

DEEMING A PREDATORY SPOUSE UNWORTHY TO INHERIT UNDER CANADIAN COMMON LAW

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Abstract/Abstrait

The thesis exposes the injustice and potential consequences of predatory marriages involving elderlies under Canadian Common Law. It proposes a remedy to cases in which a vulnerable victim spouse, manipulated into marriage, is unduly influenced into executing a new will in favour of his or her predatory spouse, by banning the predatory spouse from inheriting after the victim spouse's death. The suggestion is developed through comparative study of Canadian undue influence and its German equivalents. The common law slayer rule and elder abuse legislation assist in justify the proposed solution.

Cette thèse expose l'injustice et les conséquences potentielles dans la common law canadienne des «mariages prédateurs» impliquant des personnes âgées. Dans les cas où un conjoint vulnérable, victime de manipulation dans le mariage, est indument influencé dans l'exécution d'un nouveau testament en faveur de son conjoint prédateur, cette thèse propose un recours en empêchant le conjoint prédateur d'hériter après la mort du conjoint victime. Cette proposition est développée à travers une étude comparative de la doctrine de l'influence indue du droit canadien et de ses équivalents du droit allemand. La «slayer rule» de la common law et la législation sur l'abus des personnes âgées contribuent à justifier la solution proposée.

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Introduction

“[T]he law is not designed to protect one from one's own folly but ‘to save [persons] from being victimized by other people’.”

Wendy L. Griesdorf, “Crazy in Love: Caregiver Marriages in the Context of Estate Disputes”¹

1. The Problem

Aging, often accompanied with disease and/or disability, makes a person vulnerable. In most cases, elders require assistance in their daily affairs, supervision of their financial matters, attention to their physical comfort and supportive, soothing company. An elderly person is particularly exposed towards those who look after him or her and on whom he or she depends. The relation of dependency creates an opportunity for exploitation, especially since power can corrupt a caregiver.

One of the examples of elder exploitation involves a caregiver marrying an elder in order to access his or her assets. The typical pattern of events in these cases is as follows. Prior to their declining years, the elders enjoy a close and warm relationship with their family members, who are the main beneficiaries under the elders' testamentary dispositions. As the elders age, their mental and/or physical capabilities decrease. Initially, the children provide the care the elders require; but, as the task becomes more demanding, they arrange for a caregiver. With time, the caregivers become familiar with the elders' assets. Then they begin exploiting their position to develop a superficial, emotional, loving relationship to secure the elders' trust. The foundation of the artificially created love and trust provides the caregivers with access and, ultimately, rights to the elder's money and personal property. In the process, they use tactics to alienate and isolate the elders from their families, friends, and other support systems. Through manipulation, veiled threats, and deception, they coerce the elders into marriage. Frequently, the elders, as victim spouses, are incapable of resisting the influence and do not understand the consequences of the marriage they have entered. In most cases,

¹(2005-2006) 25 ETPJ 315 at 326.

subsequent to the marriage, the caregiver, now in the role of a predatory spouse, coerces the elder, who through marriage becomes a victim spouse, to draft a new will. The predatory spouse desires to financially exploit the relationship, namely, to inherit the victim spouse's entire estate, not only the portion a surviving spouse is entitled to. Usually, shortly after executing a new will, the victim spouse dies.

It is difficult, if not impossible, to assess motivations behind a person's actions. A party's prior dependency relation, advanced age, or deteriorating health may raise suspicions, but these are insufficient to determine personal reasons for entering the marriage. However, in some cases, courts have established that the will was made under the undue influence of the predatory spouse.² In these cases, the predatory spouse's motivation was transparent. On the basis of the presented evidence and testimony heard by the court, it was established that the events leading to the marriage were a pretence and that the new will was yet another part of a scheme, in a well-orchestrated plan, to acquire the victim spouse's entire assets.³ Nevertheless, the marriage remains valid and by operation of law, marriage revokes all previous wills and codicils, so the deceased's property passes on intestacy.⁴ Under the law of intestacy, the predatory spouse, as the surviving spouse, despite the unlawful coercion of the elderly victim spouse to draft a new will in his or her favour, still receives most of the estate.⁵

2. The Goal

The crux of the problem is that under Canadian Common Law testamentary undue influence is sufficient grounds to invalidate a will, but the person who influenced the testator does not suffer consequences for his or her actions. In other words, a person can hijack a testator's testamentary freedom without bearing any penalty for his or her actions. The goal is to remedy the cases in which an elderly victim spouse, manipulated into marriage, is unduly influenced into executing a new will in favour of a predatory spouse, by banning the predatory spouse from inheriting after the victim spouse's death.

²See e.g. *Banton v Banton* (1998), 164 DLR (4th) (available on LEXIS) at paras 97-98 [*Banton*].

³See e.g. *Ibid.*

⁴There are exceptions to the rules, but none of them applies to the discussed cases; *Succession Law Reform Act*, RSO 1990, c S.26, ss 15-16 [*Succession Law Reform Act*].

⁵*Ibid* ss 45-46.

It could be preferable to revoke consequences of a predatory marriage by nullifying every marriage that bears features of a predatory union, especially since for many people marriage has a deep, symbolic meaning. Moreover, families whose relative has been financially exploited by a predatory spouse may be unwilling to accept the legal status of a predatory spouse. Probably, in that situation, annulling a marriage would be the most desirable solution. However, challenging a marriage's validity after one spouse's death is difficult. Actions aiming at declaring elders' unions void are usually commenced only after their death. In that case, a marriage can be nullified only if one of the parties did not have the capacity to marry at the time of the marriage ceremony.⁶ In some predatory marriage cases, the victim spouse's marriage was nullified after his/her death. In two out of five presented cases, a court nullified a marriage because, at the time of the wedding, the vulnerable person did not have the capacity to understand the nature, obligations and/or consequences of his or her marriage. However, in most cases, because of a low threshold, lack of capacity is difficult to establish.⁷ Further, marriage is a very sensitive institution, and tampering with it could have unexpected consequences. Opting for extending the grounds for marriage nullification or increasing the entry threshold could infringe a person's right to marry by, for example, preventing marriages of people mentally or physically impaired or by making marriages prone to nullification by third parties.

The potentially applicable legal instruments should not influence personal rights, especially those held by elders, but should affect the position and capability of the potential predatory spouse. A person should not be constrained in making decisions, including entering marriage, getting divorced, or making testamentary dispositions. The legal consequences of a person's, especially an elder's, actions should be subject to no new additional tests implemented to assess his or her mental or physical abilities. However, a person's well-being and assumed interest should be protected against those who try to exploit his or her fragility. For that reason, a person should not be stopped

⁶Griesdorf, *supra* note 1 at 324-327.

⁷Albert H. Oosterhoff, "Consequences of a January/December Marriage: a Cautionary Tale" (1998-1999) 18 ETPJ 261 at 271 [Oosterhoff, "Consequences of a January/December Marriage"].

from acting, but those unjustly benefiting from those acts should be deprived of what they receive.

A predatory spouse is motivated by the prospect of relatively easy financial gain on the victim spouse's death.⁸ To extend his or her interest in the victim spouse's estate beyond that of intestacy, a predatory spouse unduly influences a victim spouse's will. Depriving the spouse of the benefits he or she may receive could constitute an efficient deterrent. For that reason, instead of modifying the law regulating a marriage's validity, preventing legal consequences of predatory marriages could be accomplished through protecting a person's testamentary freedom. Under the current system, that freedom is infringed by marriage, which automatically revokes all testamentary dispositions; then the effects are compounded when the predatory spouse exercises undue influence on the victim spouse's subsequent will. As a result of the marriage and the predatory spouse's actions, the deceased's estate is divided without regard to the deceased's last wishes. Preventing the predatory spouse from inheriting from the victim spouse would significantly decrease the amount of property he or she would acquire as a result of marriage and prevent some of its financial consequences. Moreover, marriage accessibility and validity would not change; but, on a victim person's death, his or her estate would be divided as if the predatory spouse did not exist.

The proposed remedy is designed to protect the victim spouse's testamentary freedom from being violated by a predatory spouse. Freedom of testation lies at the core of succession law. It derives from the notion that an owner has a right to dispose of his or her property on his or her death exactly as he or she does during his or her life.⁹ It entitles a person to express his or her wishes with regard to the division of his or her property on the event of his or her death through a revocable instrument that takes effect only on that person's death.¹⁰ Further, this remedy deprives a predatory spouse of entitlement to his or her spouse's estate. Rights acquired through manipulation and undue influence should not be honoured. Moreover, the solution protects the alleged, rightful interest of a victim

⁸See e.g. *Banton*, *supra* note 2 at paras 97-98.

⁹John H. Langbein, "Substantial Compliance with the Wills Act" (1974-1975) 88 Harv L Rev 489 at 491.

¹⁰Albert H. Oosterhoff, *Oosterhoff on Wills and Succession. Text, Commentary and Materials*, 7th ed (Toronto: Carswell 2011) at 105 [Oosterhoff, *Oosterhoff on Wills*].

spouse's family members, who, if a predatory spouse is declared unworthy to inherit, are the only heirs entitled to the victim spouse's estate. Further, depriving a person from the benefits of his or her actions could decrease the number of predatory marriage cases in which a victim spouse is testamentarily unduly influenced.

This paper is inspired by examples of elder exploitation and victimization. The presented cases discuss the problem in the context of those situations. However, the designed solution applies to cases of predatory marriages regardless of the victim spouse's age.

3. Methodology

This paper builds on a comparative methodology. The issue, arising within a common law jurisdiction, is presented and analysed based on the example of relevant Canadian case law and applicable legislation. However, the proposed and examined solution stems from a civil law jurisdiction, namely, German law. The suggested remedy's suitability to solve the problem, its efficiency in accomplishing the proposed goal, and its compatibility with the legal institutions provided under the Common Law are determined. Each system's independence and differences are respected.

Referring to a foreign jurisdiction facilitates a need for a solution that is not available under Canadian law. In this situation, it is advisable and efficient to borrow from another legal system.¹¹ However, adopting a comparative approach carries a temptation to transplant without due reflection a legal rule from one jurisdiction to another. It is important to bear in mind that legal rules are closely connected with the social, cultural, and political environment within which they have been developed and within which they exist. Stated more directly, plain words and phrasing may be transplanted from one legal system to another, but their culturally dependent interpretation may not be the same.¹²

¹¹See Konrad Zweigert & Kurt Kötz, "Jhering's Influence on the Development of Comparative Legal Method" (1971) 19 Am J Comp L 215.

¹²See Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 Maastricht Journal of European and Comparative Law 111.

If carefully applied, employing a comparative perspective allows examining a remedy already functioning under a foreign jurisdiction, but not yet applied under the receiving state's law. It provides an opportunity to determine a solution's suitability for solving a problem, considers the other jurisdiction's experience in applying the concerned legal remedy, and estimates potential obstacles or side-effects of its implementation. Further, applying a comparative approach facilitates acquiring a better understating of the national legal system of the receiving country itself. The proposal's compatibility with other legal institutions within the receiving jurisdiction is assessed in advance. Moreover, advised alterations to the proposed solution, necessary for maintaining the autonomy of the receiving country's legal system, are predicted and evaluated.

4. The Proposed Remedy

It is proposed to address the issue by referring to institutions present under German law whereby a person who pressures a testator into making a testamentary disposition is declared unworthy to inherit, namely, is deprived of any benefits from the deceased's estate. The German understanding of "duress" is functionally equivalent to the notion of testamentary undue influence under Canadian Common Law.¹³ However, determining the latter has only limited consequences insofar as an unduly influenced will becomes invalid. Expanding those consequences on the basis of the German regulation by declaring a person unduly influencing a testator under Canadian law unworthy to inherit could prevent individuals from infringing on elders' right to testamentary freedom.

Legal institutions present under Canadian Common Law justify adopting the German remedy. Canadian Common Law already provides for declaring a person unworthy to inherit; a court can declare a murderer unworthy to inherit from his or her victim under the slayer rule. The rule's applicability could be extended according to regulations provided under German law. New regulations whereby the abuser of an elder is deprived of any benefits on the elder's death that have been adopted by some American States give further credence to this solution.

¹³Ronald J. Scalise Jr., "Undue Influence and the Law of Wills: a Comparative Analysis" (2008-2009) 19 *Duke J Comp & Int'l L* 41 at 104-106.

5. Presentation of the Argument

The proposed solution deprives a predatory spouse of inheritance under a will and on intestacy by declaring him or her unworthy to inherit if he or she marries and subsequently unduly influences a victim spouse's will. The argument is presented in three steps corresponding to the subsequent parts of the paper.

The first part introduces the concept of predatory marriages and locates it in the wider context of the applicable Canadian legislation. The notion of a predatory marriage is further developed on the basis of particular, relevant case law. Specific features, present in the discussed cases, characteristic for the relations between elderly victim spouses and their predatory spouses are distinguished, analysed, and structured into a pattern. Concerns raised by predatory marriages and some of their consequences are exposed. Further, scholars' proposals aiming at preventing, invalidating, or nullifying the marriages or their outcomes are considered. It is argued that their suggestions are insufficient to prevent the legal and social consequences of predatory marriages and have significant side-effects. There is no obvious method for obviating these unions under Canadian law. For that reason, the attention is turned toward solutions that decrease the profit a predatory spouse could acquire on a victim spouse's death.

The second part presents a comparative study of undue influence under Canadian Common Law and its equivalents (*Drohung* and acts *contra bonos mores*) under German law. Each institution is characterised, its function is described, and the significance of its consequences is considered. They are compared and their compatibility is assessed. Further, examples of their applicability are discussed. It is concluded that, in context of predatory marriage cases, the German legal concept (*Drohung*) is functionally equivalent to testamentary undue influence under Canadian Common Law. On the basis of the analysis, it is suggested that the functional equivalency of each concept and their applicability justify adopting the consequence provided under German law, namely, depriving a predatory spouse of any inheritance after his or her victim spouse's death, as well as under the Canadian law on testamentary undue influence. Potentially, implementing this change could deter a predatory spouse from testamentarily unduly

influencing a victim spouse's will. This would protect the testator's freedom of testation, his or her rightful heirs, and could, possibly, decrease the attractiveness of marriage to a potential predatory spouse. Moreover, it could retrospectively aid already existing cases of predatory marriages in which a victim spouse's testamentary dispositions have been unduly influenced by a predatory spouse.

In the third part, the consequence of introducing a German judicial concept into Canadian Common Law is discussed in the context of already existing common law legal institutions. Subsequent sections show familiarity with the concept of unworthiness to inherit in Canadian and American law. First, it is shown that the concept or its consequences already exists under Canadian Common Law, because under the slayer rule, a court can declare a murderer unworthy to inherit from his or her victim. Further, it is argued that its application can be extended to punish predatory spouses who unduly influence a victim spouse's will, as has happened in some American States where it has been used to combat elder abuse. Moreover, guidelines for the remedy's application are listed and examined. They are formed on the basis of distinguished features of predatory marriages garnered from relevant case law, undue influence, and *Drohung*'s characteristics as well as hallmarks of the Canadian legal system. It is suggested that the proposed remedy could be considered an incremental change to the existing state of law. Its implementation by legislatures and the judiciary is discussed.

Part I Predatory Marriages

1. Introduction

Predatory marriages, understood as marriages between vulnerable persons and their financially motivated caregivers, constitute a significant concern. The problem is especially visible in the case of elders, who are particularly vulnerable. Their age and physical and mental impairments make them prone to be influenced by the people they depend on. It is shown that to acquire financial benefits, caregivers exploit their positions by marrying these elders and, subsequently, unduly influencing the elders' testamentary dispositions. On the example of law binding in Ontario, the severe consequences of vulnerable persons' marriages, especially in the context of their estate planning, are explained.

Canadian scholars recognize predatory marriages as a growing concern. They have advanced a number of suggestions that may decrease the number of predatory marriages by preventing them from taking place or by nullifying them. The proposals stem from Canadian law and most of them would demand legislative action. The suggestions are analysed and considered in the context of predatory marriages as well as of marriages in general. An alternative solution is proposed.

The subsequent sections investigate the problem of predatory marriages in Canada's common law provinces. A definition of a predatory marriage is presented and the marriage's legal consequences are indicated. Cases dealing with the issue are reviewed. On the basis of their analysis, a pattern presenting typical features of a predatory marriage is built. A review of the courts' reasoning follows. Further, predatory marriages are described as a source of moral and ethical concerns. Scholars' solutions are presented and thoroughly considered. It is suggested that existent literature draws only on Canadian legal authorities, which offer limited solutions to the problem addressed here, therefore it is reasonable to refer to concepts emergent in foreign jurisdictions, as explained below.

1.1. Definition of Predatory Marriage¹⁴

While scholars provide different descriptions of the phenomenon, there is no established definition of a predatory marriage.¹⁵ A brief, working definition of predatory marriage and its identifying characteristics follows.

A predatory marriage is composed of a victim spouse and a predatory spouse. The victim spouse depends on external assistance in dealing with daily physical affairs and, because of decreasing mental power, lacks coherent thought to resist influence and recognize its consequences. The predatory spouse becomes the victim spouse's primary caregiver and, subsequently, exploits the position to gain access to the victim spouse's assets and eventually, through marriage, acquires legal rights to the spouse's estate.

The union between the two persons takes the form of marriage. No other relationship (for example, common law marriage) provides such broad property rights and access to a person's assets as those given to spouses under legislation.¹⁶ For example, in Ontario, the spouse acquires, *inter alia*, the right to inherit a substantial part of the estate on intestacy under the *Succession Law Reform Act*¹⁷; the claim for support from the estate under Part V of the *Succession Law Reform Act*¹⁸; and the right to "an equalizing payment from the deceased's estate if the survivor's net family property is less than that of the deceased" under Part I of the *Family Law Act*.¹⁹

The declining health of the vulnerable person makes it difficult for him or her, or for his or her family or friends, to nullify the marriage or question its validity. In most

¹⁴Called also "caregiver marriages" in Griesdorf, *supra* note 1, and "'May-December' Marriages" in Monica Boyd, Anne Li, "May-December: Canadians' in Age-discrepant Relationships" (2003) 70 StatCan 29.

¹⁵C.f. Griesdorf, *supra* note 1 at 316; Albert H. Oosterhoff, "Foreword" in Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, 1d ed (Aurora, Ont: The Cartwright Group., 2010) 1 at 1 [Oosterhoff, "Foreword"]; Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, 1d ed (Aurora, Ont: The Cartwright Group., 2010) at 70 [Whaley, *Capacity to Marry*].

¹⁶The problem of predatory relationships has been discussed also in the context of common law marriages, for example, *Keljanovic Estate v Sanseverino* (2000), 186 DLR (4th) 481 (available on CanLII) [*Keljanovic Estate*].

¹⁷*Succession Law Reform Act*, *supra* note 4 s 45.

¹⁸*Ibid* s 57.

¹⁹Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 272; Albert H. Oosterhoff, "Barrett Estate v Dexter", Case Comment (2000-2001) 20 ETPJ 115 at 120-121 [Oosterhoff, "Barrett Estate"]; *Family Law Act*, RSO 1990, c F 3, s 1 [*Family Law Act*].

cases, the victim spouse lives for an insufficient time to be convinced of the abusive nature of the relationship or to initiate, let alone bring to fruition, legal action.²⁰ After death, the effects of marriage can be nullified only if the marriage was void. Marriage is the most elementary of contracts, with a particularly low entry threshold. For that reason it is very difficult to prove it was void. Only few cases have established that the vulnerable spouse did not have the capacity to marry. *Inter alia*, lack of consent, duress, and undue influence cause marriages to be voidable; and, in that case, their validity can be challenged only by the spouses and only while they are alive.²¹

The mental and physical capabilities of the vulnerable person are diminished. He or she is most often lonely, depressed, and suffering from dementia, Alzheimer's, or some other mental disorder that makes him or her "cognitively impaired and incapable."²² Additionally, he or she may have difficulty caring for him- or herself. Assistance in daily affairs may be required, for instance, with cooking or cleaning; there may be the need for professional help due to severe diseases, for example, cancer or Parkinson's disease.

The inevitable need for a caregiver and the fear of losing one are an important decision-making factor. The help is appreciated. The vulnerable person becomes enchanted with the caregiver and starts seeing him or her as indispensable for his or her survival.²³ Unable to imagine life without external support and companionship, he or she becomes terrified of a situation in which he or she might be deprived of them. Under these conditions a person is very vulnerable and, with little enticement, agrees to anything in order to continue receiving assistance. Alienating the vulnerable person from his or her family and friends makes him or her even more dependent.²⁴ He or she becomes unable

²⁰For the purposes of this paper, only cases of predatory marriages involving elders are considered. However, it is possible to imagine that any situation in which an imminent death of one of the spouses impends could be classified as a "predatory marriage", for example a situation of a terminally ill young person; see Terry L. Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America" (2008) 96 KY LJ 275.

²¹Griesdorf, *supra* note 1 at 324.

²²Kimberly Whaley, "Predatory Marriages: Legal Capacity to Marry and the Estate Plan", *The Six-Minute Estates Lawyer 2011* (14 December 2011), online: Whaley Estate Litigation <<http://whaleystatelitigation.com/blog/2011/03/the-six-minute-estates-lawyer-april-27-2011/>> at 1 [Whaley, "Predatory Marriages"]; Whaley, *Capacity to Marry*, *supra* note 15 at 69.

²³As stated by Griesdorf "[t]he relationship emerges from a previously non-romantic caregiving capacity" Griesdorf, *supra* note 1 at 316; Albert H. Oosterhoff, "Foreword", *supra* note 15 at 1.

²⁴Due to the alienation, the family and friends have restricted access to the elder. They are not informed

to resist suggestions made by his or her caregiver. In most cases, the vulnerable person is easily taken advantage of. He or she adheres to suggestions of the caregiver and accepts his or her proposals, including marriage. Dependency prevents a person from seeing the reasons for which another party desires marriage or to recognize all the consequences of their union.²⁵ Awareness of being exploited is very rare.²⁶

The predatory spouse is usually much younger than the vulnerable spouse. However, that does not always have to be the case. It is possible to imagine a predatory marriage developing between two elderly or young people wherein one of them acts as caregiver to the other.²⁷ The person who requires help and is dependent may just as easily be exploited as when the caregiver is much younger. Nevertheless, it is essential for the predatory spouse to be the primary caregiver. In this way he or she is capable of developing a relationship in which he or she has the dominant position. The power acquired over the vulnerable person allows the predatory spouse to pursue methodically and achieve his or her nefarious goals.

Care and affection provide the facade for the true reason the predatory spouse pursues the marital relationship. The predatory spouse is motivated to exploitation for personal benefit.²⁸ All actions of the predatory spouse aim at acquiring access to and control over the vulnerable person's property.²⁹ Marriage is merely an instrument; it becomes yet another tactic employed to achieve the strategic goal.³⁰ Prior to the marriage, the caregiver starts managing the vulnerable person's financial affairs and commences asset appropriation, including money and physical property. Testamentary dispositions are influenced as well. On the day of marriage, the well-planned and reasoned will made

about the marriage until after the wedding. The marriage ceremony is usually witnessed by strangers.

²⁵Whaley, *Capacity to Marry*, *supra* note 15 at 70.

²⁶Out of five later discussed cases, in only one of them *Feng v Sung Estate* (2003), 1 ETR (3d) 296, 37 REL (5th) 441 aff'd 11 ETR (3d) 169, 9 RFL (6th) 229 (available on LEXIS) [*Feng*] was the elder aware of being exploited and informed his relatives about it; he told them that he was threatened into giving money to his caregiver.

²⁷Oosterhoff believes that age discrepancy is a "typical" feature of a predatory marriage. See Albert H. Oosterhoff, "Foreword", *supra* note 15 at 1.

²⁸Whaley, *Capacity to Marry*, *supra* note 15 at 69.

²⁹Oosterhoff, "Barrett Estate", *supra* note 19 at 116.

³⁰Griesdorf, *supra* note 1 at 315.

in favour of the vulnerable person's family or friends is revoked by operation of law.³¹ In most cases, the vulnerable person executes a new will in favour of and under the undue influence of the new spouse. At the time of his or her death, the vulnerable person's true testamentary intention is not expressed.

1.2. Relevant Legislation

Canadian Common Law does not regulate the problem of predatory marriages. However, the issue involves institutions provided under family and succession law which, in Ontario, are governed by the *Succession Law Reform Act* and the *Family Law Act*.³² Statutes effect the position of a spouse in marriage by, *inter alia*, providing him or her with rights. In that context, especially important is the impact of marriage on spouses' rights to each other's estates and their wills.

