"AND TWO COWS TO MY WIFE … SO LONG AS SHE REMAINS MY WIDOW." PUBLIC POLICY AND TESTAMENTARY MARRIAGE CLAUSES IN CANADA

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This article, part one of a two part project, provides a comprehensive review of the law surrounding marriage conditions in wills in Canada, including the civil law jurisdiction of Quebec, through a quantitative study of nearly every electronically reported Canadian decision involving a marriage clause in a will. It begins with an overview of the history of marriage clauses in the UK, the US and Canada with a detailed review of the Canadian jurisprudence. This study reveals that the application of public policy to most marriage clauses in Canadian wills has remained stagnant since the 18th century, with two notable exceptions. The first involves clauses that condition a gift on discriminatory terms such as the sex, race or religion of a beneficiary's spouse. When asked to do so, Canadian courts have voided such conditions, beginning in the 1960s. The second is the Province of Quebec where arguably all marriage clauses are now contrary to public order. This article is followed by a companion piece that provides the normative argument as to why all marriage clauses should be considered contrary to public policy in Canada.

L'auteure, dans cet article, le premier volet d'un projet en deux parties, jette un regard sur l'ensemble du droit canadien s'appliquant aux dispositions matrimoniales dans les testaments, y compris en droit civil du Québec, au moyen d'une étude quantitative couvrant la quasi-totalité des décisions canadiennes répertoriées électroniquement concernant une disposition testamentaire liée à un mariage. L'étude s'ouvre sur un survol historique des dispositions matrimoniales au Royaume-Uni, aux États-Unis et au Canada, accompagné d'un examen détaillé de la jurisprudence canadienne. L'auteure révèle que l'application des règles d'ordre public à la majorité des dispositions matrimoniales dans les testaments canadiens stagne depuis le 18e siècle, sauf deux exceptions importantes. La première concerne des dispositions prévoyant un legs conditionné par des motifs discriminatoires, comme le sexe, la race ou la religion du mari ou de l'épouse de la personne bénéficiaire. Les tribunaux canadiens, en réponse à des demandes en ce sens, ont commencé à invalider ces dispositions dans les années 1960. La seconde

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se rapporte à la province du Québec, où toutes les dispositions matrimoniales sont manifestement devenues contraires à l'ordre public. Cet article est suivi d'un exposé complémentaire qui présente un argument normatif soutenant que l'ensemble des dispositions matrimoniales devraient être déclarées contraires à l'ordre public au Canada.

Contents

1. Introduction

Many are familiar with the plot in Jane Austen's Sense and Sensibility.[2] In it, the poor sisters Dashwood must make their way in the cruel world of early 19th century England, their father dead and their estate entailed to the nearest male relative. Pride and Prejudice, another one of Austen's novels published in 1813,[3] also involved entailments, inheritances and the necessity of marrying well for the five sisters Bennet.

Jane Austen's period fiction romances are beloved by generations. However, while her stories are fictional, the estate law that forms the backbone of the novels' plots was very real. The trifling amount of rights

2 Jane Austen, *Sense and Sensibility* (London, UK: Penguin Books, 2003).

3 Jane Austen, *Pride and Prejudice* (London, UK: Penguin Books, 2002).

accorded to the "gentler sex" when it came to property ownership and matters related to inheritance was the lived legal reality of Jane Austen and the women of her time. What might surprise contemporary readers of her work is that some of it is still the law today. Of course, entailed estates, also known as the fee tail, were abolished in the early 20th century.[4] However gifts in wills conditional on marriage, never marrying, or remaining in widowhood remain, for the most part, good law in Canada.

Inspired by this remarkable fact, this article provides a comprehensive review of the law surrounding marriage conditions in Canadian wills, including the civil law jurisdiction of Quebec. It is based on a quantitative study of nearly every electronically reported decision involving a marriage clause in a Canadian will. There are at least 442 of these decisions, and the story they tell is one that should interest not only practitioners and scholars of estate law, but those concerned with gender, patriarchy, and capricious uses of private law that require the assistance of public courts. It may even interest those concerned with the evolution (or stasis) of the common law itself.

This article begins with an overview of the history of marriage clauses in the UK, the US and Canada with a detailed review of the Canadian jurisprudence. From this work, three key insights into this area of the law can be drawn. First and foremost, this article confirms that for the most part, the values of the 18th century hold a firm grip on the application of the common law public policy doctrine to testamentary marriage clauses in Canada and elsewhere. However, the case law also reveals two notable exceptions to this uninspiring conclusion.

The first exception is the difference between the three jurisdictions of the UK, the US and Canada with respect to "partial" restraints on marriage. When faced with marriage clauses that prohibit unions or encourage separations based on immutable characteristics such as a person's race or religion, unlike their common law counterparts, from approximately 1960 onwards, Canadian courts, when asked to do so, have voided such clauses on the ground of public policy.

