable for public policy reasons and will help to stem a growing problem in our society.

72. See *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834 (S.C.C.); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).

73. See *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.), at pp. 649-650, *per* McLachlin J. See generally Oosterhoff, *et al.*, *supra*, footnote 25, §10.5.

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