Marriage has a significant impact on spouses' wills. Under the *Succession Law Reform Act* it revokes all testamentary dispositions made prior to the marriage, regardless of the testator's intention or his or her testamentary capacity.³³ Consequently, if a spouse does not make a valid will after entering a marriage, his or her estate passes on intestacy.³⁴

A person has substantive rights to his or her spouse's estate on intestacy. Generally speaking, a surviving spouse is entitled to the preferential share, which in Ontario currently amounts to \$200,000.³⁵ If the deceased had any issue, the residue of the property, if any, is divided between the surviving spouse and the children. The size of the distributive share depends on the number of the deceased's children and varies from one-half to one-third of the residue.³⁶

³¹*Succession Law Reform Act*, *supra* note 4 s 16.

³²*Ibid*; *Family Law Act*, *supra* note 19 s 1.

³³*Succession Law Reform Act*, *supra* note 4 ss 15-16.

³⁴There are certain exceptions to the rule, e.g. a will made in consideration of a marriage with a specific person is not revoked by a subsequent marriage; see *Ibid* s 16.

³⁵*Succession Law Reform Act*, *supra* note 4 s 45.

³⁶*Ibid* s 46.

A spousal legal and moral obligation to provide for each other does not cease on a spouse's death.³⁷ The surviving spouse is entitled to claim support out of the estate because, immediately before dying, a deceased financially supported him or her or, at least, was obligated to do so.³⁸ The court may order "adequate support" out of the deceased's estate for any dependant of the deceased, including a surviving spouse, left without "adequate provision for the proper support."³⁹ The court exercises discretion with regard to the duration, amount, and conditions of the support.

Further, Ontario's *Family Law Act* entitles a person to elect whether to inherit after his or her deceased spouse under the will and/or on intestacy to receive an equalizing payment out of his or her spouse's estate.⁴⁰ The surviving spouse is entitled to one-half of the excess of the difference between "the net family property of the deceased" and "the net family property of the surviving spouse."⁴¹ The court is entitled to modify the due amount only if equalization would be unconscionable.⁴²

2. Framing the Problem of Predatory Marriages in the Context of Relevant Case Law

An individual who is fully mentally and physically capable of managing his or her life is in less danger of being financially exploited and, if approached for that reason, is capable of protecting him or herself or of referring to other people for help. Sick, elderly, and mentally impaired people are among the most vulnerable to financial predation. Their physical existence depends on the assistance of their caregivers; they are mentally weak, prone to manipulation, and easily isolated from external sources of help. In their old age, they should be provided with an opportunity to die with dignity, surrounded by those who care about them the most. Protection of elders requires applying a uniform solution that will help prevent situations in which they become victims of people pursuing them for their personal financial gain.

³⁷Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 861.

³⁸*Succession Law Reform Act*, *supra* note 4 Part V.

³⁹*Ibid* s 58.

⁴⁰*Family Law Act*, *supra* note 19 s 5.

⁴¹*Ibid* s 5(2); see generally Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 816-850.

⁴²*Family Law Act*, *supra* note 19 s 5(6); see generally Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 824.

The relevant case law presents examples of predatory marriages involving elders. The cases are listed, their relevance explained, and the rulings summarized. Features of predatory marriage involving an elder are discussed in the context of the relevant case law. A general pattern consisting of elements necessary for recognizing a predatory marriage is derived from the facts presented in the cases. Consideration of the decision of the rulings follows. Final comments conclude the issue of predatory marriages in the case law.

2.1. Relevant Case Law

Five rulings have been given during the last decade in Canada's common law provinces that deal specifically with the problem of predatory marriages between an elderly person and a much younger person⁴³: *Banton v Banton*⁴⁴, *Barrett Estate v Dexter*⁴⁵, *Danchuk v Calderwood*⁴⁶, *Feng v Sung Estate*⁴⁷, and *Hart v Cooper*.⁴⁸

These cases present the essence of the problem of predatory marriages relating to the elderly. Details differ slightly, but a pattern of events is common. For each case, facts are well established and contain all the features characteristic of predatory marriages.⁴⁹

The cases were selected because of the distinguishing features they have in common. In all the cases, a female caregiver exploited a vulnerable, physically and mentally impaired male elder.⁵⁰ The man was dependent on the woman and she was free

⁴³These cases are the most often referred to when the problem of predatory marriage is considered. The same rulings have been discussed by many scholars, e.g. Griesdorf, Oosterhoff, and Whaley. The problem is present also in other common law countries, *inter alia* Great Britain and the United States; see e.g. *In re Davey*, [1981] 1 WLR 164 [*In re Davey*]; Ashley E. Rathbun, "Marrying into Financial Abuse: A Solution To Protect the Elderly in California" (2010) 47 San Diego L Rev 227. The considered cases were decided within the last decade.

⁴⁴*Banton*, *supra* note 2.

⁴⁵(2000), 268 AR 101, 34 ETR (2d) 1 (available on LEXIS) [*Barrett*].

⁴⁶(1996), 15 ETR (2d) 193, 67 ACWS (3d) 418 (available on LEXIS) [*Danchuk*].

⁴⁷*Feng*, *supra* note 26.

⁴⁸(1994), 2 ETR (2d) 168, 45 ACWS (3d) 284 (available on LEXIS) [*Hart*].

⁴⁹There are other cases that identify the problem of predatory marriages involving elders, but are difficult to refer to because not all the facts are mentioned or discussed in the ruling; see e.g. *Re McElroy*, [1978] 22 OR (2d) 381, 93 DLR (3d) 522 (available on LEXIS) [*Re McElroy*].

⁵⁰A similar situation could occur in the case of a terminally ill young person, but this paper is limited to considering situations involving elders.

to influence him.⁵¹ In each case, the age discrepancy between the parties and the terminal illness of the elder clearly indicated that the predatory spouse had no intent to spend years of her life with her new, but much older spouse.⁵² His death was imminent. As a result, the relationship would be very short and bore the potential of significant financial gain by the predatory spouse.⁵³ In practice, the relationship resembled a business arrangement.⁵⁴ The predatory spouse would provide companionship and care for the elder till his death and, in exchange, would inherit most of his assets. However, the elders seemed unaware of all the consequences of marriage and, in most cases, strongly believed in the sincerity of the woman's affection.⁵⁵ They seemed unaware that their caregiver and future wife was executing a plan of financial exploitation; that she was using marriage to gain legal rights to their assets and, eventually, to their estate.⁵⁶ The woman was aware that the marriage, by revoking the spouse's previous will, affected his testamentary dispositions. Further, she unduly influenced him to acquire power of attorney and to have a new will drafted in her favour.⁵⁷

The cases occurred within a decade and bear significant similarities. However, in each of the cases a court focused on different issues, credited different evidence, and ruled differently. In their rulings, the courts referred to other predatory marriage cases, but did not recognize a common pattern present in all the cases. Brief summaries of each of the considered cases follow.

⁵¹In all the listed cases, the woman is the predatory spouse; however, that does not have to be the case; see e.g. *In re Davey*, *supra* note 43.

⁵²A relationship between an older man and a younger woman does not need to create dependency; see e.g. *Hamilton Estate v Jacinto*, 2011 BCSC 52 (available on CanLII).

⁵³There are cases, which have some of the features of predatory marriages, but the spouses live together for a long time, see e.g., *Keljanovic Estate*, *supra* note 16.

⁵⁴It is not unusual for an elder to benefit his or her caregivers under his or her will; however, in those cases, the testator makes a conscious decision to give his or her estate in exchange for daily care and assistance; see e.g., *Boghici Estate v Benke*, [2005] 13 ETR (3d) 295, 136 ACWS (3d) 780 (available on LEXIS).

⁵⁵Feng seems to be an exception (*Feng*, *supra* note 26). He is aware that the woman marries him for his money.

⁵⁶A relationship between an older man and a younger woman may have some features of a predatory relationship, even when the parties do not marry; see e.g. *Vout v Hay*, [1995] 2 SCR 876, 125 DLR (4th) 431 (available on CanLII) [*Vout*]. In Ontario this falls under the *Succession Law Reform Act*; *supra* note 4 and the *Family Law Act*, *supra* note 19. This issue will be discussed later.

⁵⁷Testamentary undue influence may occur regardless of marriage; see e.g. *Re Marsh Estate* (1991), 41 ETR 225, (1990) 99 NSR (2d) 221 (available on CanLII) [*Re Marsh Estate*].

George Banton (hereinafter “Banton”)⁵⁹ was married twice and had a very close and loving relationship with his five children. They assisted him in daily affairs, visited him frequently, and enjoyed the broad aspects of a family life. Under the will he executed in 1991, Banton divided his estate equally among his children.⁶⁰ He gave two of his children a continuing power of attorney in regard to all his property. In 1994 he transferred some of his money into his and his sons’ joint bank accounts.

Banton was severely deaf and had difficulty walking. At the beginning of the 1990’s, he was diagnosed with prostate cancer and subsequently castrated. After his second operation in 1992, his family was informed that he would live two to three years more. He decided to move to a retirement home in 1993. Soon afterwards, in 1994, he became depressed and lonely, his memory deteriorated, and he experienced trauma, which resulted in a drastic change of his personality. He became reckless and started sharing information about his assets with strangers; he became detached from reality and delusional about his children. About the same time, when he was 88 years old, he began developing a close relationship with 31-year-old Muna Yassin (hereinafter “Yassin”), a waitress in the restaurant at the retirement home. Under her influence, he became enthusiastic about his mental, physical, and financial capabilities. Initially, he hired her in July 1994 as his companion and assistant. On a few occasions, he unsuccessfully tried to end their business and personal relationship.

Banton’s children were concerned about his relationship with Yassin, and had his mental capacity assessed. On November 14, 1994, he was certified as financially incompetent.⁶¹ After being informed, he, in the company of Yassin, attempted to withdraw large sums of money from the joint account. His sons exercised their power of

⁵⁸*Banton*, *supra* note 2.

⁵⁹Names used in this paper do not follow the courts’ example.

⁶⁰He also provided a certain amount of money for the care and maintenance of his second wife, but she predeceased him.

⁶¹Later, George Banton’s capacity was assessed a few more times. On May 17, 1995, George Banton was found capable of managing his property and delegating power of attorney. However, on June 19, 1995, he was certified as not having the capacity to manage his property; however, he was found capable of delegating power of attorney and personal care.

attorney on December 15, 1994, and transferred all Banton's money to a trust for income and capital of which Banton was the sole beneficiary. His children were designed as the beneficiaries after his death.

Banton and Yassin were married on December 17, 1994. Two strangers acted as their witnesses. Banton's children were unaware of the marriage. On December 21, 1994, Banton executed a new will and power of attorney, both in favour of Yassin.⁶² He re-executed them in May 1995.

In April 1995, Banton moved to Yassin's apartment. His family had virtually no access to him until he was hospitalised in October 1995. Subsequently, he was moved to a retirement home, where he died on February 14, 1996.

The court found that Banton had the capacity to enter the marriage. Nonetheless, the will executed in 1994 was found invalid; Banton did not have the testamentary capacity at the time of making it, and the will was made under the undue influence of Yassin. His estate passed on intestacy. The trust created by his sons was found invalid. The money became part of the estate, with an exception of the capital obtained from the sale of his house.

*Barrett Estate v Dexter*⁶³

Dwight Wesley Barrett (hereinafter "Barrett") was married twice and had four children. Two of his sons were particularly concerned with his well-being. They visited and assisted him and organized a support net for him.

Barrett suffered from dementia of the Alzheimer's type.

92-year-old Barrett met 54-year-old Arleen Sharn-Dexter (hereinafter "Sharn") in the summer of 1995. They visited each other and enjoyed each other's company. On May 15, 1996, she began renting a room in his house and became his part-time housekeeper. Soon, Sharn started influencing Barrett's decisions, for example, he gave her the privilege

⁶²The will and the power of attorney were re-executed on May 4, 1995.

⁶³*Barrett*, *supra* note 45.

of living in his house during her lifetime at the expense of his Estate; he started withdrawing cash from his bank account and gave the money to Sharn. She misguided and eventually alienated him from his family.

Barrett's sons became disturbed with Sharn's influence over their father. At the suggestion of Barrett's lawyer, Barrett gave his two sons an enduring power of attorney on April 19, 1996. On October 9, 1996, after they had his capacity assessed, Barrett was certified as mentally incapable of making reasonable judgments with respect to his estate, and the enduring power of attorney came into effect.

Barrett and Sharn's marriage ceremony took place on November 2, 1996. Strangers acted as witnesses. His family was unaware of the wedding.

In January 1997 a doctor, to whom Sharn had taken Barrett, assessed "that his mental condition was good for a man of his age."⁶⁴ Soon thereafter, on January 12, 1997 Barrett executed a new, hand-written will, under which he left almost his entire estate to Sharn.

Barrett died in July 1997.

The court decided that Sharn and Barrett's marriage was null. Barrett did not have the capacity to marry and was unduly influenced into marriage. The January will was not considered juridically operative, therefore his children inherited his estate.

*Danchuk v Calderwood*⁶⁵

George Danchuk (hereinafter "Danchuk") was separated from his second wife and had three children. He enjoyed a close relationship and was in daily contact with his daughter. In his September 1986 will, he divided his estate equally among his children. In 1992 he gave his daughter power of attorney.

Danchuk's daughter became concerned with his memory loss and disorientation. In 1993, she hired 46-year-old Ida Lorraine Ducolon (hereinafter "Ducolon") to provide

⁶⁴*Ibid* at para 27.

⁶⁵*Danchuk*, *supra* note 46.

in-home care for the 80-year-old Danchuk. Under Ducolon's influence Danchuk's behaviour changed visibly. For example, he stopped calling his daughter or answering her calls. He became isolated from his family and friends.

On January 14, 1994, during a ceremony arranged by Ducolon, she and Danchuk were married. A neighbour and her husband acted as witnesses. Danchuk's family was not aware of the wedding. On January 26, 1994, the Danchuks met with a lawyer to prepare a new will and a power of attorney in favour of Ducolon.⁶⁶ During the meeting Ducolon spoke for herself and for Danchuk.⁶⁷ The will was executed on February 3, 1994. At approximately the same time, the Danchuks opened a joint bank account and acquired credit cards.

Two doctors had independently diagnosed Danchuk with senile dementia, first on May 17, 1993 and then at the beginning of 1994. They assessed him as not capable of managing his finances.

Danchuk died on June 2, 1994.

Ducolon and Danchuk's marriage was declared void because of Danchuk's prior subsisting marriage. The court found that as of January 1994 Danchuk was incapable of making a will and that the will executed on February 3, 1994 was made under Ducolon's undue influence. Further, Ducolon's actions were financially motivated.

*Feng v Sung Estate*⁶⁸

Kam Yuen Sung (hereinafter "Sung") was a widower; he had four sons and was especially close to one of them. His son assisted Sung in his daily affairs, especially after he was diagnosed with lung cancer, pneumonia, and Parkinson's disease. Sung executed a will in favour of his family on February 3, 1999.

⁶⁶Under the new will Ducolon received the title to his house.

⁶⁷The lawyer felt that the soon-to-be deceased had "some difficulty with the words" (*Danchuk, supra* note 46 at para 71).

⁶⁸*Feng, supra* note 26.

In December 2000, 70-year-old Sung hired 47-year-old Qi Zi Feng (hereinafter “Feng”) as his part-time housekeeper. She acted as nurse when his disease progressed. A couple of months later, on August 21, 2001, Sung was told by his doctor that he was dying.

Sung and Feng had gone to a lawyer on August 16, 2001, to prepare a prenuptial agreement. Despite Sung’s belief, the agreement never came into force. The Marriage Licence suggests that their marriage was planned for August 28, 2001. Instead, it took place on August 23, 2001, and was witnessed by strangers.

As declared under the prenuptial agreement, Sung transferred \$30,000 to an account opened in his and Feng’s joint names. Additionally, Feng secretly withdrew approximately \$26,500 from his personal account.

Sung’s children did not know about the marriage. When Sung told his son about the marriage, he explained that he feared that Feng would abandon him if he did not marry her. When informed that the prenuptial agreement was not in force, Sung, without Feng’s knowledge, transferred his property and some of his funds to his sons.

Sung died on October 13, 2001.

The court found the marriage of Sung and Feng to be null and void. Feng had unduly influenced him into marriage and deprived him of the benefit of marriage with a prenuptial agreement; he lacked the mental capacity to refuse her proposal and did not comprehend the consequences of their marriage.

*Hart v Cooper*⁶⁹

Kazimierz Smiglicki (hereinafter “Smiglicki”) was a widower; he had three children with whom he maintained contact. Under his will of 1988, he divided his estate among his children.

⁶⁹*Hart, supra* note 48.

In February 1991, 76-year-old Smiglicki met 58-year-old Heidi Hart (hereinafter “Hart”). She had been married a number of times before they met. They developed a sexual relationship.

On September 13, 1991, Smiglicki was diagnosed with abdominal cancer and was advised that he would die within a couple of months. He began taking drugs (including morphine) that had the potential to affect his mental capacity; his doctors assessed him as confused and mentally impaired.⁷⁰

Smiglicki and Hart married on October 20, 1991, when he was released from the hospital on a three-day pass. The witnesses were Hart’s acquaintances. Smiglicki’s children were told about the marriage only after it took place. However, before that event, their father spoke with them about the possible marriage. Shortly after the wedding, Smiglicki transferred some of his assets, including \$13,000, to Hart and executed a power of attorney in her favour.

Hart prevented Smiglicki’s doctor from accessing his patient. Smiglicki did not return to the hospital after the three days. He was subsequently found by the police, and he admitted that he had been kidnapped and wished to go back to the hospital. He died on November 16, 1991.

The court found Smiglicki and Hart’s marriage valid. The marriage revoked his will and his estate passed on intestacy.

2.2. Pattern of Predatory Marriages

Certain facts are common in all the summarized cases. On the basis of repeating factors, a pattern of necessary features inherent to a predatory marriage is presented. Each element is discussed in context of the relevant case law.

⁷⁰The hospital’s record is unclear on this matter.

2.2.1. Reciprocal Relationship between the Children and Their Parent

In all the cases there was a close and warm relationship between the father and his family. Banton had a very close fatherly relationship with all of his five children. They enjoyed a loving family life; they visited and assisted him personally or, when needed, arranged for care.⁷¹ Danchuk's daughter was in daily contact with her father and managed his finances.⁷² Sung's son and his wife assisted him every time he went to a doctor.⁷³

The elders' affection for their children was confirmed by the fact that they wanted their children to inherit their assets. Legal actions executed by the elders proved they trusted their children. Wills were made in favour of the children and powers of attorney were given to them. For example, Banton not only made a will in favour of his children, but gave them a continuing power of attorney in regard to all his property; he also transferred money into a joint bank account he had with his sons.⁷⁴ Danchuk, under his will, wished to have his estate equally divided among his children.⁷⁵ Barrett gave his children enduring power of attorney.⁷⁶

2.2.2. Need for Continuous Care

The mental and/or physical deterioration of the elders made it necessary for them to be assisted in their daily affairs. When their children were unable to provide sufficient care, they arranged for appropriate help. For example, prior to Barrett's receiving full-time care, his son visited him regularly, he had a hot meal delivered once a day, and he had his apartment cleaned weekly.⁷⁷ Danchuk's daughter cooked for him and phoned daily.⁷⁸ In most cases, when the children became concerned with their father's inability to live alone, in-home help was provided through a contract signed by the caregiver and the elder, his child or children. For instance, Sharn was hired as Barrett's housekeeper;⁷⁹ and

⁷¹*Banton, supra* note 2 at paras 11-12.

⁷²*Danchuk, supra* note 46 at para 46.

⁷³*Feng, supra* note 26 at para 12.

⁷⁴*Banton, supra* note 2 at para 1.

⁷⁵*Danchuk, supra* note 46 at para 9.

⁷⁶*Barrett, supra* note 45 at para 13.

⁷⁷*Ibid* at para 8.

⁷⁸*Danchuk, supra* note 46 at para 46.

⁷⁹*Barrett, supra* note 45 at para 11.

Feng, an experienced nurse, was employed to provide care for the terminally ill Sung.⁸⁰

2.2.3. Knowledge of the Severe Health Issues and Assets of the Elder

The elders were all ill in various ways. Banton was deaf, had difficulty moving, and was suffering from depression and trauma after being castrated.⁸¹ Smiglicki had inoperable abdominal cancer.⁸² Sung while depressed and lonely was diagnosed with terminal lung cancer and Parkinson's disease.⁸³ The women were aware of these men's health problems, both mental and physical. For instance, Hart was present when Smiglicki was informed that he would die within a couple of months and was aware that he began taking drugs that could cause confusion, sedation, hallucinations, agitation, and disorientation.⁸⁴ Feng was Sung's nurse and, *inter alia*, was giving him his medications and changing his diapers.⁸⁵ Ducolon was hired because of the progressive deterioration of Danchuk's mental capabilities.⁸⁶

The women had substantial knowledge of the financial assets of the elders. Banton showed his investment and bank account statements to other residents and staff at his retirement home.⁸⁷ Ducolon became familiar with the exact amount of money in Danchuk's private bank account about a month before she married him.⁸⁸ Sharn confessed knowing prior to the wedding that, as Barrett's wife, she would inherit about \$40,000 from him.⁸⁹

2.2.4. Alienation of the Elder's Family

The relationship between the father and his children changed once the caregiver started influencing his decisions. As in the case of Barrett and Banton, the children were concerned with the effect their father's caregiver had on him. They were aware that the

⁸⁰Feng, *supra* note 26 at para 54.

⁸¹Banton, *supra* note 2 at paras 1, 11-12.

⁸²Hart, *supra* note 48 at para 6, 8.

⁸³Feng, *supra* note 26 at paras 10-13.

⁸⁴Hart, *supra* note 48 at para 8.

⁸⁵Feng, *supra* note 26 at para 40.

⁸⁶Danchuk, *supra* note 46 at para 51.

⁸⁷Banton, *supra* note 2 at para 18.

⁸⁸Danchuk, *supra* note 46 at para 127.

⁸⁹Barrett, *supra* note 45 at para 87.

physical and mental frailty of their father made him vulnerable to the influence of the person he depended on. Most striking was the case of Danchuk who, under Ducolon's influence, committed deeds incompatible with his strict religious beliefs and, in spite of his life-long objection to credit cards, obtained one.⁹⁰ Under the influence of Yassin, Banton became enthusiastic about his physical, mental, and financial abilities.⁹¹ The impact of the caregivers' increased control over the elders became apparent in changes to the elders' character after live-in, full-time care commenced. As caregivers, most of the women lived in the same house or apartment as the men. In the case of Banton, he moved to Yassin's apartment four months after they were married.⁹²

As time progressed, the families became more and more separated from their fathers. In some cases friends and even doctors were prevented from having contact with the elders. For instance, after Banton moved in with Yassin his family had no access to him;⁹³ Sharn removed Barrett's family photos, interfered with family gatherings, and spoke for him when in contact with his family.⁹⁴ Danchuk's daughter testified that, under influence of Ducolon, her father stopped calling her and answering her calls; his friends claimed that Ducolon prevented them from communicating with Danchuk.⁹⁵

2.2.5. Marriage Unknown to the Children

The children were concerned with the situation, but they did not realize how serious it was. The men were being manipulated into marriage. Some of them were threatened with being abandoned if they did not follow the wishes of their caregivers. This threat presented a serious danger to the elders, especially since, for example, Barret was convinced that Sharn's presence stopped his sons from putting him into a nursing home;⁹⁶ Yassin appeared to Banton as a relief to his loneliness and depression;⁹⁷ Sung

⁹⁰*Danchuk, supra* note 46 at paras 58-60, 65.

⁹¹*Banton, supra* note 2 at para 18.

⁹²*Ibid* at para 1, 29.

⁹³*Ibid* at para 29.

⁹⁴*Barrett, supra* note 45 at para 44.

⁹⁵*Danchuk, supra* note 46 at para 56.

⁹⁶*Barrett, supra* note 45 at para 43.

⁹⁷*Banton, supra* note 2 at para 18.

was absolutely physically dependent on the help he was receiving from Feng;⁹⁸ and Danchuk was disoriented when left alone.⁹⁹

In all the cases it was the woman who obtained the marriage licence and arranged the marriage ceremony. The ceremony took place on short notice and there was no wedding reception. Smiglicki and Hart's marriage took place when he was released from hospital on a three-day pass.¹⁰⁰ According to the marriage licence, Sung and Feng's marriage was planned for August 28, 2001, but because of his deteriorating health it was moved to August 23, 2001.¹⁰¹ Banton and Yassin married in her apartment, three days after they obtained the marriage licence.¹⁰²

In none of the cases were members of the family present during the ceremony. Except for Smiglicki's children, the vulnerable person's family was informed about the marriage only after the wedding took place. For instance, Banton did not inform his children about his intentions in spite of the fact that he saw them during a Christmas party they held for him two days before the marriage was finalized.¹⁰³ The children were surprised by the information; and, like Sung's son, they were disturbed and got very upset on hearing the news.¹⁰⁴

Randomly chosen parties witnessed the weddings. For example, a limousine driver and a taxi driver were present during Sharn and Barrett's wedding ceremony, and the next-door neighbours during Ducolon and Danchuk's marriage.¹⁰⁵ Feng had difficulties recalling who witnessed her and Sung's wedding.¹⁰⁶

Moreover, the future spouses had known each other for no longer than a few months to a little over a year before they married. Banton knew Yassin for less than six

⁹⁸*Feng*, *supra* note 26 at para 10.

⁹⁹*Danchuk*, *supra* note 46 at para 51.

¹⁰⁰*Hart*, *supra* note 48 at para 18.

¹⁰¹*Feng*, *supra* note 26 at para 25.

¹⁰²*Banton*, *supra* note 2 at para 99.

¹⁰³*Ibid* at para 83.

¹⁰⁴*Feng*, *supra* note 26 at para 22.

¹⁰⁵*Barrett*, *supra* note 45 at para 22; *Danchuk*, *supra* note 46 at para 63.

¹⁰⁶*Feng*, *supra* note 26 at para 30.

months.¹⁰⁷ Sharn manipulated Barrett into marriage within six months after becoming his caregiver.¹⁰⁸

2.2.6. A Significant Age Difference between the Parties

In each situation, the relation developed between a significantly older man and a much younger woman. For example, 90-year-old Banton engaged in a relationship with 31-year-old Yassin;¹⁰⁹ Danchuk was 34 years older than Ducolon;¹¹⁰ and Barrett was about 40 years older than Sharn.¹¹¹

2.2.7. Predatory Spouse's Receiving Financial Benefits

In all cases, the predatory spouse, sometimes even before the marriage took place, influenced the elder's financial decisions, gained access to his assets, and received significant amounts of money. For example, Barrett was observed handing over money he had just withdrawn from a bank to Sharn;¹¹² Smiglicki within the two weeks following his marriage effectively gave his new spouse \$13,000 and his car;¹¹³ Sung opened a joint account with his newly married wife into which he transferred \$30,000, and Feng withdrew another \$26,500 from Sung's personal account.¹¹⁴

The predatory spouses affected the last will of the elders as well. Some of them, like Hart, who was married six times before meeting Smiglicki, might have been aware that marriage revokes prior wills.¹¹⁵ Nevertheless, most of the women scheduled meetings with lawyers to discuss new wills and power of attorney for their husbands shortly after the marriage ceremony took place. The newly executed wills were almost exclusively made in favour of the predatory spouses. Yassin arranged meetings with Banton's lawyer to discuss and prepare a new will for her spouse; the will was executed four days after

¹⁰⁷*Banton*, *supra* note 2 at para 1.

¹⁰⁸*Barrett*, *supra* note 45 at paras 15, 21.

¹⁰⁹*Banton*, *supra* note 2 at para 1.

¹¹⁰*Danchuk*, *supra* note 46 at paras 2, 6.

¹¹¹*Barrett*, *supra* note 45 at paras 7, 10.

¹¹²*Ibid* at para 15.

¹¹³*Hart*, *supra* note 48 at para 20.

¹¹⁴*Feng*, *supra* note 26 at paras 37, 40.

¹¹⁵*Hart*, *supra* note 48 at para 5.

their wedding.¹¹⁶ Ducolon and Danchuk met a lawyer to make Danchuk's new will and power of attorney on the twelfth day of their marriage; and she spoke for him during their preparation.¹¹⁷ Within less than two months, Barrett executed a will in favour of Sharn, and she was also given the privilege of living in his house during her lifetime at the expense of the estate.¹¹⁸

In all the cases in which wills were prepared after the marriage took place, the court recognized that they were made under undue influence of the predatory spouse and found them invalid. None of the testamentary dispositions made prior to the marriage were made in contemplation thereof. Because marriage revoked all the wills made prior to it, if the marriage itself was valid, the estate of the deceased was passed on intestacy. When the marriage was invalid, the estate was divided according to the last valid will of the deceased.

2.2.8. Imminent Death of the Elder

In each case, the physical and/or mental health of the elder was deteriorating severely. At the time of his wedding, Sung was suffering from lung cancer and diabetes and could not walk or feed himself because of Parkinson's disease; he was later diagnosed with pneumonia.¹¹⁹ Smiglicki was terminally ill with abdominal cancer and was supposed to be hospitalized.¹²⁰ Banton had had his prostate removed, was deaf, had difficulty walking, and his mental abilities and memory were weakened.¹²¹

The imminent death of the elderly spouses was a natural and foreseeable consequence of their state of health. Because of the age difference and the men's terminal conditions, the parties' marriage lasted for only a short period of time. Smiglicki and Hart's marriage took place less than a month before he died;¹²² Sung married Feng

¹¹⁶*Banton*, *supra* note 2 at para 1.

¹¹⁷*Danchuk*, *supra* note 46 at para 64.

¹¹⁸*Barrett*, *supra* note 45 at para 15.

¹¹⁹*Feng*, *supra* note 26 at para 10.

¹²⁰*Hart*, *supra* note 48 at para 21.

¹²¹*Banton*, *supra* note 2 at para 1.

¹²²*Hart*, *supra* note 48 at paras 18, 26.

approximately a month and a half before his death;¹²³ and Danchuk was married for less than 6 months.¹²⁴

2.3. Issues Considered in Rulings

Each judge focused on the distinguishing features of the considered case. They did not recognize a common pattern present in all the predatory marriage cases. Consequently, each of them chose a different approach and considered different factors. However, particular judges acknowledged some similarities between the cases and drew on them while contemplating the verdict.

In *Banton v Banton*¹²⁵ the court focused its deliberation on the issue of Banton's testamentary capacity at the time he was making his will in December 1994 and re-executing it in May 1995; Yassin's potential testamentary undue influence; the validity of their marriage and the validity of the 1994 trust made by Banton's sons. The court recognized that it was a "case of a lonely, depressed, terminally ill, severely disabled and cognitively impaired old man whose enfeebled condition made him an easy prey for a person like [Yassin] with designs on his property."¹²⁶ The court discarded the notion that Yassin's motivation influenced the validity of the marriage. The court decided that Banton's will was invalid because he was under the delusion that his children cared about his money not him and because Yassin unduly influenced the making of the will. The marriage was found valid, because George Banton was capable of appreciating the nature, obligations and responsibilities of the marriage relationship. The trust created by Banton's sons was found invalid and the money it protected became a part of the estate.

The validity of the marriage was the main issue in *Barrett Estate v Dexter*.¹²⁷ The court ruled that based on the expertise of the expert witnesses, Barrett and Sharn's marriage was invalid for the reason that Barrett did not have the capability to understand the nature, obligations, and responsibilities of their marriage. Barrett's January will of

¹²³Feng, *supra* note 26 at paras 25, 40.

¹²⁴Danchuk, *supra* note 46 at paras 2, 14.

¹²⁵Banton, *supra* note 2.

¹²⁶*Ibid* at para 98.

¹²⁷Barrett, *supra* note 45.

1997 was not given any legal power. The court refused to consider whether Sharn unduly influenced Barrett; however, it recognized that she was motivated by financial gain, was aware that all his previous wills and powers of attorney would be revoked by their marriage, and that, as his wife, she would receive a significant part of his \$1,000,000 estate.

In *Danchuk v Calderwood*,¹²⁸ the court deliberated on the validity of the will made by the deceased. The marriage between Danchuk and Ducolon was not an issue because, at the time of the marriage ceremony, Danchuk was separated but not divorced. The court considered the validity of the will made by Danchuk in 1994 and found that Danchuk's will was executed under Ducolon's undue influence and that the will itself was made under suspicious circumstances. The court acknowledged that Ducolon's actions were financially motivated; she was aware of the balance in the Danchuk's bank account; she knew that marrying him and acquiring power of attorney gave her access to his assets; and she understood that by persuading him to make a new will in her favour, she would inherit almost his entire estate.

The validity of the marriage between Sung and Feng was the legal concern considered by the court in *Feng v Sung Estate*.¹²⁹ The court concluded that the marriage was null and void (void *ab initio*), because Sung did not have the mental and physical strength to refuse to marry Feng and did not understand all the consequences of their marriage, especially since, at the time of the wedding, he believed that there was a valid prenuptial agreement. The estate passed under the will he made in 1999. The court recognized that Feng's actions were solely motivated by her intention to gain access to Sung's money.

In the last case, *Hart v Cooper*¹³⁰, the court considered the validity of Smiglicki and Hart's marriage. The court did not give any credit to the opinion of Smiglicki's personal doctor, who believed that Smiglicki did not possess the capacity to enter marriage, that he was threatened and manipulated into that marriage, and that Hart was

¹²⁸*Danchuk*, *supra* note 46.

¹²⁹*Feng*, *supra* note 26.

¹³⁰*Hart*, *supra* note 48.

motivated by a financial gain. The court decided that the doctor did not explain his opinion, was biased, and had insufficient knowledge. It ignored the deceased's claim that he had been kidnapped from the hospital to participate in his own wedding. The court decided that Hart's motivation, knowledge, and influence over Smiglicki were irrelevant for the validity of their marriage. Consequently, the marriage was found valid, and it revoked the will made prior to the wedding. Smiglicki's estate passed on intestacy.

2.4. Conclusions

Canadian courts treat and consider each predatory marriage case separately. The reviewed case law reveals that, although a pattern characterizes such unions, there is no uniform approach to remedy predatory marriages in Canada's common law provinces. However, in each ruling, the courts considered similar issues: the validity of a predatory marriage, a predatory spouse's motivation, and, if necessary, her testamentary undue influence on a victim spouse, as well as the victim spouse's testamentary capacity. Furthermore, particular judges referred to earlier rulings involving predatory marriages and drew upon their verdicts.

Canadian courts have not comprehensively addressed the issue of predatory marriages. They have failed to see the "bigger picture", to recognize the pattern inherent to a predatory marriage. Moreover, none of the judges acknowledged that the cases bear significant similarities and tried to address the problem by providing a solution that could be applied to other cases rather than only to the one case's particular circumstances. However, it could be difficult to justify developing such a proposal. It is the legislature that is responsible for providing answers to urgent social problems. Courts are empowered only to deal with particular disputes and make incremental changes in law. Nevertheless, deliberating on the same aspects, referring to different predatory marriage cases, and recognizing the similarities among them may be the first step towards creating a unified answer to the problem.

To distinguish and provide a comprehensive solution to predatory marriage cases, apart from assessing the marriage's and, when applicable, the will's validity, particular attention should be given to evaluating the role of a caregiver, the subsequent predatory

spouse. It is at the discretion of each judge to consider the motivation and knowledge of the woman, the predatory spouse, as well as her influence on the elderly man, the victim spouse. However, in each case, it was evident that the predatory spouse was particularly interested in the victim spouse's assets. Exploiting vulnerable persons allowed the caregivers to access their money and, in most cases, to pursue their entire estate by having a new will drafted in their favour. Whenever the court considered it, it stated that the predatory spouse had exercised undue influence on the execution of her victim spouse's new will.

3. The Problem of Predatory Marriages

The problem of predatory marriages is important and complex. It involves the well-being of vulnerable persons, the unclear case law, and the insufficiency of legislation as well as its interpretation. The issue has been discussed and analysed by scholars, who suggest how to prevent these marriages from taking place or how to better protect the presumed interests of vulnerable persons and their heirs. Their proposals are grounded in Canadian law; they require amending currently binding law, appealing to existing legal institutions, or imposing new procedures. This paper suggests an alternative approach that involves less invasive solutions and turns to foreign jurisdictions for appropriate guidelines.

This section recognizes predatory marriages as a concern and provides solutions to prevent them. The reasons for which predatory marriages are recognized as problematic are indicated and explained. Further, possible solutions are listed and discussed in the context of proposals presented by scholars. Moreover, consideration is given to the consequences of the proposed remedies.

3.1. Predatory Marriages as a Concern

3.1.1. Predatory Marriages and Society

Predatory marriages are repugnant for several reasons: their instrumental use of marriage, exploitation of a person's vulnerability, especially, through deprivation of his or her testamentary freedom, and denial of the person's family of their moral and legal

rights. The problem is especially significant in Canada because of the ageing population.¹³¹

In Western society, marriage is traditionally conceived as a relationship of two people who wish to publicly manifest the love and commitment they share with each other.¹³² Marriage provides spouses with property rights to create a partnership based on respect and equality. Predatory marriages do not express these values.¹³³ Instead, they are based on dependency, fear, coercion, and a desire for financial benefit. Often, the vulnerable person is coerced into marriage. Affection is supplanted with its illusion. The predatory spouse uses marriage to gain access to the vulnerable person's assets.¹³⁴

Freedom of testation of the vulnerable person is severely affected as well. He or she is unduly influenced into entering a marriage that automatically revokes all previous testamentary dispositions and then is unduly influenced into making a new will. A person who does not have testamentary capacity and marries is deprived of his or her right to decide about the division of his or her estate. Furthermore, exercising testamentary undue influence over a person denies that person's right to express his or her testamentary intent.

A predatory spouse capitalizes on the victim spouse's vulnerability, especially his or her need for care. The latter is prone to abuse because of advanced age and severe mental or physical disabilities. Most often, the person does not recognize the true motivation of his or her caregiver. The care and attention provided by the caregiver are exchanged for access to the vulnerable person's assets. However, the person does not make a conscious decision in regard to the arrangement and is unable to foresee its

¹³¹ Statistics show that:

As of July 1, 2010, 4,819,600 seniors aged 65 years and over accounted for 14.1% of the Canadian population, up from 13.9% one year earlier. In 1971, 8.0% of the population were seniors and there has been a steady increase during the last forty years. Population aging in Canada is expected to accelerate between 2011 and 2031, as all people in the large cohort of baby boomers reach their senior years. Projections show that seniors could account for more than one-fifth of the population as soon as 2026 and could exceed one-quarter of the population by 2056. (Anna Milan, "Age and Sex Structure: Canada, Provinces and Territories, 2010 (*Report on the Demographic Situation in Canada*)" online: Statistics Canada <<http://www.statcan.gc.ca/start-debut-eng.html>>).

¹³² *Halpern v Toronto (City)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (available on WL Can) at para 5.

¹³³ The meaning of marriage in such context is devaluated; See Rathbun, *supra* note 43 at 247.

¹³⁴ Griesdorf, *supra* note 1 at 315.

consequences.¹³⁵ Frequently, the person is delusional about and alienated from his or her family and friends. The person dies angry, unsatisfied, and disappointed with his or her family. Once under the influence of the predatory spouse, the vulnerable person stops making independent decisions. He or she is governed by and in favour of the predatory spouse.

The members of the vulnerable person's family are also victimized. Because of significantly restricted access they are deprived of having a healthy and on-going relationship with the victim, they cannot assist or appreciate their relative's company during his or her last days of life, and they lose their chance to part with him or her in peace. The family members suffer emotional damage and are deprived of the financial benefits they would receive under the will made prior to the predatory marriage. If a will in favour of the predatory spouse is executed, the family members are most frequently entirely disinherited.¹³⁶

Predatory marriages are problematic for the entire society. Only a few cases have been discussed, but there is a significant probability that most predatory marriages are not identified.¹³⁷ Considerable costs prevent litigation in a majority of estate cases, while in many others there is no one interested in questioning the marriage's or the will's validity.¹³⁸ As expanding life spans increase the population of elderly persons, the problem will increase statistically.¹³⁹ Society should protect those that are vulnerable from exploitation.¹⁴⁰

3.1.2. Legal Perspective on Predatory Marriages

Predatory marriages raise several legal concerns. It would be difficult to nullify every predatory marriage. It is easy to enter marriage, since the capacity to marry is significantly low, but marriage influences a person's property and succession rights, and undue influence is unequally treated in the cases of marriages and wills.

¹³⁵Oosterhoff, "Foreword", *supra* note 15 at 1.

¹³⁶*Ibid.*

¹³⁷Rathbun, *supra* note 43 at 230 (footnote 18).

¹³⁸Oosterhoff, "Barrett Estate", *supra* note 19 at 116.

¹³⁹Whaley, *Capacity to Marry*, *supra* note 15 at 5-6; (footnote 115).

¹⁴⁰Oosterhoff, "Barrett Estate", *supra* note 19 at 116.

It is difficult to challenge the validity of a predatory marriage. If it is entered into under undue influence, it is not void, as it would be in the case of lack of capacity of one of the parties, but voidable. Only the spouses can set it aside and they can do so only while they are both alive.¹⁴¹ However, questioning the validity of the marriage is not in a predatory spouse's interest. Invalidating marriage would deprive him or her of the property rights gained through the union. An executor of an estate of a deceased spouse may contest voidable marriage only if the deceased him or herself commenced the proceedings prior to his or her death. However, an old and ill person is unlikely to start that kind of proceeding. For that reason, predatory marriages are usually challenged after the death of the vulnerable person on the basis of the deceased's lack of capacity to marry.¹⁴²

It is possible to nullify a marriage on the ground of a spouse's lack of capacity to marry. However, it is very difficult to question the validity of marriage and prove that it is void on this basis. The law regulating the capacity to marry is not sufficiently transparent. The capacity to marry is not legislatively regulated, and there is no single, comprehensive definition of marriage or of the capacity to marry.¹⁴³ In case law, marriage is described as "a very simple" contract to enter for which a high degree of intelligence is not required.¹⁴⁴ To be married, a person must be capable only of comprehending the nature of marriage and its obligations.¹⁴⁵ No party needs to understand all the responsibilities that come with marriage.¹⁴⁶

In spite of the fact that the threshold for capacity to marry is so low, marriage has significant consequences for a person's property. It provides an individual with rights to his or her spouse's property under family and succession law.¹⁴⁷

Moreover, capacity to marry is problematic in the context of much more restricted testamentary capacity. As a result, a person may be capable of marrying or remarrying,

¹⁴¹Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 324.

¹⁴²Griesdorf, *supra* note 1 at 324-327.

¹⁴³Whaley, *Capacity to Marry*, *supra* note 15 at 2.

¹⁴⁴Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 271.

¹⁴⁵*Re McElroy*, *supra* note 49 at para 6.

¹⁴⁶Whaley, "Predatory Marriages", *supra* note 22 at 10.

¹⁴⁷*See* Part I s. 2.

but not of making a new will. However, marriage revokes wills made prior to it.¹⁴⁸ Consequently, even the will of a person who does not possess testamentary capacity and whose intentions at the time of entering marriage are unclear is revoked by operation of law by his or her subsequent marriage.¹⁴⁹ In this situation, revocation takes place regardless of the usually required testamentary capacity. Additionally, if after being married, a person is unable to make a new will, he or she cannot influence the way his or her estate is divided on his or her death. The estate passes on intestacy.¹⁵⁰

The last problem arises from the difficulty in proving testamentary undue influence. The courts do not recognize equally the undue influence made on a person executing a will and on a person entering a marriage. In each case the influence leads to the same effect, which is acquiring access to a person's property.¹⁵¹ However, the burden of proof in the case of testamentary undue influence is much higher.

3.2. Solutions Proposed by Scholars

Predatory marriages raise complex concerns. It is important to prevent the consequences of those marriages from taking place and to better protect the presumed interests of the vulnerable persons and their heirs. Scholars have offered solutions to the legal problems. The most relevant proposals are discussed and analysed below.¹⁵²

3.2.1. Difficulty in Nullifying Predatory Marriages

To accommodate the problem of predatory marriages being voidable and not void, the law regarding the validity of marriages could be changed.¹⁵³ The range of persons entitled to contest the validity of a marriage on the basis of undue influence after the death of one of the spouses could be widened.¹⁵⁴ Presumably, it should include the estate

¹⁴⁸*Ibid.*

¹⁴⁹Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 273; Oosterhoff, "Barrett Estate", *supra* note 19 at 121.

¹⁵⁰*Ibid.*

¹⁵¹Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 272.

¹⁵²Due to the scope of discussed case law and legislation, presented proposals refer only to the legal system binding in Canada's common law provinces.

¹⁵³Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 324.

¹⁵⁴Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 273-274; Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 325-326.

of the deceased or “any person with a financial interest in the matter.”¹⁵⁵ It could also be applied in cases of duress and coercion, especially to persons with weakened capacity, who can more easily be unduly influenced by others.¹⁵⁶

3.2.2. Low Entry Threshold for Capacity to Marry

The requirement of minimum comprehension of the nature of marriage is historically justified by the urge to promote and make marriage more accessible.¹⁵⁷ The discrepancy between a low threshold for capacity to marry and the high protection of a spouse's property rights is a result of stagnation in the case law and the progress of legislation. However, it is widely recognized that the policy and law ought to be reconsidered in the face of an ageing population, an increase in the number of people marrying more than once during their lifetime, and a rise in the number of people suffering from mental impairments.¹⁵⁸

According to most scholars, the capacity to marry should be made stricter and “include the ability to appreciate the basic consequences of entering into the contract of marriage.”¹⁵⁹ The effect marriage has on a person's property rights and division of his or her estate should be understood by spouses before entering marriage.¹⁶⁰

3.2.3. Spouse's Extensive Property Rights

To prevent the vulnerable person from being taken advantage of and the effect that marriage has on spousal property rights, the property rights gained through marriage could be limited.¹⁶¹ An alternative is to redefine the capacity to marry in such a way as to include a consideration of the financial consequences of marriage.¹⁶² Along that line,

¹⁵⁵Oosterhoff, “Barrett Estate”, *supra* note 19 at 119, 123.

¹⁵⁶Griesdorf believes that the ruling in the case *Feng* makes an important breakthrough. “Greer J. made the connection between capacity, influence and consent: where there is weakened capacity, it takes less influence to overthrow someone's independent consent.” Griesdorf, *supra* note 1 at 324-325.

¹⁵⁷Whaley, *Capacity to Marry*, *supra* note 15 at 2.

¹⁵⁸*Ibid* at 3.

¹⁵⁹Jordan M. Atin, “Revocation of Wills by Marriage” (1998-1999) 18 ETPJ 13 at 26 [Atin, “Revocation”].

¹⁶⁰Whaley, *Capacity to Marry*, *supra* note 15 at 3-4.

¹⁶¹Oosterhoff, “Consequences of a January/December Marriage”, *supra* note 7 at 272-273; Oosterhoff, “Barrett Estate”, *supra* note 19 at 121.

¹⁶²Oosterhoff, “Consequences of a January/December Marriage”, *supra* note 7 at 272-273.; Oosterhoff, “Barrett Estate”, *supra* note 19 at 121; Whaley, *Capacity to Marry*, *supra* note 15 at 3-4.

vulnerable persons should be advised that “a capacity assessment specifically on the issue of capacity to marry” would include testing their understanding of the consequences the marriage would have on the rights of their children.¹⁶³

3.2.4. High Testamentary Capacity

There are a couple of proposals on how to solve the problem of the discrepancy between the threshold of capacity to marry and testamentary capacity. The capacity to marry could be made to match or even depend on testamentary capacity; marriage of a person lacking testamentary capacity should not revoke his or her wills made prior to the marriage; or marriage of such a person should not revoke a will if that person entered that marriage under undue influence of such a degree that it would invalidate a will.¹⁶⁴

These solutions raise the concern of assessing testamentary capacity at the time of marriage. Deciding whether a person possesses testamentary capacity at the time of making a will or not is difficult to resolve, even when the will is made with the help of a practising, experienced lawyer. The evaluation is even more difficult when this witness is not available; currently the presence of a lawyer is not required for a marriage ceremony to be valid.¹⁶⁵ Proving testamentary capacity or its lack at the time of marriage also causes practical problems of burden of proof and administrative difficulties.¹⁶⁶

Theoretically, persons who preside over marriages could be obliged to follow standards similar to lawyers when they prepare wills for their clients. They should be obligated to observe and record the entire ceremony and the parties' behaviour and be able to “attest to the parties' capacity and independent consent.”¹⁶⁷ In ambiguous situations, the notes may need to be scrupulously detailed.¹⁶⁸ Further, the individuals who preside over a marriage should be educated about capacity to marry. They spend very

¹⁶³Oosterhoff, “Barrett Estate”, *supra* note 19 at 119-120; Rathbun also proposed a “Marital Capacity Test”, *See* Rathbun, *supra* note 43 at 261ff.

¹⁶⁴Oosterhoff, “Consequences of a January/December Marriage”, *supra* note 7 at 273; Oosterhoff, “Barrett Estate”, *supra* note 19 at 121; Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 325-326; Albert H. Oosterhoff, “Testamentary Capacity, Suspicious Circumstances and Undue Influence” (1998-1999) 18 ETPJ 369 at 375 [Oosterhoff, “Testamentary Capacity”].

¹⁶⁵Atin, “Revocation” *supra* note 159 at 25.

¹⁶⁶*See generally Ibid.*

¹⁶⁷Griesdorf, *supra* note 1 at 327.

¹⁶⁸*Ibid* at 327.

little time with the persons who enter marriage and, except in extreme cases, without specialized training may not be able to recognize that one of the parties of the future marriage may lack the capacity to marry.¹⁶⁹

3.2.5. Effects of Marriage on Wills

According to some scholars, since marriage generally revokes prior wills, it should be treated and subject to challenge as would any other testamentary act.¹⁷⁰ For that reason, the same rules for the burdens and presumptions should be applied to challenging wills and marriages.¹⁷¹ This approach should be practised especially if circumstances that appear suspicious occur.¹⁷² As in cases of a will, the court should not affirm a marriage's validity unless the suspicious circumstances are discarded.¹⁷³ If events raise specific and founded suspicions that a party entered a marriage without having the capacity to marry or did so under undue influence or duress, the court ought to increase the scrutiny and pursue the problem to make sure that, nevertheless, the marriage is valid. The court must be satisfied with the results and entirely convinced.¹⁷⁴

In the context of marriage, suspicious circumstances may be raised by a combination of features, such as a significant age difference between the spouses, mental or physical disability of one of the spouses, imminent death of one of the spouses, or major financial gain through the marriage of one of the spouses.¹⁷⁵ For that reason, marriage, facts related to entering it, and the parties' consent to it should be examined with as much scrutiny as are wills, their formation and the testator's capacity to execute them.¹⁷⁶

¹⁶⁹Whaley, *Capacity to Marry*, *supra* note 15 at 89.

¹⁷⁰Griesdorf, *supra* note 1 at 324.

¹⁷¹*Ibid* at 327.

¹⁷²*Ibid*.

¹⁷³See *Oosterhoff on wills*, *supra* note 10 at 215.

¹⁷⁴Griesdorf, *supra* note 1 at 327.

¹⁷⁵*Ibid*.

¹⁷⁶For more risk factors see C. Peisah et al, "The Wills of Older People: Risk Factors for Undue Influence" in The Law Society of Upper Canada, *Special Lectures 2011: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Canada: Irwin Law, 2011) 211 at 217-227.

3.2.6. Revocation of a Will by Marriage

Another approach suggests abandoning revocation of a will by marriage. According to this proposal, it is redundant under the protection offered to a spouse under the *Succession Law Reform Act* and the *Family Act*.¹⁷⁷ Further, automatic revocation of a will by marriage is also dangerous, because the general public is unaware of it, and its outcome may be unfair for children from prior marriages.¹⁷⁸

On the other hand, the alleged protection a surviving spouse is provided with under the legislation could be questioned. If a spouse does not inherit under the rules of intestacy, his or her rights are limited. He or she can not apply for an equalizing payment from the deceased's estate under the *Family Law Act*, if there was no "increase in value of the deceased's property from the date of marriage to the date of death."¹⁷⁹ The same may happen if the deceased's property declined in value or the surviving spouse's property increased in value.¹⁸⁰ However, if the spouse was a dependant of the deceased, he or she may still apply for support under section 58 of the *Succession Law Reform Act*.¹⁸¹

Further, it could also be argued that the end result may still be unjust, no matter whether a marriage revokes or does not revoke a will made prior to it.¹⁸² Revocation of a will by marriage may be unfair to those who were appointed as beneficiaries under the revoked will; and keeping the will in force, in spite of the marriage, could be hurtful to the spouse of the deceased.¹⁸³ By revoking a will made prior to marriage, the law follows the most rational wish of the deceased to dispose his or her property in favour of his or her family and their spouses and children. It also protects the deceased's family members by providing them with the right to the deceased's estate on intestacy.¹⁸⁴

¹⁷⁷Griesdorf, *supra* note 1 at 326; Oosterhoff, "Barrett Estate", *supra* note 19 at 120.

¹⁷⁸Griesdorf, *supra* note 1 at 326; see Law Reform Commission of Saskatchewan, *Report on Revocation of Wills* (May 2006), online: The Law Reform Commission of Saskatchewan <<http://www.lawreformcommission.sk.ca/>>, Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Final Report, (Halifax: Law Reform Commission of Nova Scotia, 2003) at 28-30.

¹⁷⁹Atin, "Revocation", *supra* note 159 at 25.

¹⁸⁰*Ibid.*

¹⁸¹*Succession Law Reform Act*, *supra* note 4 s 58.

¹⁸²Atin, "Revocation", *supra* note 159 at 24.

¹⁸³*Ibid.*

¹⁸⁴*Ibid* at 24-25.

3.2.7. Inequality between Testamentary Undue Influence and Undue Influence to Marry

To remedy the discrepancy between undue influence in the case of marriage and that in executing a will, the two cases should be treated alike. Namely, if consent to marry is unduly influenced, it should be treated in the same way as an unduly influenced will and ought to make the marriage invalid.¹⁸⁵

3.3. Analysis of the Proposed Solutions

Being drawn from the literature, the scholars' proposals are analysed in the context of preventing the consequences of predatory marriages as well as from a more general perspective. The alternative suggestion involving the civil law doctrine of unworthiness to inherit is briefly outlined.

Marriage and, especially, capacity to marry should be regulated in a more transparent way. The conditions should be precisely specified. As was suggested, implementing a test that would establish a person's capacity to marry could clarify some situations. It could determine whether a person understands the financial consequences of a marriage and the effect marriage would have on his or her children. However, because under the law, a spouse does not have to know or understand all the consequences of marriage, the test would exclude only the most extreme cases, and it would not solve the issue of predatory marriages. This raises the question whether the capacity-to-marry threshold ought to be so low.

The capacity to marry could be evaluated because of the consequences marriage has on a person, his or her family, and on other members of society. As proposed, the threshold of the capacity to marry could, for example, match the threshold of the testamentary capacity. Restricting access to marriage would stop most predatory cases from taking place, especially, if the mental state of a spouse-to-be were assessed. However, from a societal perspective, imposing additional restrictions could prevent, for example, mentally impaired people from legalizing their relationships. It could also lead

¹⁸⁵Oosterhoff, "Consequences of a January/December Marriage", *supra* note 7 at 272.

to increased litigation in which a marriage's validity is questioned. Consequently, there could be more litigation and more marriages declared null. More importantly, it is not marriage that causes problems. It is its misuse that leads to the situation of predatory marriages. Marriage is the most basic union in society and should be readily accessible. It should not be modified unless it is absolutely necessary to do so.

The low threshold for the capacity to marry makes it more difficult to nullify predatory marriages. After the death of a spouse, marriage can be questioned only on the basis of lack of capacity to marry, not on the basis of undue influence. One of the offered solutions proposes amending the law and allowing nullification of marriage if one of the persons entered it under undue influence. In that case, more people would be entitled to contest the validity of the marriage after one spouse's death, for example, the executor of the deceased's estate or any person with a financial interest in nullifying the marriage. To further facilitate the nullification, rules that apply to the burdens and presumptions in the case of a will could be applied to challenging marriages. Those modifications could be helpful in the case of predatory marriages; however, it is more beneficial to society if nullifying a marriage stays restricted. Extending the reasons for which a marriage could be nullified after a spouse's death could jeopardize the stability of the institution of marriage. Nullifying would become too easy and would deprive a deceased's spouse and children of their rights. There could be cases in which a marriage would be nullified years after it was entered into. In such situations, even if a person had been unduly influenced into marriage, he or she would be likely to grow to accept the marriage over the years. If he or she had not contested the marriage's validity during his or her lifetime, it is possible that he or she would not wish for it to be done posthumously. A third person should not be allowed to question the marriage after a spouse's death.

If it is to accept that the conditions under which a marriage is entered or nullified should remain unchanged, the effect marriage has on a spouse's rights could still be modified. This could happen through abandoning the revocation of a will by marriage or by depriving a spouse of some of his or her rights.

Another solution is to decrease the number of rights with which spouses are provided. In the context of predatory marriages, depriving a predatory spouse of the right to inherit most of his or her spouse's estate on intestacy could make predatory marriages less attractive. After all, the person's major aim is to benefit financially on the vulnerable person's death. In most of the discussed cases, the predatory spouse desired to inherit her spouse's estate under a will. But after a will was found invalid due to undue influence, the surviving spouse inherited a significant share of the estate on intestacy. In that context, limiting a person's rights to his or her spouse's estate could solve the issue, especially since the assets gained by a predatory spouse during the lifetime of his or her spouse are not as significant as the share on intestacy.

In the case of predatory marriages, abandoning revocation of a will by marriage would allow a vulnerable person's children to inherit under his or her will regardless of the marriage. If the revocation was abandoned, the will could be revoked only by a testator and only if he possessed testamentary capacity at the time of the revocation. Further, unduly influenced revocation would not cause a will to become invalid. However, the revocation of a will by marriage is but one of several regulations that provide the family of a deceased person with access to his or her estate. Unlike in civil law jurisdictions there are no compulsory shares, a testator may disinherit an heir; and if there is a will, only a deceased's dependant can receive support from the estate. For that reason, the doctrine of revocation of a will by marriage should remain in force. However, limiting its scope of application could be considered. The rule could be provided with an exception under which a marriage would not revoke an existing will if at the time of the wedding the person who married lacked testamentary capacity or was under undue influence. Nevertheless, assessing a person's testamentary capacity as well as a caregiver's undue influence on the day of marriage ceremony could be problematic.

Suggested modifications involve the problem of assessing the capacity to manage property or to make a will on the day of the marriage ceremony. Persons above a certain age who are entering marriage could be required to have their testamentary capacity and their capacity to manage property evaluated. However, that procedure might raise the question of equality. For that reason, instead of professional assessment, persons

presiding over marriages could be required to ask the same type of questions that lawyers ask when preparing a will. Specialized training could make them more sensitive to any ambiguous situations.

3.4. Conclusions

Scholars' proposals suggest how to prevent predatory marriages from taking place or nullify those that have occurred and invalidate their consequences. The proposed solutions deal specifically with the predatory marriage issue. They expose the problem and emphasize its significance. Moreover, applying each of the proposals could certainly decrease the number of predatory marriages or diminish their attractiveness for potential predatory spouses. Possibly, their implementation could even completely eliminate the problem. Further, the suggestions draw from Canadian law and legal doctrine and are consistent with the specifics of the Canadian legal system.

As helpful as these proposed solutions could be in remedying the predatory marriage issue, they could also adversely influence the accessibility, permanence, and consequences of marriage. They involve restricting access to marriage; they facilitate nullification of marriage on extended grounds; they increase the number of conditions under which vulnerable persons may enter marriage; or they limit the rights granted to the spouses. However, it is difficult to direct and limit the results of the potential changes only to predatory spouses. Modifying marriage, the most elementary and yet very delicate institution, could affect many people and could have unpredictable consequences.

The suggestions that do not influence marriage itself involve assessing testamentary capacity. The number of cases in which this problem has been deliberated indicates that even experienced, practising lawyers have difficulty in assessing it.¹⁸⁶ Professional training may be helpful, but it may also be insufficient. The competency of a person officiating at marriages would have to be verified.

¹⁸⁶See M. Elena Hoffstein & Joanna Gorman, "Capacity Assessments by the Drafting Lawyer" in The Law Society of Upper Canada, *Special Lectures 2011: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Canada: Irwin Law, 2011) 309.

There is no apparent solution to the concerns raised by predatory marriages within the Common Law. For that reason, responding to this issue may require referring to institutions present in other jurisdictions.¹⁸⁷ It is established that a predatory spouse is motivated by the perspective of an easy financial gain on the vulnerable person's death. Depriving the spouse of the benefits he or she may receive could decrease the attractiveness of predatory marriages. That could be accomplished by declaring a predatory spouse unworthy to inherit if he or she unduly influences the testator's will. A person could still enter a marriage regardless of his or her age, and the marriage would remain valid regardless of the reasons for which it existed, but on a person's death his or her estate would be divided as if the predatory spouse did not exist. Implementing it in common law jurisdictions could be done analogously to the reasoning supporting the common law principle of the slayer rule, under which a murderer cannot benefit from his or her victim's death, and to the motivation behind the introduction of elder abuse legislation in some American states.

The next two parts of this paper will present the doctrine of unworthiness to inherit as developed under civil law jurisdictions and under common law jurisdictions and provide an assessment of its applicability in the case of predatory marriages. By combining the experience and heritage of Common Law and Civil Law, a basis for this proposal is developed.

¹⁸⁷Carsley suggests referring to Civil Law. She proposes adopting a regulation that will explicitly provide for disinheriting a person who unduly influences a testator or behaves in a reprehensible manner. See Stefanie Carsley, "Beyond the Problem of Predatory Marriage: Considering the Wider Implications of *Banton v Banton* and Alternative Legal Reforms" (2010) [unpublished].

Part II Undue Influence

1. Introduction

As indicated earlier, predatory marriages are an unresolved issue with adverse social and legal consequences. In the absence of coherent solutions under Canadian law, a remedy from a German legal system is investigated. German law provides a unique and helpful solution to the problem of the predatory marriages' legal consequences under succession law. If implemented, it would entitle a court to declare a predatory spouse, who unduly influenced an elderly victim spouse's testamentary dispositions, unworthy to inherit. Consequently, the predatory spouse would be deprived of any bequest under a will or on intestacy. This solution is present in other civil law jurisdictions, e.g. Greece, Poland, Austria, Switzerland, or France, because these countries adopted the German Civil Code as their national code, were influenced by that codification, or drew the solution, as German law did, directly from Roman law.¹⁸⁸

Borrowing legal concepts from a foreign jurisdiction requires caution. Even the most efficient solutions may not be acceptable unless they are compatible with the legal system of the recipient country. To better facilitate the reception, the legal environment of the donor state and the receiving state must be examined.¹⁸⁹ It is equally important to recognize that the meaning of a legal rule is rooted in its social and cultural context.¹⁹⁰ For that reason, a legal concept needs to be understood in the original setting within which it was developed and currently functions. Presuppositions of similar functions or characteristics of different concepts may blur their true meaning. From that perspective,

¹⁸⁸K.D. Magliveras, "Greece" in David Hayton, ed. *European Succession Laws*, 2d ed (Bristol: Jordan, 2002) at 271-272; Joseph J. Darby, "The influence of the German Civil Code on law in the United States" (1999) 1 *Journal of South African Law* 84 at 84; Wojciech Dajczak, Tomasz Giaro & Franciszek Longchamps de Berier, *Prawo Rzymskie U Podstaw Prawa Prywatnego* (Warszawa: Wydawnictwo Prawnicze, 2009) at 267-268; *Civil Code of Québec* (arts 620-624) and *French Civil Code* (arts 726-729) provide for declaring a person unworthy to inherit in certain situations, but none of them is directly comparable to undue influence.

¹⁸⁹It is further suggested that social, cultural, and political contexts should be investigated while considering legal transplants; however, in this paper, these contexts will not be examined; see O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *Mod L Rev* 1 at 27; Loukas A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform-Some Fundamental Observations" (2000) 34 *Int'l Law* 1055 at 1066;

¹⁹⁰Legrand, *supra* note 12 at 114.

discussing differences between legal rules and presenting them for what they are rather than how they could be seen as being is crucial for their comparison.¹⁹¹ This methodology allows for a better understanding of the donor state's and the receiving state's legal systems.¹⁹²

For that reason, Canadian common law testamentary undue influence and two German concepts (*Drohung* and acts *contra bonos mores*) are described in the context of their legal environment and the analysis and comparison of their similarities and differences follows. In particular, the subsequent sections consider the issue of undue influence: the history and origins of undue influence common to Civil and Common Law, the understanding of testamentary undue influence under Canadian Common Law, and of concepts equivalent to undue influence under German law. A comparative analysis of the discussed legal concepts and a discussion of their applicability in predatory marriage cases follow. On the basis of the examination, it is suggested that Canadian testamentary undue influence and *Drohung* (duress) are rooted in Roman law, are functionally equal, and apply in the same situations, including predatory marriage cases. It is concluded that the Canadian Common Law testamentary undue influence and its German equivalent are functionally comparable and that the solution adopted in Germany, to declare unworthy to inherit a person who unduly exercises duress on a testator, could be applied to the predatory spouse.

2. Introduction to the History of Undue Influence

Testamentary undue influence under Canadian Common Law and its equivalents under German law (*Drohung* and acts *contra bonos mores*) stem from a concept developed under Roman law. They evolved from rules and exceptions established over time.

¹⁹¹*Ibid* at 124.

¹⁹²Alan Watson, "From Legal Transplants to Legal Formants" (1995) 43 Am J Comp L 469 at 474-475.

In general, under early Roman law, a will could not be set aside on the grounds of undue influence. Even if a person's true will was overpowered by fear, it was still recognized under the law as the person's testamentary disposition.¹⁹³

The first exception to that rule was provided, in the late Republic, under the praetor's edict. A praetor promised to protect a person coerced into a legal act by invalidating acts made under duress (*metus causa*). *Metus* was understood as fear of a degree that "reasonably has an effect upon a man of the most resolute character."¹⁹⁴ "*Metus causa*' could be constituted by 'fear of death', 'prison' or 'sexual assault', [...] but not by fear of '*infamia*' or 'annoyance.'"¹⁹⁵ Proof of fraud or force was required to invalidate a will; mere pressure, suggestion, or flattery not related to a fraud was not enough.¹⁹⁶ "A showing of force or intimidation was necessary to demonstrate that one's freedom of will had been compromised."¹⁹⁷

Undue influence was insufficient to invalidate a will, particularly in the context of marriage. A husband was allowed to influence his wife's testamentary dispositions. Similarly, recognized already in the first century, "legacy hunters", who pressured dying people into making wills in their favour ("*captatio*"), were only morally condemned. The law did not forbid their conduct.¹⁹⁸ With the exception of a stepmother, family members' influence on a testator did not constitute undue influence.¹⁹⁹ A stepmother's influence was prohibited only if it "led the testator to pass over or disinherit one who had a legal claim to a parent's estate."²⁰⁰ Moreover, it was already clear in the second century that a

¹⁹³J. du Plessis & R. Zimmermann, "The Relevance of Reverence; Undue Influence Civilian Style" (2003) 10 Maastricht Journal of European and Comparative Law 345 at 347.

¹⁹⁴Scalise, *supra* note 13 at 44; du Plessis & Zimmermann, *supra* note 193 at 348: "the fear experienced must have been of such a magnitude that it would have had an impact even on a man of the most steadfast character, on the (model) *vir constantissimus*."

¹⁹⁵Scalise, *supra* note 13 at 44; du Plessis & Zimmermann, *supra* note 193 at 347: "A Roman citizen could normally be held responsible for his actions and his declarations, and any attempt to get away from what he had done or said was instinctively frowned upon."

¹⁹⁶Scalise, *supra* note 13 at 44-45.

¹⁹⁷*Ibid* at 45.

¹⁹⁸*Ibid* at 45-46.

¹⁹⁹*Ibid* at 46; it seemed to be limited to "the denial of family claims, the rupture of family ties, the triumph of the outsider—the possibility of a member of the family captating as well is out of the question."

²⁰⁰*Ibid*.

witness to a will, his relatives, and dependants were prohibited from benefiting under it. The law aimed at preventing “fraudulent and captative conduct of others.”²⁰¹

Medieval law relaxed the requirements of invalidating acts due to fear.²⁰² By the thirteenth century, an act could be found void on the grounds of reference. In the sixteenth and seventeenth centuries, under *ius commune*, the degree of influence necessary to invalidate an act was lower for persons with decreased capabilities.²⁰³ The seventeenth-century school of natural law condemned undue influence by stating that “the law of humanity demands that no man be deceived with empty hopes.”²⁰⁴ At the same time, under “[t]he Roman-Dutch version of the *ius commune*”, not only witnesses, but also those who wrote a will could not benefit under it. That applied particularly to notaries and their close relatives.²⁰⁵ Relaxed standards appeared under German law in the eighteenth century, and they were applied when the civil law was codified at the beginning of the twentieth century in the German Civil Code of 1900 (*Bürgerliches Gesetzbuch*, BGB).²⁰⁶

The concept of undue influence spread to England in the eighteenth century. Initially, it was applied only “in transactions involving parents and children.”²⁰⁷ A century later, acts *inter vivos* and, subsequently, acts *mortis causa*, including testamentary dispositions, made under undue influence were recognized as being invalid.²⁰⁸

²⁰¹*Ibid* at 47: “a specific application of the more general principle that ‘[n]o one is a satisfactory witness in his own cause.’”

²⁰²du Plessis & Zimmermann, *supra* note 193 at 352.

²⁰³Scalise, *supra* note 13 at 47; see du Plessis & Zimmermann, *supra* note 193 at 352-354.

²⁰⁴Scalise, *supra* note 13 at 47, similarly, “Johannes Voet concludes that a will can be nullified due to ‘acts and tokens from which it can be inferred that compulsion, intimidation or unreasonable and fraudulent fawnings have taken place with the object of extorting or obstructing a last will.’”

²⁰⁵*Ibid* at 48.

²⁰⁶*Bürgerlichen Gesetzbuches* (Civil Code) [BGB] (English translation available online: Bundesministerium der Justiz <http://www.gesetze-im-internet.de/englisch_bgb/>); John P. Dawson, “Economic Duress and the Fair Exchange in French and German Law” (1936-1937) 11 Tul L Rev 345 at 348-349 [Dawson, “Economic Duress”].

²⁰⁷Scalise, *supra* note 13 at 48-49.

²⁰⁸*Ibid*.

3. Undue Influence under Canadian Common Law²⁰⁹

To present the legal environment of the receiving country, characteristics of testamentary undue influence under Canadian Common Law are discussed.²¹⁰ This section introduces undue influence features, the relevant burden of proof, and legal consequences.

3.1. Influence That Is Undue.

A will expresses a testator's wishes with respect to the division of his or her estate on his or her death.²¹¹ In this regard, a testator must be a free agent. If a testator's will is overpowered by the will of another person and consequent testamentary dispositions express the will and wishes of this person rather than the testator's will and true intention, then his or her will is considered to have been made under undue influence.²¹² A testator may be unduly influenced into making, revoking, or not revoking certain testamentary dispositions.²¹³

A testator's will may be legally affected by others. As stated in *Hall v Hall*²¹⁴ it is legitimate to exercise influence on a testator. Others may remind about or insist upon factors that may influence a testator's will, including appealing "to affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution."²¹⁵ The influence becomes illegal when another person's will overpowers a testator's free will and testamentary dispositions are made in spite of the fact that the testator does not

²⁰⁹The doctrine of undue influence is not understood identically in common law countries; see Fiona R. Burns, "Reforming Testamentary Undue Influence in Canadian and English Law" (2006) 29 Dal LJ 455 at 455.

²¹⁰Hereinafter "testamentary undue influence" and "undue influence" are used indifferently, unless otherwise indicated.

²¹¹A. J. White Hutton, "Undue Influence and Fraud in Wills" (1932-1933) Dick L Rev 16 at 16.

²¹²In this paper only testamentary undue influence is considered. Undue influence exerted on *inter vivos* acts is not investigated; for the distinction, see Johanne L. Amonson, "Rebutting the presumption of undue influence" (1991-1992) 11 E & TJ 100; W. H. D. Winder, "Undue Influence and Coercion" (1939-1940) 3 Mod L Rev 97; however, rules of testamentary undue influence apply also to acts *inter vivos* that have testamentary consequences, see Oosterhoff, "Testamentary Capacity", *supra* note 164 at 383-384.

²¹³Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 240-241; see *Re Marsh Estate*, *supra* note 57.

²¹⁴*Hall v Hall* cited in Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 234-235.

²¹⁵*Ibid.*

support them.²¹⁶ The testator is unable to resist that person's influence, and the wishes embodied in testamentary dispositions do not represent the testator's own wishes. They express the will of a person exposing the testator to pressure or to threats or fear that overbear him or her. The testator, if not under undue influence, would dispose his or her estate differently.²¹⁷

Influence becomes undue when it is of a certain degree. As explained in *Wingrove v Wingrove*,²¹⁸ undue influence amounts to coercion; it exceeds persuasion, suggestion, or encouragement to dispose property in a certain way.²¹⁹ Undue influence takes place only when a testator, in spite of his or her will, is coerced into making certain testamentary dispositions. Influence of any other degree does not affect the validity of a will, even if it is morally or socially disapproved.²²⁰

The degree of coercion necessary to establish undue influence depends on the vulnerability of a testator: the more vulnerable the testator is, the less influence is required.²²¹ The coercion may be exercised in different forms depending on circumstances and testator's state of mind and body. It may take the form of violence; but, in some cases, psychological pressure is sufficient.

3.2. Burden of Proof of Undue Influence

In the case *Vout v Hay*,²²² the court confirmed that the burden of proof is borne by a person alleging undue influence.²²³ Further, a testator's lack of knowledge and approval may overlap with his or her being unduly influenced, but they are distinct issues.²²⁴ Proving that a testator knew and appreciated his or her actions does not eliminate the

²¹⁶Unlike in transactions *inter vivos*, testators free agency must be broken; see Basil D. Stapleton, "The presumption of undue influence" (1967) 17 UNBLJ 46.

²¹⁷Oosterhoff, "Testamentary Capacity", *supra* note 164 at 381; Winder, *supra* note 193 at 105, 107.

²¹⁸*Wingrove*, (1885) 11 PD 81 [*Wingrove*].

²¹⁹*Ibid* at 82; See *Banton*, *supra* note 2 at 82: "It follows that the degree of influence is greater than that required to set aside *inter vivos* dispositions other than, perhaps, gifts *mortis causa*."

²²⁰*Wingrove*, *supra* note 218 at paras 82-83.

²²¹*Ibid*; see *Re Marsh Estate*, *supra* note 57; see *Vout*, *supra* note 56; see Michel Silberfeld, "Susceptibility to Undue Influence in the Mentally Impaired" (2001-2002) 21 ETPJ 331.

²²²*Vout*, *supra* note 56.

²²³*Ibid*; *Craig v Lamoureux*, [1920] 1 AC 349, [1919] 3 WWR 1101 (available at JUSTICE) at paras 355-356 [*Craig*].

²²⁴Oosterhoff, "Testamentary Capacity", *supra* note 164 at 391.

existence of undue influence. He or she could be aware of and consent to the content of the will in spite of being coerced into making and executing that will.²²⁵ Similarly, the circumstances surrounding a will's preparation and execution, as well as its content, including designation of the beneficiary, are irrelevant for shifting the burden of proof of undue influence.²²⁶ However, when undue influence cannot be proven, the issue of testamentary capacity and suspicious circumstances may be raised.²²⁷

There is no presumption of undue influence, even if there was a relation of dominance between the person benefiting under a will and a testator.²²⁸ Additionally, as the court stated in *Wingrove v Wingrove*,²²⁹ it is also insufficient to establish a probability that another person could have unduly overpowered a testator's will.²³⁰ It has to be proven that the power was exercised and that the testamentary dispositions resulted from that exercise of power.²³¹ In other words, the person alleging undue influence must determine that the will was obtained through undue influence and that the circumstances of its execution indicate that the will is inconsistent with the testator's true will and wishes.²³² In *Banton v Banton*, it was stated that undue influence can be proven on the balance of probabilities and established on the ground of circumstantial evidence.²³³ The relation of confidence between the parties should be established.²³⁴ In *Stephens v Austin*,²³⁵ the court set out factors recommended for consideration. They are: the testator's background, the nature of his or her property, and his or her relation with his or her relatives, as well as, as far as it may help in determining, whether he or she had

²²⁵*Vout*, *supra* note 56 at para 28.

²²⁶*Craig*, *supra* note 223 at paras 355-356.

²²⁷For a discussion of the interaction between undue influence and suspicious circumstances, see Jordan M. Atin, "Undue Influence and Suspicious Circumstances: 'A Whole Ball of Wax'" in The Law Society of Upper Canada, *Special Lectures 2011: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Canada: Irwin Law, 2011) 231.

²²⁸See Dennis R. Klinck, "Does the Presumption of Undue Influence Arise in the Testamentary Context?" (2005-2005) 24 ETPJ J 125; that is not the case with regard to transactions *inter vivos*, see Winder, *supra* note 193 at 105-108.

²²⁹*Wingrove*, *supra* note 218 at para 83.

²³⁰*Ibid*; see *Smith Estate v Rotstein*, 2010 ONSC 2117, 56 ETR (3d) 216 (available on LEXIS) [*Smith Estate*].

²³¹*Wingrove*, *supra* note 218 at para 83.

²³²*Craig*, *supra* note 223 at paras 355-356.

²³³*Banton*, *supra* note 2 at paras 58-60.

²³⁴*Black's Law Dictionary*, 8th ed, *sub verbo* "undue influence".

²³⁵*Stephens v Austin*, 2003 BCSC 341, 50 ETR (2d) 255 (available on LEXIS).

testamentary capacity at the time of making the will and his or her capacity during and after executing his or her will.²³⁶ Additionally, his or her vulnerability, reasons for making testamentary disposition, and changing a previous will should be examined.²³⁷ The person allegedly unduly influencing a testator's character and his or her opportunity to exercise undue influence should be investigated.²³⁸

3.3. Legal Consequences of Undue Influence

It is irrelevant whether the person has unduly influenced a testator into making a disposition in his or her or another person's favour. The fact that testator was unduly influenced invalidates a testamentary disposition.²³⁹ Consequently, a will made under undue influence is voidable.²⁴⁰

4. German Equivalents of Undue Influence

From the comparative perspective, it is important to present a legal concept, its understanding, function, and legal consequences in the context of the legal culture in which it was developed and exists.²⁴¹ To satisfy this need, in this section, German equivalents of testamentary undue influence are examined in the context of their original setting.

German law does not expressly recognize testamentary undue influence, although its regulations deal with coercion and are functionally equivalent to undue influence.²⁴² Scholars suggest that there are two concepts under German law that are adequate: acts

²³⁶*Eady v Waring* (1974), 2 OR (2d) 627 at para 220.; see *Smith Estate*, *supra* note 230.

²³⁷*Scott v Cousins*, [2001] 37 ETR (2d) 113 (available on LEXIS) at paras 112-114.

²³⁸*Ibid.*

²³⁹Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 239; see *Re Marsh Estate*, *supra* note 57.

²⁴⁰However, theoretically, if only some of the testamentary dispositions were made under undue influence, a court may find only those dispositions void and the rest of the will may remain in force. Undue influence is a form of fraud; and for that reason, it may be suggested that, as in a case of fraud, only the dispositions made under undue influence, instead of the entire will, may become voidable. See Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 243.

²⁴¹Legrand, *supra* note 12 at 116: "A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates."

²⁴²Scalise, *supra* note 13 at 65.

against good morals (*contra bonos mores*) and duress (*Drohung*).²⁴³ To provide a broader perspective both notions are described here. However, after noting their characteristics, the discussion will focus on duress (*Drohung*) as being more compatible with Canadian testamentary undue influence.

4.1. German Legal System

German succession law is regulated in the fifth book, “Law of Succession”, of the German Civil Code (*Bürgerliches Gesetzbuch*; hereinafter BGB), in sections 1922 to 2385.²⁴⁴ Nevertheless, the first, introductory book of the BGB, called “General Part” regulates acts against good morals (*contra bonos mores*) and duress (*Drohung*). The book applies to all the legal transactions that are regulated by the code and participants of which intend to provide them with legal effects, including unilateral and bilateral acts, under, *inter alia*, contract and succession law.²⁴⁵

German succession law is based on the principles of universal succession and of automatic devolution (translated also as “automatic inheritance”), under which all the property rights of a deceased person, including assets and liabilities, regardless to the successor’s or successors’ knowledge or approval, are directly transferred to them on the deceased person’s death.²⁴⁶ The system provides and guards a testator’s testamentary freedom.²⁴⁷ The testator is free to dispose his or her property according to his or her wishes.²⁴⁸ The estate is divided on intestacy only if there are no testamentary

²⁴³*Ibid* at 104-106: “Although German law fails to provide explicit equivalents of undue influence [...], [it does] maintain restrictions associated with certain types of incapacities or prohibitions that prevent many of the same instances of undue influence”; John P. Dawson, “Unconscionable Coercion: the German Version” (1975-1976) 89 Harv L Rev 1041 at 1047 [Dawson, “Unconscionable Coercion”]; John P. Dawson, “Economic Duress and the Fair Exchange in French and German Law” (1937-1938) 12 Tul L Rev 42 at 53 [Dawson, “Economic Duress and the Fair Exchange”]; contra E.J. Cohn & W. Zdzieblo, *Manual of German Law*, 2nd, Vol 1 (London: The British Institute of International and Comparative Law, Bobbs Ferry, N.Y., Oceana Publications, 1968) at 288.

²⁴⁴Karsten Kühne, Stephan Dollinger & Dirk Krome, “Germany” in David Hayton, ed. *European Succession Laws*, 2d ed (Bristol: Jordan, 2002) at 243.

²⁴⁵Dawson, “Unconscionable Coercion”, *supra* note 243 at 1046.

²⁴⁶Peter Gottwald, Dieter Schwab & Ewa Büttner. *Family & Succession Law in Germany* (München: C. H. Beck, 2001) at 118; Norbert Horn, Hein Kotz & Hans G. Leser, *German Private and Commercial Law: an Introduction* (Oxford: Clarendon Press, 1982) at 195-196; Kühne, Dollinger & Krome, *supra* note 244 at 244.

²⁴⁷Gottwald, Schwab & Büttner, *supra* note 246 at 124.

²⁴⁸BGB, *supra* note 206 arts 1937-1941.

dispositions.²⁴⁹ However, a deceased person's descendants, parents, and spouse can claim a compulsory share ("*Pflichtteil*", also translated as "compulsory portion" or "forced share") in the deceased's estate.²⁵⁰ If they are entirely or partially disinherited under testamentary dispositions, they are entitled to the cash difference between "one-half of the value of the share of the inheritance on intestacy" and what they received under the testamentary dispositions.²⁵¹

4.2. Acts *contra bonos mores*

Under the BGB, acts that "contravene [...] the sense of decency of every person who possesses understanding for what is just and equitable" are unenforceable.²⁵² Under section 138 of the BGB, legal acts that are contrary to the public policy or good morals are void:²⁵³

- (1) A legal transaction which is contrary to public policy is void.
- (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.²⁵⁴

²⁴⁹Gottwald, Schwab & Büttner, *supra* note 246 at 120.

²⁵⁰BGB, *supra* note 206 arts 2303-2338.

²⁵¹*Ibid* art 2303; it is a claim under the law of obligation and it is subject to certain limitations; see Gottwald, Schwab & Büttner, *supra* note 246 at 137-142, Kühne, Dollinger & Krome, *supra* note 244 at 245-246; A. Röthel, "Law of Succession and Testamentary Freedom in Germany" in Miriam Anderson & Esther Arroyo i Amayuelas, eds, *The Law of Succession: Testamentary Freedom European Perspective* (Groningen: Europa Law, 2011) at 162-165; Walter Pintens & Steven Seyns. "Compulsory Portion and Solidarity Between Generations in German Law" in Christoph Castelein, René Foqué & Alan Verbeke, eds, *Imperative Inheritance Law in a Late-Modern Society* (Antwerp: Intersentia, 2009) 167; Horn, Kotz & Leser, *supra* note 246 at 199.

²⁵²Scalise, *supra* note 13 at 65-66; Cohn & Zdziebło, *supra* note 243 at 78.

²⁵³In this context "transactions" include also unilateral legal acts; see Scalise, *supra* note 13 at 65-69.

²⁵⁴BGB, *supra* note 206 art 138 (in original):

- (1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.
- (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.

Subsection 138(1) provides a general rule under which legal acts contrary to public policy (understood also as good morals or public morals) are void.²⁵⁵ In the case of succession law, it applies if a testamentary disposition is inconsistent with the public policy. That happens when a testator abuses the freedom of testation to exercise control over an heir.²⁵⁶ In its earliest application, this provision was used to invalidate so-called “paramour wills”, which benefited a paramour at the expense of a legal spouse. Currently, it applies if the purpose of the will is inconsistent with basic rights or fundamental freedoms, and if a will’s provision is comparable to an “immoral clause.”²⁵⁷ For instance, this is the case if inheriting under the will depends on following directions given by a testator in regard to changing life partners, sexual orientation, or faith. In these situations, the condition under which the inheritance passes on to an heir is void.²⁵⁸

The second part of section 138 presents exemplary cases contrary to good morals.²⁵⁹ It provides protection for a person who due to one or more impairments listed in the section has a compromised bargaining capacity from being exploited by burdening him- or herself with disproportionate performance.²⁶⁰ For wills, the subsection protects testators, especially those of impaired or compromised mental capacity or in need of care, from being coerced into executing testamentary dispositions by invalidating acts made due to “lack of sound judgement or considerable weakness of will.”²⁶¹ For example, it would invalidate dispositions benefiting medical staff made through the abuse of their “position of trust” as contrary to good morals.²⁶² Additionally, this subsection is used to invalidate wills that violate statutory provisions, for example, a provision of a statute that prohibits benefiting a staff member of a nursing home under a patient’s will.²⁶³

²⁵⁵Dawson, “Unconscionable Coercion”, *supra* note 243 at 1052; Ernest J. Schuster, *The Principles of German Civil Law* (London: Clarendon Press, 1907) at 101.

²⁵⁶Scalise, *supra* note 13 at 65.

²⁵⁷A. Röthel, *supra* note 251 at 157-159; Scalise, *supra* note 13 at 65-67.

²⁵⁸Scalise, *supra* note 13 at 65-67.

²⁵⁹Dawson, “Unconscionable Coercion”, *supra* note 243 at 1054.

²⁶⁰*Ibid* at 1052-1054.

²⁶¹BGB, *supra* note 206 art 138(2). In this context “transactions” also include unilateral legal acts; see Scalise, *supra* note 13 at 65-69.

²⁶²Scalise, *supra* note 13 at 65-67.

²⁶³*Ibid* at 67-68; this application was challenged under, *inter alia*, the constitutional law of freedom of testation and right to inheritance; however, the German Federal Constitutional Court (*Bundesverfassungsgericht*) ruled on its applicability.

4.3. Acts under *Drohung*

Drohung is identified as “physical violence, actual or threatened.”²⁶⁴ It is translated in English as duress. The doctrine of *Drohung* was developed under contract law. However, the understanding of the concept is common to both contract and succession law.²⁶⁵ For that reason, under the BGB, a testamentary disposition can be contested on the ground of *Drohung*.

Under section 123(1) of the BGB, acts made under deceit or duress (*Drohung*) are voidable. The code provides that:

A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration.²⁶⁶

Deceit is not an equivalent of testamentary undue influence and, as such, not relevant for further consideration. The main concern is the interpretation and function of duress.

In the case of duress (*Drohung*), a person may be threatened or physically forced to make a declaration. Under German law, a threat is defined as “any action intended to create fear of future evil.”²⁶⁷ The threatened evil has to be under the control of the person making the threat (hereinafter the threatener).²⁶⁸ In determining whether a threat occurred, the threatened person’s state of mind is important. He or she must believe that the threat is serious, that it may be carried out, and that it is conditional only upon the threatener’s will. The degree of duress necessary to overpower a person’s will decreases as the person’s mental capabilities diminish. Consequently, establishing the existence of a threat may depend on the person’s circumstances; and, in certain cases, mere suggestions can be treated as such. Furthermore, there must be a causal link between the threat and

²⁶⁴Dawson, “Unconscionable Coercion”, *supra* note 243 at 1047.

²⁶⁵Scalise. *supra* note 13 at 73; “Most cases of *Drohung* occur in the contractual context, but the testamentary prohibition in art 2078 of the BGB is the same as the general prohibition of *Drohung* in the contractual realm.”

²⁶⁶BGB, *supra* note 206 art 123 (in original):

(1) Wer zur Abgabe einer Willenserklärung durch arglistige Täuschung oder widerrechtlich durch *Drohung* bestimmt worden ist, kann die Erklärung anfechten.

²⁶⁷Cohn & Zdzieblo, *supra* note 243 at 82.

²⁶⁸Nigel Foster & Satish Sule, *German Legal System and Laws*, 4ed (New York: Oxford, 2010) at 444.

the act.²⁶⁹ The reason for the threatened person's action is the fear originating from the threat.²⁷⁰ The threat is the "*conditio sine qua non*" for the person to act.²⁷¹ On the other hand, the threatener must intend to force the other person to act in a certain way and must desire the act.²⁷² It is disputable whether he or she must know that the threat is immoral or unlawful.²⁷³

A threat can be made explicitly or implicitly.²⁷⁴ The threatened evil does not have to be of any special kind; it can be of a "material or idealistic nature."²⁷⁵ The act insisted upon by the threatener may be in favour of him or her or a third person.²⁷⁶ A threat must consist of a promise of harm done to the threatened or to another person.²⁷⁷

Threats are unlawful (prohibited by law) under three categories: because of "the means of threatening", "the end (desired result)", or "the particular connection between means and end."²⁷⁸ A threat's means (the evil) is unlawful when a person is threatened with illegal conduct, for example, acts that are forbidden under the criminal law, such as violence or slander.²⁷⁹ A threat's end (aim) is illegal when it leads to an unlawful outcome, which violates statutory law or is contrary to good morals (*contra bonos mores*).²⁸⁰ The relation between the means and the end is unlawful when separately either of them is illegal, but their simultaneous occurrence in a particular relation under certain circumstances makes the threat unlawful.²⁸¹ The application of the means must lead to achieving the desired outcome. Additionally, the threatener must have a "justifiable

²⁶⁹See Armin Hadjiani, "Duress and Undue Influence in English and German Contract Law: a Comparative Study on Vitiating Factors in Common and Civil Law" online at: Oxford U Comparative L Forum

1 <ouclf.iuscomp.org> at s.V(d).

²⁷⁰See *Ibid.*

²⁷¹See *Ibid.*

²⁷²The threatener may threaten a person into not acting, but that is unlawful only if the person is legally obliged to act; *Ibid* at s.V(c).

²⁷³See *Ibid.*

²⁷⁴*Ibid* at s.V(a).

²⁷⁵*Ibid.*

²⁷⁶Schuster, *supra* note 255 at 110.

²⁷⁷"A threat not to act will satisfy the requirement if there is a legal duty to act" Hadjiani, *supra* note 269 at s.V(a).

²⁷⁸Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise*, 2d ed. (Oregano: Hart, 2006) at 317; Schuster, *supra* note 255 at 110.

²⁷⁹Scalise, *supra* note 13 at 73; Hadjiani, *supra* note 269 at s.V(aa).

²⁸⁰However, a threat that results in an unlawful result can be invalidated on the grounds of the statutory provision that it violates. Hadjiani, *supra* note 269 at s.V(aa); Scalise, *supra* note 13 at 73.

²⁸¹Scalise, *supra* note 13 at 73-74.

interest in the intended result of the threat.”²⁸² The relation between the means and the end obtains, for instance, when a caregiver threatens to leave a vulnerable testator unless the testator makes a will in the caregiver’s favour.²⁸³ In this case, the threat is illegal, because, contrary to good morals, a person subjects a testator to pressure to benefit under his or her will.

According to the dominant view, establishing the existence of an unlawful threat shifts the burden of proof. The person accused of imposing duress must prove that there was no causal relation between the threat and the actions of the threatened person.²⁸⁴

4.4. Legal Consequences of German Undue Influence Equivalents

Acts conducted *contra bonos mores* are void and have no legal effects.²⁸⁵ A promised performance or legal document is not enforceable and is treated as if it had never existed (*null ab initio*).²⁸⁶ This also applies to testamentary dispositions that are not enforceable. The property disposed by them passes on intestacy. There are no specific provisions under German succession law that would provide any further consequences for a person acting *contra bonos mores*.

Acts made under section 123 of the BGB are voidable. A court must establish that testamentary dispositions were made under *Drohung* for them to become void and have no legal effects. If only some dispositions are void, the remaining dispositions may remain in force. Property disposed under dispositions recognized as made under duress passes on intestacy. Additionally, under section 2339(1) of the BGB, if a testator makes or revokes a disposition *mortis causa*, including testamentary dispositions, under another person’s duress, the court declares that person unworthy of inheriting from the testator.²⁸⁷

²⁸²Hadjiani, *supra* note 269 at s.V(aa).

²⁸³“The general rule is that where the means of the threat and the end are intimately connected, the pressure is lawful; and where they are not related to each other, the pressure may be unlawful.” Markesinis, Unberath & Johnston, *supra* note 278 at 317; John P. Dawson, “Economic Duress”, *supra* note 206 at 360 (footnote 56).

²⁸⁴Hadjiani, *supra* note 269 at s.V(d).

²⁸⁵Dawson, “Unconscionable Coercion”, *supra* note 243 at 1056; the person taken advantage of can commence a proceeding.

²⁸⁶*Ibid*; Foster & Sule, *supra* note 268 at 446.

²⁸⁷“Duress” (in the German version “*Drohung*”) under article 2339 is an equivalent of “duress” (in the German version “*Drohung*”) under art 123 of the BGB; BGB, *supra* note 206 art 2340(1).

However, this does not apply if the testator forgives the other person,²⁸⁸ or if the disposition *mortis causa* becomes or would become ineffective before the testator's death.²⁸⁹

Unlawful threat is one of the circumstances under which a person, including a legatee, a testamentary and statutory heir, becomes unworthy to inherit.²⁹⁰ For example, a person is also unworthy to inherit if he or she has deliberately and unlawfully killed or attempted to kill the deceased person. Furthermore, this is also the case if he or she has enabled the deceased to execute or revoke a disposition *mortis causa*, stopped the deceased from executing or revoking such a disposition, forged or falsified a testator's disposition *mortis causa*, or deliberately used such documents.²⁹¹

A person declared unworthy of inheriting does not benefit from the testator's estate either under a will or under the law of intestacy. A statutory heir is not entitled to claim the compulsory portion.²⁹² However, descendants of a person declared unworthy to inherit are not precluded from benefiting from the testator's estate.²⁹³

²⁸⁸Schuster, *supra* note 255 at 592; BGB, *supra* note 206 art 2345.

²⁸⁹BGB, *supra* note 206 art 2339(2):

In the cases set out in subsection (1) nos. 3 and 4, unworthiness to inherit does not occur if, before the occurrence of the devolution of the inheritance, the disposition that the testator was induced to make or in respect of which the criminal offence was committed has become ineffective, or the disposition which he was induced to revoke would have become ineffective.

²⁹⁰Schuster, *supra* note 255 at 592; BGB, *supra* note 206 art 2345.

²⁹¹BGB, *supra* note 206 art 2339, *supra* note :

(1) A person is unworthy to inherit:

1. if he has intentionally and unlawfully killed or attempted to kill the deceased, or has put him in a state as a result of which the deceased was incapable until his death of making or revoking a disposition *mortis causa*,
2. if he has intentionally and unlawfully prevented the deceased from making or revoking a disposition *mortis causa*,
3. if he has, by deceit or unlawfully by duress, induced the deceased to make or revoke a disposition *mortis causa*,
4. if he is, in respect of a disposition *mortis causa* made by the deceased, guilty of a criminal offence under the provisions of sections 267, 271 to 274 of the Criminal Code [Strafgesetzbuch].

²⁹²Schuster, *supra* note 255 at 628.

²⁹³Reinhard Zimmermann, "Unworthiness to Inherit: The Development of a Legal Rule in the Mirror of European Codifications" in Helmut Koziol & Peter Apathy, eds, *Festschrift für Helmut Koziol zum 70. Geburtstag* (Wien: Sramek, 2010) 462 at 483.

This regulation serves as a deterrent. It aims at protecting a testator's freedom of testation and the rightful order of succession.²⁹⁴ Further, it berates an heir's illegal action. It is assumed that a person who transgresses against a testator should not benefit from his or her act.²⁹⁵ It penalizes undesirable behaviour.²⁹⁶ For the regulation's application, it is irrelevant whether a testator would dispose his or her property differently if he or she knew or, in the case of impaired testators, understood the transgression.²⁹⁷

The procedure of establishing a person unworthy to inherit may be commenced after the death of a testator by any person who would benefit by an heir's disqualification.²⁹⁸ A person declared unworthy of inheriting does not automatically acquire the inheritance, but, instead, is treated as if he or she predeceased the testator.²⁹⁹ The share in the estate he or she would have received devolves upon the persons who would inherit as if the person declared unworthy to inherit were not alive.³⁰⁰

There are very few cases in which a court has declared a person unworthy to inherit under German law.³⁰¹ Probably, most such cases are not recognized, or those entitled to commence a legal procedure are afraid or choose not to do so.³⁰²

5. Functional Comparison

Testamentary undue influence is compared to both acts against good morals (*contra bonos mores*) and duress (*Drohung*).³⁰³ This section presents the compatibility of

²⁹⁴Bogudar Kordasiewicz, ed, *System Prawa Prywatnego: Prawo Spadkowe* (Warszawa: CH Beck Instytut Nauk Prawnych PAN, 2009) at 148; Zimmermann, *supra* note 293 at 483-484.

²⁹⁵Mathias Reimann & Joachim Zekoll, *Introduction to German Law*, 2nd edition (The Hague: Kulwer Law International, 2005) at 288.

²⁹⁶Kordasiewicz, *supra* note 294 at 148.

²⁹⁷Zimmermann, *supra* note 293 at 485-486.

²⁹⁸Schuster, *supra* note 255 at 592; BGB, *supra* note 206 art 2341.

²⁹⁹Magliveras, *supra* note 188 at 291; BGB, *supra* note 206 art 2342:

(1) Avoidance is effected by bringing an action for avoidance. The action must be directed to having the heir declared unworthy to inherit.

(2) The avoidance does not enter into effect until the judgment is final and absolute.

³⁰⁰*Ibid* s. 2344

(1) If an heir is declared unworthy to inherit, the inheritance is deemed not to have devolved upon him.

(2) The inheritance devolves upon the person who would be entitled to inherit if the person unworthy to inherit had not been living at the time of the devolution of the inheritance; the devolution is deemed to have occurred upon the devolution of the inheritance.

³⁰¹Knut Werner Lange, *BGB Kommentar: Erbrecht* (München: C. H. Beck, 2011) at 876.

³⁰²*Ibid*.

the Canadian common law's testamentary undue influence and the German legal concepts' origins, functions, characteristics, and consequences to conclude that the Canadian legal notion has the most in common with *Drohung*.

5.1. The Concepts in Their Original Settings

The common historical roots of undue influence under Canadian Common Law and under German law are noticeable. However, they evolved in parallel legal systems, completely separate and independent from each other. Moreover, the time, the legal and social environment, and the need for their introduction in either jurisdiction influenced their development and current form.

Both legal concepts representing undue influence under German law, in a legal system based on written law interpreted and applied by the courts, were incorporated into law under provisions of a civil code. None of the Canadian common law statutes regulate undue influence; rather, it is a rule developed solely under and applied in case law.

The meanings of the described German legal concepts, regulated in the "General Part" of the BGB, are universal throughout civil law, regardless of their application. Their general understanding is applied in succession law as well as in contract and family law. Only in the case of *Drohung* do the consequences of establishing it vary regarding acts *inter vivos* and *mortis causa*. Under Canadian Common Law, testamentary undue influence concerns only acts carried out under succession law. In other areas of law, the application of undue influence is based on different rules.³⁰⁴

5.2. Functions of the Concepts

Declaring unlawful acts against good morals (*contra bonos mores*) and acts made under duress (*Drohung*) serves the same purpose that undue influence does. In the context of succession law, the declaration aims to ensure that acts inconsistent with a

³⁰³Scalise, *supra* note 13 at 104-106; Dawson, "Unconscionable Coercion" *supra* note 243 at 1047; Dawson, "Economic Duress and the Fair Exchange" *supra* note 243 at 53; contra Cohn, *supra* note 222 at 288.

³⁰⁴See Amonson, *supra* note at 212; Winder, *supra* note 193; Oosterhoff, "Testamentary Capacity", *supra* note 164.

testator's free will have no legal effects. Consequently, this procedure protects a testator's testamentary freedom and prevents coercing testator into making any undesired testamentary dispositions.

The application of section 138 of the BGB, making acts *contra bonos mores* void, is wider than the application of testamentary undue influence. Its purpose is not only to prevent enforcement of acts inconsistent with a testator's will but, more frequently, to invalidate acts publically or morally disapproved acts. No coercion is required. The sole purpose of Canadian testamentary undue influence is to invalidate acts a testator has executed against his will. Section 138(2) of the BGB is more comparable to undue influence, since its application is limited to certain cases of exploitation of a person's compromised position.

As in the case of testamentary undue influence under Canadian Common Law, the purpose of section 123(1) of the BGB regulating *Drohung* is to protect a person's free will. Acting under duress is equivalent to being coerced into acting. In both cases, force, a form of violence, or a threat needs to occur. However, the concept of duress is wider, and coercion might be seen as one of its examples.³⁰⁵

5.3. The Concepts' Characteristics

It seems that in the process of declaring or establishing the illegality of acts the German concepts refer to abstract notions, such as good morals or public policy. They implicitly refer to them when judging the unlawfulness of different legal actions. However, the courts have also established the illegality of acts that are inconsistent with or prohibited by statutory law. Canadian Common Law does not seem to invoke fairness or justice; rather, it relies on rules established under law and implements them when conditions for their applicability are met.

Acts are *contra bonos mores* if they are inconsistent with public policy or good morals, currently understood as basic rights or fundamental freedoms. Finding *Drohung*

³⁰⁵Lonnie Chunn, "Duress and Undue Influence—A Comparative Analysis" (1970) 22 Baylor Law Review 572 at 572-573.

requires establishing that a testator executed a will because of a threat, implied or explicit, or violence. In other words, it is important to prove that under the circumstances and in the context of good morals or public policy, a testamentary disposition could not reflect a testator's true will. Testamentary undue influence takes place if, through coercion, a person overpowers a testator's will and the dispositions *mortis causa* demonstrate this person's will rather than the will of the testator.

Coercion, which is necessary under Canadian law to establish testamentary undue influence, is a form of duress. Under German law, *Drohung* (duress) subsumes particular species, such as coercion. Consequently, undue influence and *Drohung* would be established if a person were coerced into executing a testamentary disposition. However, only *Drohung* would be constituted if some other types of duress took place, for example, if a person was physically forced to execute particular dispositions. In other words, *Drohung* has a wider application than testamentary undue influence. Theoretically, it could be established in cases in which testamentary undue influence was not found; therefore it ought to occur more frequently and be easier to prove than the presence of testamentary undue influence under Canadian law.

It can be only assumed that the degree of duress and the degree of coercion necessary to overpower the will of a testator with diminished capacity decrease in both legal systems in the same, proportional manner. Nevertheless, the definition of diminished capacity may be rooted in the cultural and social contexts of legal rules.

5.4. Legal Effects of the Concepts

Acts *contra bonos mores* are void and have no effect. In a dispute, a court declares them void. Acts made under *Drohung*, like those made under Canadian common law testamentary undue influence, are merely voidable. In either case, to constitute them void, a court must establish that duress or coercion took place. Until declared void, such acts are enforceable.

Declaring a testamentary disposition *contra bonos mores* or finding that it was made under *Drohung* and establishing testamentary undue influence have the same

consequences: the disposition becomes invalid. Additionally, German law, under section 2339 of the BGB, finds a person who exercised duress on a testator unworthy to inherit. Under Canadian law, a person unduly influencing a testator does not bear any such consequences of his or her actions.

The rigid outcome provided under German law is supposed to deter persons from tampering with a testator's freedom and to protect a testator from any unlawful duress, especially since German law secures a testator's family rights to his or her estate by entitling the family to a compulsory share. Even if disinherited, they have a cash claim on the estate. Influencing a testator puts that inheritance at risk and reveals the influencers' extraordinary avarice. On the other hand, the provision promotes those who respect the testator's freedom. If an heir is declared unworthy of inheriting, the other heirs' shares in the estate increase.

Under Canadian Common law, a person unduly influencing a testator does not bear any consequences of his or her actions. This situation encourages the exercise of undue influence, particularly, because the law does not provide family members, apart from the deceased's dependants who can apply for support out of the estate, with rights to the deceased's estate if he or she, explicitly or by omission, disinherited them.³⁰⁶ Clearly, unlimited infringement of a testator's freedom carries no risk.

5.5. Conclusions

The analysed legal concepts stem from two contrasting legal systems, based on significantly different rules. Each of them applies distinct means to accomplish their function, and each relies on different rules or concepts in judging legal acts. They vary in the consequences they impose.

In spite of the considerable structural differences, the three concepts share the same purpose. Their functions, characteristics, and consequences vary, but they correspond to each other. Particularly, in the case of *Drohung* and that of testamentary undue influence under Canadian Common Law, they share all the relevant features.

³⁰⁶ *Succession Law Reform Act*, *supra* note 4 s 58.

6. Undue Influence in Relevant Predatory Marriage Cases

A legal concept is understood through an investigation of its theoretical meaning and practical dimensions. The subsequent analysis examines the application of testamentary undue influence in Canadian common law predatory marriage cases involving elders and the potential applicability of *Drohung* under the circumstances indicated in these cases. Establishing that testamentary undue influence under Canadian Common Law and the German concept of duress are each other's equivalents allows limiting the scope of the further examination to those two concepts.

6.1. Testamentary Undue Influence in Predatory Marriage Cases

In predatory marriage cases, predatory spouses marry to benefit from their spouses' death. In *Banton v Banton*,³⁰⁷ *Danchuk v Calderwood*,³⁰⁸ and *Barrett Estate v Dexter*,³⁰⁹ to extend their interests in the estates beyond that of intestacy, the wives coerced their husbands to execute a will in their favor. Imposing their will on their spouses' testamentary dispositions caused the wills to be invalid. It deprived the men of their testamentary freedom. For that reason, in the first two cases, the courts decided that the wills were made under the undue influence of the predatory spouses. The case *Barrett Estate v Dexter* is slightly different, because the court did not consider the issue of undue influence, but found the will invalid on the grounds of lack of testamentary capacity.³¹⁰ The applicability of testamentary undue influence in this case is not considered.

In *Feng v Sung Estate*³¹¹ and *Hart v Cooper*³¹² the predatory spouses did not infringe the victim spouses' testamentary freedom through coercing them into executing a new will. However, each of them financially gained by entering the marriage and engaged in further, specific actions to increase that gain. Additionally, they were expecting to inherit a significant part of their respective husbands' estate under the succession law. Feng received and withdrew from Sung's private bank account over

³⁰⁷*Banton*, *supra* note para 2.

³⁰⁸*Danchuk*, *supra* note para 46.

³⁰⁹*Barrett*, *supra* note para 45.

³¹⁰*Ibid* at paras 74, 88.

³¹¹*Feng*, *supra* note para 26.

³¹²*Hart*, *supra* note para 48.

\$56,500.³¹³ Moreover, in spite of Sung's will, Feng dismissed the lawyer who was preparing the prenuptial agreement that would have prevented her from inheriting a share in Sung's estate on his death. Hart, during a month-long marriage, received Smiglicki's life savings and valuable property.³¹⁴ He transferred his assets to her though he later claimed that he was kidnapped.³¹⁵ Moreover, Hart had been married six times before marrying Smiglicki, and she must have been aware that their marriage would revoke his previous testamentary dispositions and that, as the surviving spouse, she would inherit most of his estate.³¹⁶

In *Banton v Banton*³¹⁷ the validity of Banton's will was assessed in the context of his wife's influence and his mental condition.³¹⁸ The court established that at the time of executing and re-executing his will, Banton was vulnerable, both physically and mentally. Numerous health issues made him dependent on external assistance and prone to being influenced.³¹⁹ After marrying Yassin, he became incapable of resisting her influence; he was a "mere puppet."³²⁰ He rarely showed initiative in his financial affairs. During the meetings between Banton and his lawyer or banker, Yassin expressed Banton's alleged wishes. She gave the instructions and was the one who communicated with the lawyer.³²¹

The court described Yassin as determined, strong-willed, and persistent. She used her influence on Banton to dominate him and to acquire control and ownership of his assets. She handled any uncertainty he had about their marriage and his will and stopped his family from accessing or influencing him and his personal and financial affairs. When Banton became her husband, she abused the relation of dependency to achieve her goals. After he executed a will and a power of attorney in her favour, she became confident that, on his death, she would acquire all his assets. Consequently, her interest in him

³¹³*Feng*, *supra* note para 26.

³¹⁴*Hart* *supra* note 48 at para 20.

³¹⁵*Ibid* at para 21.

³¹⁶*Ibid* at para 5.

³¹⁷*Banton*, *supra* note para 2.

³¹⁸*Ibid* at para 57.

³¹⁹*Ibid* at para 62.

³²⁰*Ibid* at para 93.

³²¹*Ibid* at paras 85-89.

decreased, as became particularly evident after Banton was admitted to hospital in October 1995. After Yassin's initial visit, during which they fought, she stopped visiting him and communicated with him only by phone.³²² He never returned to her apartment, his family regained full access to him, and Yassin did not see him again prior to his death. At this point, Banton could not revoke or execute a new will because he was assessed as incapable of managing property or making a new will.

The court found that Banton executed and re-executed his will under Yassin's undue influence. It therefore stated that:

on a strong balance of probabilities [...], as a result of the imposition of Yassin's influence on his weakened mental state, [...] Banton was incapable of making an independent decision with respect to the disposition of his property by will on December 20 and 21, 1994 and May 4, 1995, and [...] the decisions he purported to make on those occasions were an expression of her will and not his.³²³

The court confirmed that the desire to acquire Banton's property motivated Yassin's actions and grounded the ruling in "the totality of the evidence."³²⁴

In *Danchuk v Calderwood*,³²⁵ the court established that Danchuk, alienated from his relatives and friends, was exclusively dependent on his caregiver, and subsequent wife, Ducolon. She controlled his decisions. During a meeting with a lawyer, since Danchuk had "some difficulty with the words", Ducolon gave the instructions with regard to his will.³²⁶ The lawyer interviewed him and read his will in Ducolon's presence.³²⁷ Additionally, the circumstances surrounding the preparation and execution of his will were suspicious. In the court's opinion, the lawyer did not investigate all the relevant issues. The lawyer preparing Danchuk's will did not inquire about the testator's health,

³²²*Ibid* at para 93.

³²³*Ibid* at paras 97-98; the court stated:

"It is the case of a lonely, depressed, terminally ill, severely disabled and cognitively impaired old man whose enfeebled condition made him an easy prey for a person like Muna [Yassin] with designs on his property."

³²⁴*Ibid* at para 97.

³²⁵*Danchuk, supra* note para 46.

³²⁶*Ibid* at para 71.

³²⁷*Ibid* at para 117.

the already existing will and the reasons for which it was revoked, or the power of attorney given to Danchuk's daughter and the explanation for its revocation.³²⁸

Ducolon was presented as driven, financially-oriented and meticulous. She became aware of the extent of Danchuk's property and obtained absolute control over him to access his assets. The court was convinced that Ducolon was implementing a plan to obtain Danchuk's property. Through marriage, executing mutual wills, and obtaining a power of attorney in her favour, she had unrestricted access to his assets during his lifetime and a means of acquiring his estate after his death.³²⁹

The court did not accept the lawyer's and Ducolon's evidence that Danchuk's will represented his true will and wishes.³³⁰ It ruled that Ducolon "exercised undue influence upon the deceased at the material times and that the circumstances surrounding the preparation of the [w]ill in question were suspicious."³³¹ Consequently, the court did not admit the will of 1994 to probate.³³²

These cases demonstrate how predatory spouses implemented a plan in which a will was a means of extending their access to a vulnerable person's assets. Elderly victim spouses made and executed testamentary dispositions in favour and under the undue influence of their predatory spouses. They were deprived of the right to decide about the division of their assets upon their death. The predatory spouses' desire for financial gain compromised the victim spouses' freedom of testation.

6.2. *Drohung*'s Applicability to Canadian Predatory Marriage Cases

Drawing on the doctrine of *Drohung*, it can be assumed that a predatory spouse's testamentary undue influence on a victim spouse amounts to duress under German law. Discussion of the hypothetical applicability of *Drohung* to the predatory marriage cases follows.

³²⁸*Ibid* at para 71.

³²⁹*Ibid* at para 128.

³³⁰*Ibid* at para 120.

³³¹*Danchuk v Calderwood*, [1997] BCJ No 1439 at para 3.

³³²*Ibid* at paras 130-131.

In *Banton v Banton* and in *Danchuk v Calderwood*, an implicit threat implies presence of duress. In the situation of dependency, both promoted and exploited by the predatory spouse, a vulnerable person was threatened by the possibility that his caregiver leaving him. He was aware of his compromised capabilities, his powerlessness, and his need for constant assistance; and he viewed losing his caregiver as a real and serious threat. He was afraid of being abandoned and sought to please his predatory spouse in order to secure continued support. Out of fear, the vulnerable person succumbed to the suggestion to revise his testamentary dispositions. In this kind of situation, proving violence or explicit threat would be unnecessary.

The predatory spouse's actions showed her intentions and determination to obtain the victim spouse's estate. She desired a will in her favour and coerced the vulnerable person to execute it. She arranged meetings with lawyers and communicated with them. She also represented the victim spouse's alleged will during those meetings.

The implied threat would be found unlawful for two reasons. The threat's outcome was unlawful. It forced a testator, against his will, to make and execute a will that disinherited his children, which is contrary to good morals and public policy. It interfered with a testator's freedom of testation and his or her descendants' moral right to their parents' estate. However, more importantly, the relation between the means and the end was unlawful. The simultaneous occurrence of threats while the testator was dependent on his predatory spouse and the execution of a new will in her favour were unlawful. The threat was unlawful because the predatory spouse used the relationship of dependency to impose her will on the victim spouse, and she did it to benefit financially from the victim spouse's testamentary dispositions.

7. Conclusions

The German *Drohung* is functionally equivalent to the Canadian common law testamentary undue influence. Both concepts aim to protect a testator's freedom to dispose his or her property according to his or her true will and wishes. However, under German succession law, a court declares a person unworthy to inherit if he or she

exercised duress over a testator, while under Canadian Common Law a person unduly influencing a testator does not suffer this consequence.

The equality of the concepts and the unsolved issue of testamentary undue influence in predatory marriage cases justify providing testamentary undue influence and *Drohung* with similar consequences. Potentially, applying the German consequences of duress to persons who unduly influenced a testator could solve the problem of courts' being powerless in predatory marriage cases. It would be appropriate for a predatory spouse to be declared unworthy to inherit if it were proven that he or she exercised testamentary undue influence on a victim spouse. It would be a severe consequence, but one commensurate with the person's conduct.

Establishing undue influence proves that the predatory spouse's actions were solely financially motivated. He or she transgressed his or her position in a trust-dependency relationship and took advantage of the testator's mental and physical impairments for monetary gain. Putting financial gain above the well-being of another person is worthy of condemnation. Providing severe consequences, namely, losing rights to a testator's estate, could deter predatory spouses from coercing or threatening a testator into making testamentary dispositions in their favour. Better protection could prevent situations of exploitation from occurring.

Depriving a testator of his or her inherent right to decide about his or her property's disposition is a serious transgression. Determining the division of his or her property is every person's moral and legal right. It rewards a person's efforts put into accumulating and cultivating his or her assets. A testator decides about the division and, potentially, consumption of his or her assets while taking into account beneficiaries' conduct, needs, and their relationship.

The proposed outcome would be morally and socially just, since deeming a predatory spouse unworthy to inherit would cause the estate to be distributed on intestacy among the vulnerable person's legitimate heirs.

Unlike applying the suggestions proposed by Canadian scholars, declaring a person who unduly influences a testator to be unworthy to inherit would not have significant side effects. The court would apply this consequence after a testator's death. It would have no influence on marriage and would not make it less accessible, stable, or easier to nullify. It also would not influence a testator's family's succession rights. Since it would be an added consequence to an existing legal concept (testamentary undue influence), in order to be applied it would not require conducting any additional or external assessments.

Transplanting a solution provided under a foreign legal system requires close consideration of its suitability within the confines of the receiving state's legal framework. In the next part of this paper, declaring a predatory spouse unworthy to inherit is discussed in the perspective of its hypothetical implementation under Canadian Common Law. A means of application based on the principle that a person cannot benefit from his or her wrong is considered.

Part III Declaring a Predatory Spouse Unworthy to Inherit

1. Introduction

Transplanting legal concepts requires considering their suitability within the receiving legal system. For that reason, transferring the German concept, under which a person is declared unworthy of inheriting, needs to be examined in context of Canadian Common Law, the receiving country's legal system. However, the considered idea is not unique to the German legal system. Under Canadian Common Law, pursuant to the slayer rule, this consequence already applies to murderers, who do not inherit from their victims. Some American states have also introduced this concept to fight, *inter alia*, elder abuse.³³³

Neither the slayer rule nor the provisions applying in cases of elder abuse can be implemented in predatory spouse cases. A predatory spouse's acts, no matter how repugnant and socially condemned, are not comparable to murder or manslaughter and do not meet the threshold of elder abuse. However, discussing declaring a slayer unworthy to inherit shows how this concept was adopted and developed under the Common Law in Canada and how its application has been extended in the United States. The consequence is not unknown to the Common Law. Its implementation to testamentary undue influence in predatory marriage cases would not require accepting exotic remedies. Instead, the suggested German solution, already existing in a parallel form within the system, could be applied under new circumstances.

Further, proposing a concept needs to be supported by detailed guidelines regarding its application in the receiving country. Descriptions of the particular elements necessary to establish a situation in which a predatory spouse could be declared unworthy to inherit after a victim spouse are drawn from the earlier analysis of predatory marriage

³³³Also child abusers and spouse abusers are deemed unworthy to inherit under some states' statutes, see Anne-Marie Rhodes, "Consequences of Heirs' Misconduct: Moving from Rules to Discretion" (2007) 33 Ohio NUL Rev 975 at 986; Kymberleigh N. Korpus, "Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation", Note, (2000-2001) 52 Hastings LJ 537 at 568.

cases, testamentary undue influence, and the applicability of consequences provided under the German doctrine of *Drohung*.

Finally, the solution's implementation under Canadian common law is discussed. The proposed remedy is considered as an incremental change to existing law that could be introduced through case law. However, because of the uncertainties of this proposal's character, the issue of the remedy's application is open to a further debate.

The following sections consider the slayer rule and elder abuse remedies. They focus on the policy justification, content, and applicability of these legal concepts for predatory marriage cases. Their role in supporting the deeming of a predatory spouse unworthy to inherit under the condition of testamentary undue influence is presented. Subsequently, directions for indicating the circumstances suitable for applying unworthiness to inherit in predatory marriage cases are examined. Finally, the remedy's implementation is considered.

2. Unworthiness of Inheriting at Common Law

2.1. Introduction

Comparing acts committed by a slayer and a predatory spouse is unreasonable. Violating the right to live has different legal and moral implications that exceed the significance of financial gain. However, examining the slayer rule's policy facilitates applying its consequences, namely declaring a predatory spouse unworthy to inherit on the example of German *Drohung*.

To indicate the slayer rule's significance in preventing a predatory spouse from benefiting from a victim spouse, the rule itself is investigated. Subsequent sections indicate the rule's policy justification, conditions for its application, and its relevance to predatory marriage cases. Investigation of the rule's compatibility with the German remedy follows.

2.2. Not Benefiting from Wrongdoing

At Common Law, under the general rule, a person should not benefit from his or her crime.³³⁴ In particular, a slayer cannot profit from a lethal deed he or she has committed. For that reason, a court finds him or her unworthy to inherit from his or her victim.³³⁵ The rule is grounded in public policy and in the presumption that a victim would not want his or her killer to benefit on his or her death.³³⁶

Depriving a killer of any rights to his victim's property is justified by equity, morality, and the rules of property law.³³⁷ Under the equitable policy, the slayer rule aims at preventing unjust enrichment and deterring acts that harm a community and constitute a crime.³³⁸ In that context, the slayer's intention to benefit or not to benefit on his or her victim's death is immaterial.³³⁹ Moreover, the rule implements the view that it is immoral to kill another person.³⁴⁰ Morals authorize depriving a murderer of a share in the victim's estate, especially, if he or she is illicitly motivated by avarice or a desire to influence the order of property succession.³⁴¹ Under such circumstances, depriving him or her of a bounty serves as a deterrent and "strengthens criminal sanctions."³⁴² Finally, the slayer interferes with the property transfer scheme.³⁴³ The victim is deprived of future enjoyment of his or her property or of modifying his or her estate plans.³⁴⁴ The order of succession is violated. Therefore, the slayer should not benefit from his or her act.³⁴⁵

³³⁴Leonard E. Lang, "Disinheriting a Murderer of an Ancestor" (1953-1954) 8 Wyoming Law Journal 132 at 132.

³³⁵Julie J. Olenn, "'Til Death Do Us Part: New York's Slayer Rule and *In re Estates of Covert*" (2001) 49 Buff L Rev 1341 at 1341.

³³⁶*Lundy v Lundy* (1895), 24 SCR 650 at 14 [*Lundy*].

³³⁷Mary Louise Fellows, "The Slayer Rule: Not Solely a Matter of Equity" (1985-1986) 71 Iowa L Rev 489 at 491ff; Kent S. Berk, "Mercy Killing and the Slayer Rule: Should The Legislatures Change Something?" (1992-1993) 67 Tul. L Rev 485 at 495; Adam J. Katzt, "*Heinzman v Mason*: A Decision Based in Equity But Not Equitable Decision" (1998-1999) 13 Quinipiac Prob L J 441 at 456; Olenn, *supra* note 335 at 1349-1351.

³³⁸Berk, *supra* note 337 at 495-497; Katzt, *supra* note 337 at 451.

³³⁹Berk, *supra* note 337 at 495-497; Katzt, *supra* note 337 at 451.

³⁴⁰Berk, *supra* note 337 at 498-502; Katzt, *supra* note 337 at 452-453.

³⁴¹Fellows, *supra* note 337 at 491-492.

³⁴²Berk, *supra* note 337 at 498-502; Katzt, *supra* note 337 at 452-453.

³⁴³Fellows, *supra* note 337 at 545.

³⁴⁴Berk, *supra* note 337 at 495; 502-506; Katzt, *supra* note 337 at 454-455.

³⁴⁵Berk, *supra* note 337 at 495; 502-506; Katzt, *supra* note 337 at 454-455.

Justifying the validity of the rule by grounding it in the victim's alleged intent contradicts the rule's origins. It is most likely that the principle replaced "ancient common law doctrines of attainder, forfeiture and corruption of blood, and escheat."³⁴⁶ Until 1870, when they were abolished by the Act to Abolish Forfeitures for Treason and Felony, they had entitled the Crown to confiscate property of convicted felons, including murderers.³⁴⁷

2.3. Slayer Rule³⁴⁸

In 1892, in *Cleaver v Mutual Reserve Fund Life Association*,³⁴⁹ the rule of public policy was established in case law. The court decided that any person's rights that directly resulted from that person's crime were unenforceable.³⁵⁰ Subsequently, other courts found asserting the rights of criminals who committed murder and manslaughter repugnant.³⁵¹

If the slayer is insane at the time of executing the act and does not comprehend "the nature and quality of the act or know that it was wrong", he or she is not disinherited.³⁵² Cases in which a murderer kills his or her victim and subsequently commits suicide are difficult to assess. In those situations, the courts presume that the slayer was sane at the time of murder.³⁵³ The murderer or the administrator of his or her estate must prove insanity.³⁵⁴

³⁴⁶Indeed, the principle may be said to be inherent in the basic doctrines of equity: 'let the hand receiving be ever so chaste.' Andrew Simester, "Unworthy but Forgiving Heirs" (1990-1991) 10 E & TJ 217 at 219; see Alison Reppy, "The Slayer's Bounty – History of Problem in Anglo-American Law" (1941-1942) 19 NYU LQ Rev 229 at 230; J. Chadwick, "A Testator's Bounty to His Slayer" (1914) 30 Law Q Rev 211 at 214; Olenn, *supra* note 335 at 1343, Andrew Hemming, "Killing the Goose and Keeping the Golden Nest Egg" (2008) 8 Queensland University of Technology Law and Justice Journal 342 at 345, but William M. McGovern, Jr., "Homicide and Succession to Property" (1969-1970) 68 Mich L Rev 65 at 65ff.

³⁴⁷Norman M. Tarnow, "Unworthy Heirs: the Application of the Public Policy Rule in the Administration of Estates" (1979-1981) 5 E & TQ 376 at 376; see Reppy, *supra* note 346 at 229-244.

³⁴⁸Called also a "forfeiture rule", see Hemming, *supra* note 346.

³⁴⁹[1892] 1 QB 147 [*Cleaver*].

³⁵⁰*Ibid* at 156.

³⁵¹However, it is uncertain whether the manslaughter has to be intentional, see Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 395; Tarnow, *supra* note 347 at 379-381.

³⁵²Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 432.

³⁵³See *In re Pollock*, *Pollock v Pollock*, [1941] 1 Ch 219; Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 432-433.

³⁵⁴*Ibid*.

According to the *dictum* established in *Nordstorm v Baumann*,³⁵⁵ it is irrelevant whether the slayer's act constitutes a crime. For the purposes of applying the public policy rule, a civil court can assess the criminal responsibility of an alleged slayer. The court finds a slayer unworthy to inherit because of his or her act and regardless to whether he or she was criminally convicted.³⁵⁶ However, a judgment of a criminal court is admissible in evidence; but it establishes "merely" a rebuttable presumption of criminal responsibility.³⁵⁷ This also applies to a verdict of acquittal of criminal charges.³⁵⁸

Under the rule, regardless of his or her motives, a murderer cannot acquire property through his or her act.³⁵⁹ He or she becomes unworthy to inherit. In particular, a slayer cannot inherit a share in his or her victim's estate provided to him or her under a will or on intestacy.³⁶⁰ The slayer is also deprived of proceeds from the victim's life insurance,³⁶¹ social security benefits,³⁶² and an interest as a surviving joint tenant.³⁶³ He or she cannot administer the victim's estate³⁶⁴ or probate his or her will.³⁶⁵

The rule's application is based on the presumption that the rule does not apply if a victim, after being lethally wounded, makes a new will benefiting the slayer or lives for time sufficient to revoke his or her will or disinherit the slayer.³⁶⁶ Accepting a victim's

³⁵⁵(1961), 37 WWR 16, [1962] SCR 147 (available on CanLII) at para 16.

³⁵⁶*Re Charlton*, [1969] 1 OR 706, 3 DLR (3d) 623 (available on WL Can) at para 6 [*Charlton*]; Chadwick, *supra* note 346 at 212.

³⁵⁷*Charlton*, *supra* note 356 at para 6; contra *Re Cora Crippen*, [1911] P 108 at para 115, *In Re Noble Estate*, [1927] 1 WWR 938 at para 5ff [*In Re Noble Estate*].

³⁵⁸*Re Emele*, [1941] 4 DLR 197, 2 WWR 566 (available on WL Can) at para 12; Tarnow, *supra* note 347 at 383-384.

³⁵⁹John W. Wade, "Acquisition of Property by Wilfully Killing Another – A Statutory Solution" (1935-1936) 49 Harv L Rev 715 at 720.

³⁶⁰*Lundy*, *supra* note 336 at para 4, 7; *Re Medaini*, [1927] 4 DLR 1137 (available on WL Can) at para 1; *In re Sigsworth*, *Bedford v Bedford*, [1935] 1 Ch 89 at paras 90-92; see Chadwick, *supra* note 346 at 212.

³⁶¹See *Cleaver*, *supra* note 349; *Trudeau v Standard Life Insurance Company* (1900), 31 SCR 376 (available on WL Can).

³⁶²See *Re Gore*, [1972] 1 OR 550, 23 DLR (3d) 534 (available on WL Can).

³⁶³*Ibid*; *Schobelt v Barber* (1966), [1967] 1 OR 349, 60 DLR (2d) 519 (available on WL Can); Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 425-426.

³⁶⁴*In Re Noble Estate*, *supra* note 357 at para 20.

³⁶⁵Oosterhoff, *Oosterhoff on Wills*, *supra* note 10 at 425-426.

³⁶⁶*Lundy*, *supra* note 336 at para 6; Simester, *supra* note 346 at 212-213.

intent to benefit his or her slayer as decisive prevents the rule's application if a victim forgives the slayer.³⁶⁷

2.4. Slayer Rule's Applicability in Predatory Marriage Cases

From the perspective of public policy, morality, equity, and property law, asserting a predatory spouse's rights, which were gained through exploitation of a victim spouse is as repugnant as affirming a slayer's rights acquired through murder or manslaughter. The principle forbidding a person from benefiting from his or her wrongdoing is applicable in both cases. Each action is wrong and a wrongdoer should not benefit after committing it. Killing a person and unduly influencing a victim spouse's will are illegal. Moreover, cases in which a murder was motivated by greed are as morally condemned as cases in which a marriage and exploitation of mentally and physically vulnerable individuals were motivated by financial gain. These acts violate the inheritance succession order, which is grounded in social and moral values as well as in property law, and harm the well-being of the community in which they take place. More importantly, both, a murderer and a predatory spouse, deprive their victims of the right to enjoy their property and to dispose of it according to their wishes. Each of them violates a person's testamentary freedom.

Three assumptions would be required to justify the application of the slayer rule in predatory marriage cases. First, marriage and testamentary undue influence exercised on a victim spouse are comparable to killing a person; more particularly, exploiting an elder's declining physical and mental health and advanced age is equal to depriving a person of his or her life. Two, like the victim of a slayer, the victim spouse would not desire to provide an inheritance to the predatory spouse. Thirdly, as in the case of a predatory spouse, the prospect of inheriting from the victim is the slayer's sole motivation. Acquiring property through exploitation of a person's weaknesses is seen as corresponding to killing a person for the same reason.

³⁶⁷C.f. J S McLennan, "Unworthy to Inherit, the 'Bloedige Hand' Rule and Euthanasia: What to Say in Your Will" (1996) 113 SALJ 143 at 143ff; contra: Simester, *supra* note 346 at 222-229.

These three assumptions question the policy underlying the slayer rule. Even if a slayer's act did not constitute a crime, testamentary undue influence does not match the severity of murder or manslaughter. Under the doctrine of testamentary undue influence, the will of a coerced person does not reflect that person's will and wishes. Subsequent to the execution of testamentary dispositions, the victim spouse's mental incapacity to articulate his or her wishes allows only the presumption of what they might be or their accordance with public policy and morality. Moreover, considering that in most cases, the elder remains under the predatory spouse's power until his or her death, or that in his or her last days, he or she is incapable of making a new will, it will be impossible for the victim spouse meaningfully to forgive the predatory spouse. Finally, the slayer's intention to benefit from his or her victim's death is irrelevant for him or her to be found unworthy to inherit.

According to the above argument, the slayer rule is inapplicable in predatory marriage cases. The significance of a killing is incomparable with a financially motivated exploitation of victim spouse's physical and mental condition. However, the rule's consequence, namely, declaring a predatory spouse unworthy to inherit, could provide a remedy in predatory marriage cases. Depriving the predatory spouse of rights to the victim spouse's estate could deter him or her from coercing or threatening a testator into making testamentary dispositions. Furthermore, the consequences increase the criminal sanctions of the slayer rule; similarly, they could strengthen the legal consequences borne by a predatory spouse testamentarily unduly influencing a victim spouse. He or she would not only lose rights to the victim spouse's estate under the coerced will, but also would not be entitled to any other victim spouse's rights.

2.5. Slayer Rule's Compatibility with the German Remedy

The slayer rule cannot be used to declare a predatory spouse who unduly influenced a testator unworthy to inherit. However, as argued earlier, because the Canadian doctrine of undue influence is functionally equal to the German concept of duress (*Drohung*), the consequences can be applied as in the German doctrine. The slayer rule facilitates that transference in predatory marriage cases. The consequences present

under the rule set a precedent for legitimizing declaring an heir unworthy to inherit under Canadian Common Law. Moreover, the slayer rule and *Drohung* share policy justifications and the means to apply the consequences.

As indicated earlier, under Canadian Common Law a slayer is unworthy of inheriting from his or her victim. Under German law, an unworthy person is deprived of any rights to the deceased's estate. The slayer rule is recognized and firmly established under the common law legal system; it has been applied in Canada since the end of the nineteenth century. The doctrine justifies depriving a slayer of his bounty, supplies courts with jurisdiction, provides the grounds for its application, secures relevant exceptions, and equips it with appropriate consequences.

The policy justification for declaring a person unworthy to inherit is similar under both the slayer rule and the German duress' doctrine. In both situations, finding an heir unworthy to inherit is grounded, *inter alia*, in public policy and moral and social values. It also corresponds to the principle that a person cannot benefit from his or her own wrongdoing. Moreover, if in spite of the circumstances, a testator wishes to benefit said person, he or she can prevent his or her heir from being disinherited by forgiving the person.

As under the slayer rule, in German law, a civil court has the exclusive jurisdiction to declare a person unworthy to inherit and, consequently, deprives that person of any rights to a deceased person's estate. That outcome cannot be achieved through the operation of law or a criminal court ruling.

3. Californian Solution

3.1. Introduction

A predatory spouse is not comparable to someone who abuses an elder. The former exploits an elderly victim spouse's mental and physical weaknesses for his or her own benefit, but may not abuse the elder. More accurately, the predatory spouse's acts should be classified as financial or material exploitation. Still, it would be unlikely that his or her actions would meet the threshold of American law for abuse of an elder.

Nevertheless, an example from California shows an innovative extension of the consequences of the slayer rule supported by arguments that are also employable in predatory marriage cases.

To demonstrate the precedential implementation of unworthiness to inherit in situations of elder abuse, the American provision is investigated. Subsequent sections indicate justification of its implementation, conditions for declaring an abuser unworthy to inherit, and its relevance in predatory marriage cases. Investigation of the rule's compatibility with the German remedy follows.

3.2. Fighting Elder Abuse

Some of the American states have introduced laws that under certain circumstances and to a certain extent deem a person found guilty of elder abuse unworthy to inherit.³⁶⁸ Such laws are among many responses to the problem of elder abuse.³⁶⁹ The problem can take many forms. Abuses vary from physical or sexual, through neglect or abandonment, to causing emotional or psychological damage. Financial and material exploitation are also distinguished.³⁷⁰ Physical abuse involves using “physical force” to cause “injuries or physical pain”, to restrain, or to administer medications inappropriately, while emotional abuse results in mental damage.³⁷¹ Withholding the necessities of life, such as food, water, or medicine, indicates neglect.³⁷² Deserting an elder person is seen as abandonment. Financial or material exploitation involves improper or illegal use of an elder's assets.³⁷³

Generally, the perpetrators of elder abuse are location dependent. If an elder is at a nursing or retirement home, the offender is most likely not blood related; if the elder is

³⁶⁸E.g. California, Oregon, Illinois, Maryland, see especially Lisa C. Dumond, “The Undeserving Heir: Domestic Elder Abuser's Right to Inherit” (2009-2010) 23 Quinnipiac Prob LJ 214 at 229-234; Rhodes, *supra* note 333 at 986-987.

³⁶⁹See e.g. Seymour Moskowitz, “New Remedies for Elder Abuse and Neglect” (1998) 12 Prob & Prop 52 [Moskowitz, “New Remedies”].

³⁷⁰National Center on Elder Abuse, “Major Types of Elder Abuse”, online: National Center on Elder Abuse <<http://www.ncea.aoa.gov>>; see generally Dumond, *supra* note 368 at 217; *Ibid* at 52; Carolyn L. Dessin, “Financial Abuse of the Elderly” (1999-2000) 36 Idaho L Rev 203 at 206ff (financial abuse).

³⁷¹Dumond, *supra* note 368 at 217.

³⁷²National Center on Elder Abuse, *supra* note 370.

³⁷³*Ibid*.

living with relatives, domestic abuse can occur. Domestic abuse takes place most frequently.³⁷⁴

In 1981, the House of Representatives Select Committee on Aging in a report entitled “Hidden Problem” revealed the prevalence of elder abuse.³⁷⁵ The report estimated that almost one in twenty-five elders is a victim of mistreatment.³⁷⁶ A follow-up report, “Elder Abuse: A Decade of Shame and Inaction,” noted that the problem was escalating.³⁷⁷ According to current estimations, nearly one in twenty elders is a victim.³⁷⁸

The issue of elder abuse is growing as the American population ages. According to statistics, people over sixty-five are the fastest growing segment of the population.³⁷⁹ Currently, they constitute about thirteen percent of the population and are projected to be nearly twenty-five percent by 2050.³⁸⁰

3.3. Unworthy Elder Abusers

To prevent and punish elder abuse, some states have referred to the slayer rule.³⁸¹ Under a recently introduced law, if a person has abused a deceased person, he or she is deemed unworthy to inherit from the latter.³⁸² California, a leader in anti-elder abuse legislation, introduced this provision in 1998 and it came into force on January 1, 1999.³⁸³ Subsequently, other states have adopted this elder abuse deterrent under their

³⁷⁴Dumond, *supra* note 368 at 216 (“It has been estimated that roughly two-thirds of all elder abuse perpetrators are family members, most often the victim's adult child or spouse, but the abuser can also be the victim's sibling, friend or caregiver.”); see Seymour Moskowitz, “Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective” (2002-2003) 86 Marq L Rev 401 at 419.

³⁷⁵Nina Santo, “Breaking the Silence: Strategies for Combating Elder Abuse in California” (1999-2000) 31 McGeorge L Rev 801 at 807-808; Audrey S. Garfield, “Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California”, Note, (1990-1991) 42 Hastings LJ 859 at 864-865

³⁷⁶Santo, *supra* note 375 at 807.

³⁷⁷*Ibid* at 808.

³⁷⁸Martin Ramey, “Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act” (2002) 39 San Diego L Rev 599 at 602.

³⁷⁹Moskowitz, “New Remedies”, *supra* note 369 at 53.

³⁸⁰*Ibid*.

³⁸¹See Dumond, *supra* note 368.

³⁸²Seymour Moskowitz, “Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect” (2002-2003) 36 Loy LA L Rev 589 at 654 [Moskowitz, “Golden Age”].

³⁸³*Ibid* at 655; Korpus, *supra* note 333 at 568.

legislation or through common law.³⁸⁴ The provided solutions vary in details; and, for that reason, only the precedential statutory solution adopted in California is discussed.

Under section 259 of the Californian Probate Code a court can declare a person unworthy to inherit. He or she is treated as if he or she predeceased the deceased if while acting in bad faith, he or she physically or financially abused or neglected an elder or a dependant.³⁸⁵ Further, he or she must “have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.”³⁸⁶ The burden of proof is high.³⁸⁷ The person’s liability must be established “by clear and convincing evidence.”³⁸⁸

Moreover, from the time the acts of abuse occurred until his or her death, an abused person has to be substantially incapable of managing his or her financial resources or of resisting fraud or undue influence.³⁸⁹ This provision applies only to the abuse of an elder or a dependent adult. An elder is identified under the law as an individual 65 years old or older.³⁹⁰ A dependant adult is a person between the ages of 18 and 64 “who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights” or “is admitted as an inpatient to a 24-hour health facility.”³⁹¹

Further, a person is treated as if he or she had predeceased the deceased if he or she has committed one of the violations listed in section 259 (b) against an elder or a dependant adult and was convicted thereof. The list includes infliction of pain, injury or endangerment, theft, embezzlement, forgery, fraud or identity theft, and false imprisonment.³⁹²

³⁸⁴E.g. California, Oregon and Illinois implemented a statute, while Maryland provided it under the common law; see especially Dumond, *supra* note 368 at 229-233.

³⁸⁵Cal Prob Code § 259 (a1-a2) (West 2007) [Probate Code].

³⁸⁶*Ibid* § 259 (a3).

³⁸⁷*Ibid* § 259 (a1).

³⁸⁸*Ibid* § 259 (a1).

³⁸⁹*Ibid* § 259 (a4).

³⁹⁰Cal Wel & Inst Code § 15610.27 (Lex 2012) [Welfare Code].

³⁹¹*Ibid* § 15610.23.

³⁹²California Penal Code § 236, 368 (West 2007).

Regardless of whether a person liable for abuse is entitled to property under a trust, will, or on intestacy, a civil court deprives that person of “any property, damages, or costs” awarded to the deceased’s estate.³⁹³ Additionally, he or she cannot serve as a fiduciary if an instrument appointing him or her for that position was executed during the time the deceased was “substantially unable to manage his or her financial resources or resist fraud or undue influence.”³⁹⁴

3.4. Applicability of Elder Abuse Deterrents in Predatory Marriage Cases

Combating elder abuse and predatory marriages involving testamentary undue influence can both be justified by an argument that a wrongdoer should not benefit from his or her evil act. However, as serious as it is, the mistreatment of seniors, especially if it takes the form of financial or material exploitation, is not comparable to culpable homicide.³⁹⁵ Abusing a person is not equivalent to depriving that person of his or her life. As indicated earlier, neither do acts committed by a predatory spouse resemble a murder or manslaughter. Nevertheless, the applicability of the principle has been widened to accommodate cases of elder abuse.

Exploiting a person’s frailty for financial benefit does not bear the same significance as physical or mental abuse of an elder. A victim spouse is not usually physically or mentally mistreated; he or she is not in physical or mental pain inflicted upon him or her by someone else. Instead, a caregiver provides him or her with the necessities of life. Nevertheless, acts committed by a predatory spouse resemble cases of financial abuse.³⁹⁶ Like an abuser, he or she accesses the victim spouse’s assets and property for personal benefit. The victim spouse who has been assessed as incapable of

³⁹³Probate Code, *supra* note 385 § 259 (c).

³⁹⁴*Ibid.*

³⁹⁵Rhodes, *supra* note 333 at 986-987.

³⁹⁶Welfare Code, *supra* note 390 § 15610.30:

“Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:

- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

managing his or her property or of making a will would meet the criterion of being substantially incapable of managing his or her financial resources or of resisting fraud or undue influence at the time the financial abuse occurred or until his or her death.³⁹⁷ However, proving with “clear and convincing evidence” that a predatory spouse acted in bad faith and was “reckless, oppressive, fraudulent, or malicious in the commission” of his or her acts towards the victim spouse would be difficult.³⁹⁸ Thus far, there have been no cases to which the provision has been applied.

The consequences applied to an elder abuser could solve the problem of a predatory spouse’s unduly influencing a victim spouse’s will. In both instances, the outcome could prevent, deter, and reduce the problem at stake or punish the evil-doer.³⁹⁹ In the case of abuse, the issue is mistreatment of seniors; in the predatory marriage cases, it is the exploitation of mental and physical frailty through marriage and testamentary undue influence. Both provide motivation for the victim’s potential heirs to report abuse or to challenge the validity of a will prepared under coercion.

Employing provisions comparable to those in the Californian elder abuse statute to regulate acts of a predatory spouse under Canadian law is possible. The statute has a wide scope of application that focuses on combating elder abuse and financial exploitation of elders, both of which encompass the conditions of predatory marriage cases. However, the regulations would need to apply to victim spouses who possess the testamentary capacity at the time of marriage. As well, implementing the law would require further analysis of the elder abuse problem in Canada and consideration of the significance of a high threshold of burden of proof, especially since employing a dormant law will not solve a vital issue in Canadian society.

3.5. Compatibility of Elder Abuse Deterrents with the German Remedy

The American application of the doctrine of unworthy to inherit set a precedent that can justify its employment in predatory marriage cases. No longer is declaring an heir unworthy to inherit limited to slayers. The Californian solution indicates that

³⁹⁷Probate Code, *supra* note 385 § 259 (a4).

³⁹⁸*Ibid* § 259 (a1-4).

³⁹⁹Moskowitz, “Golden Age”, *supra* note 382 at 656; Korpus, *supra* note 333 at 569.

widening the scope of application of unworthy to inherit is possible. It could facilitate disinheriting a predatory spouse. However, for deterring testamentary undue influence in predatory marriages, implementing the remedy that resembles the German *Drohung* could be less invasive. As indicated earlier, this German legal concept, which is functionally equivalent to Canadian testamentary undue influence, is more specific and has withstood the test of time.

The German-based remedy derives from a concept that, like the Common Law's testamentary undue influence, aims to protect an individual's freedom of testation. Implementing it would respect the concepts' differences and modify only the consequences of undue influence. Its impact on a person's rights under succession, family, and property law would be comparable to the slayer rule's effects.

Further, declaring a predatory spouse unworthy to inherit under testamentary undue influence could aim specifically at breach of testamentary freedom in predatory marriage cases. Its narrow scope eliminates investigating its potential influence on other legal institutions and eases identifying and limiting its side effects.

Finally, *Drohung* has endured the test of time. It has been in force in German law for over two centuries and has proven its efficiency. Potentially, if the consequences are applied to its Canadian equivalent, they will be effective under the Common Law as well.

4. Implementing Unworthy to Inherit in Predatory Marriage Cases

Recognizing that an heir can be deemed unworthy to inherit under Canadian Common Law and that the law of another common law country disinherits unworthy heirs under a growing number of circumstances, it is reasonable to consider its implementation in the case of a predatory spouse who unduly influenced a victim spouse. A description of the conditions under which the remedy could be applied follows, and grounds for employing the remedy through case law are provided.

4.1. Guidelines for the Implementation

As with any other law, implementing the concept of declaring a predatory spouse who has unduly influenced a testator unworthy to inherit requires precise guidelines. The remedy aims to prevent, deter, and punish predatory spouses who violate their spouses' freedom of testation. For that reason, the remedy is applicable if an individual manipulates a vulnerable person into marriage and, subsequently, violates his or her testamentary freedom through testamentary undue influence. This description of particular elements necessary to constitute a situation under which the remedy could be applied is based on the earlier analysis of cases involving predatory marriage,⁴⁰⁰ conditions for establishing testamentary undue influence, and the circumstances under which a person is deemed unworthy to inherit under the German doctrine of *Drohug*.

4.1.1. Victim Spouse

A victim spouse, or a vulnerable person, can be identified as a person whose ongoing decline in physical and mental capabilities makes him or her increasingly dependent on external assistance in dealing with daily physical affairs. This condition results in his or her lack of coherent thought and an inability to resist influence and recognize its consequences. As seen in earlier cases, such victim spouses are typically elders. Their age, health deterioration, and lifelong accumulation of assets make them particularly prone to exploitation, especially if they are divorced or widowed, lonely, and depressed. Even attentive children, if they are busy with their own lives, cannot fulfil the need for company.

In any case, it seems that declining health is the most decisive factor. Due to physical limitations, vulnerable people who later become victim spouses require help; mental impairments can facilitate their exploitation. However, though the elders' minds may have lost their sharpness, in order to declare predatory spouses unworthy to inherit owing to undue influence, the victim spouses need to remain legally capable of executing a will.

⁴⁰⁰Banton, *supra* note 2; Barrett, *supra* note 45; Danchuk, *supra* note 46; Feng, *supra* note 26; Hart, *supra* note 48; see Part I.

4.1.2. Predatory Spouse

The evolution of a predatory spouse is typical. Initially, a vulnerable person's family entrusts him or her with assisting their beloved. Over time, the vulnerable person becomes dependent on the caregiver. At this point, financial motivation encourages the caregiver to exploit the vulnerable person's dependency.

Initially, the vulnerable person's family hires the predatory spouse as a caregiver to provide care, company, and various services for the vulnerable person. They are concerned with the vulnerable person's ability to live alone. To allow him or her, the comfort to remain in his or her home in spite of his or her progressing health problems, they provide their relative with assistance. Alternatively, if he or she is mentally capable of it, the vulnerable person may employ the caregiver. Depending on the vulnerable person's needs, the caregiver is chosen for his or her medical and/or social skills. In return, the caregiver receives a salary and may reside in the vulnerable person's house free of charge. The agreement does not entitle the caregiver to appropriate the vulnerable person's assets, to receive additional money for personal needs, or to benefit on the vulnerable person's death. The relation based on trust ends when the caregiver is found misusing his or her position, particularly when he or she alienates the vulnerable person from his or her relatives, misappropriates his or her assets, and marries the vulnerable person without the latter's family's knowledge. Nevertheless, especially in the face of the marriage, the family becomes helpless and is forced to tolerate the predatory spouse's presence.

The ultimate goal of the predatory spouse is to gain access to the vulnerable person's property. Thanks to the trust he or she is given, he or she becomes aware of the person's assets. As the vulnerable person's capabilities decline, the caregiver's importance increases. With time, he or she becomes the primary caregiver and gains almost unlimited control over the vulnerable person. He or she uses the position of trust and the victim spouse's vulnerability to extend his or her influence over the victim spouse. Initially, he or she pressures the vulnerable person into giving him or her money or doing financial favours for him or her or his or her relatives and friends. By means of

marriage, the predatory spouse gains access to the vulnerable person's property and becomes entitled to inherit a share in his or her estate. Subsequently, he or she meets with lawyers to settle his or her rights to the victim spouse's estate. In most cases, under the predatory spouse's pressure and influence, the victim spouse executes a new will.

As mentioned earlier, a predatory spouse may be significantly younger than his or her victim; however, that is not always the case. Furthermore, he or she often alienates the vulnerable person from his or her family and friends.⁴⁰¹

The caregiver's control over the victim spouse has two consequences. First, he or she manipulates the vulnerable person into a marriage. Second, he or she coerces the victim spouse into executing testamentary dispositions in his or her favour.

4.1.3. Predatory Marriage

A marriage can be recognized as predatory if it develops from a secretive, relatively short relationship of a caregiver and a vulnerable person, and, on the totality of evidence, it can be established that the vulnerable person is pressured into marriage. The victim spouse often dies shortly after the marriage ceremony.

The alleged romantic relationship between the caregiver and the vulnerable person develops in secret. Usually, it corresponds with the caregiver's actions aimed at alienating the vulnerable person from his or her environment. Progressively, the caregiver denies the vulnerable person's family and friends access to their beloved by, for example, interrupting their phone communication or declining offers to visit. In the face of his or her health deterioration and his or her being alienated from his or her relatives, the vulnerable person feels as he or she is left at the mercy of his or her caregiver. Often, pressured with threats, the vulnerable person yields to his or her caregiver's wishes and marries him or her. The marriage is finalized at a short notice, in the presence of strangers, and without a reception. The predatory individual inspires and orchestrates all facets of the marriage ceremony. The victim spouse's family learns about the marriage only after their relative and his or her employee are married.

⁴⁰¹See *Feng*, *supra* note 26.

The relationship between the spouses is very short. They meet only when the victim spouse's health declines and he or she becomes unable to live alone, or shortly before that. In most cases, they have known each other for no longer than a few months to a year before they marry. The marriage itself lasts from a couple of months to a year or two. At the time the marriage takes place, the victim spouse's health condition allows accurate prediction of his or her imminent death.

Moreover, a significant age difference between the predatory spouses and victim spouses, as well as the predatory spouse's marital history, may raise suspicions. Further, as a result of the victim spouse's health limitations, the parties frequently do not consummate their marriage.⁴⁰²

4.1.4. Testamentary Undue Influence

It needs to be established that the predatory spouse unduly influenced a victim spouse into making testamentary dispositions in his or her favour. Typically, there are two indications. The new will is inconsistent with the previously expressed victim spouse's testamentary wishes. The predatory spouse becomes the main beneficiary under the victim spouse's will.

It is characteristic that before the caregiver starts influencing the vulnerable person, the latter's family members are the main beneficiaries under his or her will. Further, they are also the people of trust to whom the vulnerable person gives his or her power of attorney. Frequently, he or she shares bank accounts with them.

The victim spouse's estate plans suddenly change under suspicious circumstances. Drafting and executing a new will closely follows the marriage ceremony. Depending on the victim spouse's health, the couple sees a lawyer within a few days or few weeks after their wedding. The predatory spouse arranges the meeting with a lawyer who, most often, had not previously provided any services to either party. The predatory spouse expresses

⁴⁰²In Canada, for a marriage to be valid, spouses are required to possess the capacity to consummate their marriage. See Mary Jane Mossman, *Families and the Law in Canada Cases and Commentary* (Toronto, Canada: Emond Montgomery Publications, 2004) at 69-70. However, impotence of one of the spouses renders a marriage voidable but not void. See Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 3rd ed, (Toronto: Irwin Law, 2008) at 39-40.

the victim spouse's alleged wishes. The testator is rather passive throughout the meetings. Executing a new will is concurrent with creating a power of attorney in the predator spouse's name.

4.1.5. An Unworthy Predatory Spouse

If a person possessing the characteristics of a predatory spouse marries a person who can be identified as a victim spouse, and it is established that he or she unduly influenced the victim spouse's will, then he or she should be declared unworthy to inherit. Under the already binding law, the predatory spouse does not inherit from the victim spouse under a will because unduly influenced testamentary dispositions are unenforceable. The predatory spouse also should not inherit on the victim spouse's death. A court should find him or her unworthy to inherit any share in the deceased's estate on intestacy and to be ineligible to administer the victim spouse's estate. Further, like a slayer, he or she should be deprived of benefiting from the victim spouse's life insurance, social security benefits, and any interest as a surviving joint tenant. To maintain the severity of the legal concept, the spouse should not be entitled to any remaining goods available to a person on his or her spouse's death, such as equalization payments or support claims as the deceased's dependant. However, the rationale underlying these benefits is different from that pertaining to inheriting on intestacy or under a will and, for that reason, the issue requires further, wider examination. The provided analysis focuses only on property that passes under legislation or under a will.

It is possible that, in spite of the fact that a predatory spouse unduly influenced a victim spouse while the victim spouse was executing a will, the latter truly wishes to benefit the predatory spouse. For example, the testator could indicate this in subsequent writing or orally to a third person. In this situation, there is no basis for disinheriting the predatory spouse. However, there should be clear and convincing evidence supporting the testator's statement; it cannot be presumed. Moreover, the person alleging it, as in the case of exceptions to the German *Drohung* rule, the slayer rule, and California's elder abuse legislation should bear the burden of proof.

4.2. Declaring a Predatory Spouse Unworthy to Inherit as an Incremental Change

The legislature, representing the majority of the population, is the lawmaking body. It is advisable that the legislature enact new laws and reform existing ones.⁴⁰³ However, having this body implement the remedy proposed here could be difficult.⁴⁰⁴ The issue under discussion influences a growing, but still rather small number of people. Moreover, it still needs to gain publicity in order to generate consideration and commentary by legislative actors. Even if this or any other proposal preventing predatory marriage or its consequences were to become an object of the legislature's proceedings it is uncertain whether or when it would come into force as a binding law.

The second law-making body in Canada is the judiciary. Its prime responsibility is to resolve disputes. However, it is also responsible for adjusting existing laws contemporary challenges faced by parties in disputes.⁴⁰⁵ The modifications introduced through case law must meet the following criteria. They have to follow the policy promoted by the legislator.⁴⁰⁶ Courts can change a law to make it more just and fair. The modifications must improve the existing law by being "necessary or desirable."⁴⁰⁷ The mechanism allows courts to adjust the law to the changing needs of society.⁴⁰⁸ Further, the modification has to be "incremental"; its effect on the law has to be relatively small.⁴⁰⁹ A court must be aware of all the information relevant to how to change the law.⁴¹⁰ Respectively, it should be aware of the issues underlying the policy, be able to create rules and procedures supporting the change's implementation, and understand its consequences.⁴¹¹ Moreover, if the particular law is relied on for acquiring rights,

⁴⁰³The Right Honourable Beverley McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask L Rev 309 at 311.

⁴⁰⁴See Dale Gibson, "Judges as Legislators: Not Whether but How" (1986-1987) 25 Alta L Rev 249 at 250-252.

⁴⁰⁵McLachlin, *supra* note 403 at 311.

⁴⁰⁶Paul M. Perell, "Changing the Common Law and Why the Supreme Court of Canada's Incremental Change Test Does Not Work" (2002-2003) 26 Advocates' Q 345 at 353-354.

⁴⁰⁷*Ibid* at 359-360.

⁴⁰⁸*Ibid* at 354.

⁴⁰⁹*Ibid* at 356.

⁴¹⁰McLachlin, *supra* note 403 at 316.

⁴¹¹Perell, *supra* note 406 at 357; Anthony J. Duggan & Kent Roach, "A Further Note on *Final Note*, The Scope and Limits of Judicial Law Making" (2002) 36 Can Bus LJ 115 at 125.

protection, or privileges, it should not be amended.⁴¹² A particular change should not destabilize the system of rules within which a law exists or contribute to a law's uncertainty.⁴¹³

Declaring a predatory spouse unworthy to inherit could be implemented through the judiciary. To prevent some of the consequences of predatory marriage cases involving testamentary undue influence, a court dealing with the case could respond in a rapid and adequate manner by applying the suggested remedy. The proposed solution could be used as a temporary remedy and the issue could be further analysed to develop a solution applicable to all predatory marriage cases. However, implementing the proposed remedy through the judiciary should be considered in the context of the above-listed criterion of incremental change.⁴¹⁴

By implementing the remedy, the courts would support the national policy of preventing and fighting elder abuse. The Canadian federal and local governments treat elders with growing attention. The increasing number of acts regulating elder abuse indicates that preventing harm to and exploitation of elders has become a public priority.⁴¹⁵

As shown earlier, the growing problem of predatory marriages coexisting with a financially motivated violation of elders' freedom of testation remains unsolved. As the society ages, the issue will continually increase. Implementing the proposed solution may serve as a deterrent and prevent future cases of elder exploitation.

The scope of the changes will be relatively small. Depriving a predatory spouse of any inheritance on the victim spouse's death is an extension of the common law principle stating that a person cannot benefit from his or her wrongdoing. It is a variant of it, like the slayer rule or elder abuse legislation. It requires applying a change to the Canadian Common Law doctrine of testamentary undue influence.

⁴¹²Perell, *supra* note 406 at 361.

⁴¹³*Ibid* at 361-362.

⁴¹⁴To see other potential benefits of modifying law by the judiciary, see Gibson, *supra* note 404 at 253-256.

⁴¹⁵See Seniors Canada, online: Seniors Canada <<http://www.seniors.gc.ca>>.

The change's consequences for the predatory spouse, as well as for the legal system, are predictable, as the proposed modification already exists under the law, but under slightly different circumstances. The consequences developed under the slayer rule would become applicable to a predatory spouse. The same supporting procedures and rules would apply.

A predatory spouse, while planning and executing his or her plan, relies on the rights he or she expects to gain through marriage and an unduly influenced will. However, acquiring them should not be legal. They are an outcome of the exploitation of another person's frailty.

Further, under Canadian Common Law neither the principle justifying the slayer's rule nor testamentary undue influence is regulated legislatively; it would therefore be only natural to introduce the change declaring a predatory spouse unworthy to inherit through case law.⁴¹⁶

The remedy's implementation seems to be possible through the judiciary. However, it is arguable whether the proposed solution's scope exceeds the extent of legitimate judicial activism. The change involves equipping an already existing doctrine with a consequence that would result in a deprivation of expected property rights. In this light, it is questionable whether the change is indeed incremental.

Implementing the suggested change, even if controversial, could stimulate a debate in result of which the solution could be accepted, modified, overruled by the legislature, or replaced by a different suggestion. A disputable ruling could commence a dialogue between the judiciary and the legislature.⁴¹⁷ In addition, a court's ruling would bring public attention to the predatory marriage issue and would highlight its significance.⁴¹⁸

⁴¹⁶Gibson, *supra* note 404 at 253.

⁴¹⁷Duggan & Roach, *supra* note 411 at 125.

⁴¹⁸To see other restraints to the judicial activism see Gibson, *supra* note 404 at 257-260.

4.3. Implementing the Solution

If the remedy's implementation through case law is considered controversial, it would be advisable for the law to be modified by the legislature. On the other hand, having the change applied through case law would accelerate the implementation process and might stimulate debate. If a court should decide to apply the proposed solution, it should investigate the case in question and establish the above-discussed hallmarks of a predatory marriage and of testamentary undue influence. Once the predatory marriage and undue influence are found, the court could then declare a predatory spouse unworthy to inherit.

5. Conclusions

Declaring a predatory spouse who unduly influenced a victim spouse's will unworthy to inherit is appropriate under Common Law. The remedy, in spite of the fact that the idea of its application to the problem is drawn from a foreign jurisdiction, harmonizes with the common law rules on wills and estate. Deeming a predatory spouse unworthy to inherit constitutes a new application of a legal solution, unworthiness to inherit, already functioning under different circumstances in Canadian law.

In contrast to a situation in which an exotic legal concept is transplanted to a new setting, the consequences of extending deprivations of inheritance to unworthy, predatory spouses are predictable. The notion has been applied to slayers under Common Law for over a century; the scope of the disinheritance is firmly established. Extending it to cases of predatory spouses could be seen as an incremental change. Moreover, the concept applies to unworthy heirs under German Law. Reflecting on this foreign experience may prevent unexpected side effects, especially since under both jurisdictions a court deprives a person declared unworthy of similar rights.

Conclusions

The goal of this thesis is to deter financially motivated caregivers who through manipulation have married their wards from coercing the latter into executing testamentary dispositions in their favour. It is accomplished by declaring a predatory spouse who unduly influences a victim spouse's will unworthy of inheriting from his or her victim spouse. As a result, the unworthy individual would lose all entitlement under the coerced will and all the rights he or she would acquire on intestacy. It is suggested that implementing this solution will discourage predatory spouses from violating a testator's freedom of testation. Consequently, it may protect intended and rightful heirs.

The remedy, while not responding to the ethical and moral issues of predatory marriage, addresses the need to punish predatory spouses' excessive greed. A remedy which prevents or nullifies a predatory marriage is not proposed.

1. Remedy's Scope of Application

The proposed solution applies to situations in which a vulnerable person, after being manipulated into marriage by his or her financially motivated caregiver, is unduly influenced to execute a will in favour of the predatory spouse. For a predatory spouse to be found unworthy to inherit, a court must declare victim spouse's testamentary dispositions invalid owing to the predatory spouse's undue influence.

All the considered cases involved a marriage that was characterised as predatory. Out of the five discussed cases, in three of them there was a will made subsequent to marriage. In all three cases the courts decided that testamentary dispositions executed subsequent to the marriage were invalid; two of them were made under undue influence. Out of these three cases, in two of them a court found that the marriage was invalid; and in one of them the invalidity resulted from the vulnerable person's lack of capacity to marry. In this last case, the proposed solution could be applied as an alternative to nullifying marriages. In one of the two remaining cases, *Banton v Banton*, the court upheld the marriage, but found that the will made subsequent to it was executed under

undue influence and was thus invalid. In this case, applying the proposed solution would prevent the predatory spouse from inheriting from the victim spouse.

The solution is designed to achieve a very narrowly described goal. For that reason its potential application is limited to cases that meet the strict conditions of the remedy's employment. Consequently, for example, the solution would not apply to cases in which a marriage bearing predatory features took place, but subsequent to which no will was executed. Similarly, the remedy is unemployable if a court does not find that a will was made under undue influence of the predatory spouse. In those cases, as until now, a marriage could be questioned after a spouse's death only on the basis of a party's lack of capacity to marry.

The research is focused and the solution is tailored for predatory marriage cases involving elders. However, the remedy is applicable also in situations involving other vulnerable persons, e.g. individuals of any age mentally or physically impaired or terminally ill who are married for financial reasons by their caregivers and who subsequently execute a will under the undue influence of their predatory spouse.

The remedy has a potentially wider application. It is a matter for further investigation whether a court should be able to declare a caregiver unworthy to inherit if, as characteristic of predatory marriages, he or she coerced a vulnerable person into marriage. Because marriage revokes all previous testamentary dispositions, it influences a person's estate planning. Unduly influencing a person into marriage could be seen as a violation of a person's freedom of testation. In spite of a person's intent, his or her will is revoked by a subsequent marriage into which he or she was coerced, especially if a person does not have testamentary capacity or his or her subsequent will is unduly influenced. Further, the remedy could be justified from the social and moral perspective, as no individual should benefit from his or her wrongdoing. However, as in the case of marriages of convenience, the parties' motives are irrelevant to the validity of marriage.⁴¹⁹ Nevertheless, unlike deeming a predatory spouse who unduly influences a

⁴¹⁹Payne & Payne, *supra* note 402 at 35.

testamentary disposition unworthy to inherit, this change would have to be introduced through the legislature.

Potentially, as under German law, not only predatory spouses, but also other individuals who unduly influence a testator could be declared unworthy to inherit. In each instance, a person who breached a testator's freedom of testation should not benefit on his or her death. Introducing this notion would increase protection of the testator's freedom, deter persons tempted to influence the testator, and punish those who have already breached his or her freedom.

Even if the scope of the remedy's applicability is further widened, its potential employment remains limited. It is difficult to recognize and prove testamentary undue influence under Canadian Common Law. Further, as under German law, it is possible that most cases to which it could be applied will remain unidentified. However, considering that the solution's application expresses legal, moral, and social condemnation of a person's actions and declares that person unworthy of acquiring any material or immaterial inheritance from a deceased party, it is advisable to employ it carefully and only in particularly repugnant cases.

2. Remedy's Consequences of Application

As is currently the practice, if a court finds that a predatory spouse unduly influenced a victim spouse's will, the will becomes invalid. Its dispositions have no legal consequences. No one, including a predatory spouse, inherits on the will's grounds.

On the basis of the proposed solution, unquestionably, a predatory spouse whom a court declared unworthy to inherit would not acquire property from the victim spouse's estate on intestacy. Respective to the slayer rule, it is expected that he or she would not benefit from the victim spouse's life insurance or social security benefits or that he or she would receive any interest as a surviving joint tenant. Similarly, he or she should not be entitled to any other rights born by a surviving spouse, e.g. equalizations payment or support claim. However, because those institutions are founded on reasons different from those supporting inheritance rights, justifying this notion requires further investigation.

Unlike the case in which a marriage is nullified, a predatory spouse would remain the legal surviving spouse of the victim spouse. The marriage would remain in force. However, since the predatory spouse has been declared unworthy to inherit, he or she would be deprived of all the material benefits he or she would normally inherit as a surviving spouse. Unless acquired illegally, the property a predatory spouse became entitled to during the marriage would remain his or hers. However, in most cases, the predatory spouse's access to the victim spouse's money during the marriage is fairly limited because in most cases a third person holds an enduring power of attorney over victim spouse's assets.

3. Remedy's Potential Benefits

Implementing the remedy could deter potential caregivers from unduly influencing vulnerable persons into making testamentary dispositions in their favour. It would prevent predatory spouses from benefiting on a victim spouse's death. It could be also seen as a punishment of predatory spouses who have coerced their victim spouse's into executing testamentary dispositions. Further, it has a potential to reduce the severity of predatory marriages' consequences or even decrease the number of predatory marriages.

The solution does not interfere with a victim spouse's rights. It does not limit his or her personal rights and does not burden him or her with additional legal requirements. Instead, it provides a solution that punishes illegal, predatory spouse behaviour. Potentially, it creates better protection for the victim spouse's testamentary freedom.

Moreover, the proposed solution protects the legal interests of victim spouse's family. They become the sole heirs entitled to the victim spouse's estate. Additionally, it protects society by deterring persons aiming at financially exploiting its vulnerable members and by securing the expected succession order.

Further, the solution, as an incremental change, influences the legal system to an insignificant degree. It does not propose an appeal to any of the existing legal institutions, particularly marriage. It does not deprive a person of legally and justly acquired rights.

Instead, it prevents a predatory spouse from acquiring rights stemming from intended financial exploitation of the victim spouse.

4. Remedy's Justification

The suggested remedy's application is morally and socially sustainable. It is morally unjust to benefit from severe wrongdoing, particularly to acquire rights through exploitation of a person's fragility. Further, it is socially unacceptable to enter a marriage of convenience and even more to acquire financial benefits at the expense of the victim spouse's family. Violating the inheritance succession order, which is grounded in social and moral values, harms the community in which it occurs.

It is illegal to violate a person's freedom of testation. Under the law, an individual has the right to dispose of his or her property in the event of his or her death. Unduly influencing a person's will violates that freedom. Manipulating a person into marriage does not constitute a breach of the law, but it has consequences under succession law because it changes the succession order on that person's death.

5. Remedy's Administration

The proposed solution could be implemented by the legislature or administered by a court. Either way, a court would be exclusively entitled to apply the consequence. It would be a consequence of finding that a will was executed under undue influence. Declaring a predatory spouse unworthy to inherit does not require conducting any additional procedures above those necessary for establishing testamentary undue influence.

6. Comparative Methodology

The issue is not of a strictly national character. However, the legislature provides solutions, such as revocation of a will by marriage, which influence its shape and constitute it as partially unique to common law countries. None of those countries provides a coherent solution that would prevent the consequences of predatory marriages or the marriages themselves and is applied in practice.

Considering the problem from a civil law jurisdiction's perspective allows providing an alternative to Canadian scholars' suggestions. The finding extends the contemplated approaches and uses the German legal system's experience. The provided remedy potentially decreases the consequences of predatory marriages. It is efficient, for it requires adopting a legal consequence already existing under Canadian law to a legal institution functioning within that system of law.

The proposed solution is based on comparative research, which respects the differences of each country's legal systems. Further, the remedy's applicability is considered in the context of Canadian case law, legislation, and legal policy rationale. The solution is compatible with Canadian law, it is an incremental change, and it is justified within the legal system itself.

7. Conclusion

Drawing on the case studies considered earlier, the proposed approach would render the predatory spouse unworthy to inherit in three out of the five cases examined. In one of the five cases, it would be the only solution preventing a predatory spouse from benefiting on the victim spouse's death. In two out of the five cases, it could be applied as an alternative to marriage nullification.

Declaring a predatory spouse who unduly influences a victim spouse's will unworthy to inherit would prevent him or her from benefiting on a victim spouse's death. It would not hamper predatory marriages themselves. Instead, it could punish a predatory spouse for exploiting a vulnerable person's fragility by manipulating him or her into marriage and then unduly influencing his or her will.

The proposed solution remedies the consequences of a problem, not its source. However, if considered as an incremental change, it could be applied immediately; it could provide relief in the most compelling cases; and it could give more time for carrying out more complex legal reforms. It is compatible with Canadian law and draws from over two hundred years' experience in German law, thus strongly suggesting its smooth transfer. Moreover, it supports the solutions implemented in some American

states to combat elder abuse. In addition, its application may be extended to other cases involving undue influence.

On the ground of this research, it can be stated that applying a comparative methodology has provided a solution capable of decreasing potential consequences of predatory marriages and influencing the number of marriage bearing predatory features. Drawing from a legal institution present in a foreign jurisdiction, it provides a new approach that applies an approach already existing under Canadian law to predatory marriage cases, to which it has not been applied before.

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