The second is the very significant exception of Quebec. The story of testamentary marriage clauses in Quebec, while relevant to its sister jurisdictions, has until now, been largely ignored by the anglophone

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[4] In the UK in 1925, and in most Canadian provinces (Prince Edward Island being the exception) between 1851–1956. See e.g. *Law of Property Act 1925* (UK), c 20, s 130(7); *Of Estates Tail,* RSNS 1851, c 112; *Conveyancing and Law of Property Act,* RSO 1990, c C.34, s 4. See also Mary Jane Mossman, *Property Law: Cases and Commentary*, 4th ed (Toronto: Emond Montgomery Publications, 2020) at 233.

literature. A detailed review of the Quebec cases shows that as of 2018, all forms of marriage clauses in that province, if challenged in a court of law, will be found contrary to public order.

While the aim of this paper is to provide an authoritative explanation of what the law is with respect to marriage clauses in Canada, in a companion article to this one, I argue what the law should be. In it, drawing on the findings of this paper, I make the case for why all marriage clauses are contrary to public policy.

2. Approach

Throughout both articles, the term "marriage clause" is employed as a descriptor for any condition attached to a testamentary gift that concerns a beneficiary's marital or intimate relationship status. The condition must be followed for a beneficiary to either receive or retain their gift. Common examples of marriage clauses include: requiring a beneficiary never to marry or to remarry; requiring a beneficiary to divorce their current spouse; forbidding a beneficiary from marrying a person of a certain race, ethnicity, religion, sex or gender; or requiring the beneficiary to be married or to marry in order to obtain or retain their gift.

Over the course of three summers, with the assistance of research assistants, I searched for and read any reported Canadian decision that referenced a marriage clause using CanLII, Westlaw, Quicklaw and SOQUIJ. Search methods included both key word searches, keycite statute searches, and cross-referencing cited decisions within located cases. This search produced a data set of 442 cases. Some of these cases have no reasons reported but instead are referenced and described within others. In most of these cases, the marriage clause was incidental to the argument before the court. Only electronic sources were used for this search which has the limitation of not going back before the early 1800s.[5] However, given the scope and nature of the research, while there are certainly more Canadian cases out there, there is no reason to think that the data set is not representative of the Canadian jurisprudence on the issue. This data set was then catalogued into categories that provide a clearer picture of the population demographic most deeply impacted by this issue, the impact of these clauses on beneficiaries, as well as their jurisdiction and temporal distribution.[6]

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[5] For example, Lexis+ has digitized cases going back to 1823: "Court Decisions" (2024), online: (QL) LexisNexis Canada <https://tinyurl.com/3urra8kk>; 1825 is the cutoff date for cases on Westlaw: "Cases" (2024), online: (WL) Thomson Reuters Canada <https://tinyurl.com/mr33zw68>.

[6] The data set categories include: the date and jurisdiction of the decision, the kind of restraint (total, partial, remarriage), the sex of the beneficiary, the relationship of the

For ease of reference, throughout this article I adopt terms used by other academics when referring to different kinds of marriage clauses. A gift conditioned on the promise never to marry is often referred to as a "total" restraint on marriage, as is one that requires a termination of a marriage. A gift that requires the recipient never to remarry, while technically a total restraint, is called a "remarriage or viduity" clause. A gift that qualifies the kind of person a beneficiary may marry is referred to as a "partial restraint".

3. The Legal History of Marriage Clauses

A) The UK

For hundreds of years the legality of marriage clauses has been scrutinized by courts in the United Kingdom, the origins of which can be traced back to the laws of Ancient Rome. As one jurist explained, bans on marriage clauses in Roman wills date back to the time of Emperor Augustus.[7] In 1st century Rome, any interference with marriage was illegal as it was deemed an encouragement of celibacy, contrary to the good of society that depended on population growth.[8]

Before subjects of the British Empire could dispose of their estate by way of will,[9] English ecclesiastical courts were charged with the disposition of personal property starting in the 13th century. The ecclesiastical courts operated under canon law, which itself was greatly influenced by Roman law.[10] The laws of the ecclesiastical courts concerning marriage restraints were adopted to a certain extent by the courts of chancery and the courts of common law.[11] As early as the 18th century, conditions attached to gifts in wills imposing complete restraints against marriage were deemed contrary to public policy,[12] a doctrine that allows courts to void otherwise

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beneficiary to the testator, whether the condition was upheld or voided by the court and why, whether the condition was followed by the beneficiary, and whether the case involved a dependants' relief claim.

7 Rose M Trapani, "Conditions in Restraint of Marriage" (1939) 14:1 St John's L Rev 89 at 89, art 4.

8 See *Stackpole v Beaumont* (1796), 30 ER 909 at 913, [1796] 3 Ves 89 (EW HC Ch).

9 *Statute of Wills,* 32 Hen 8, c 1.

10 Sir John Baker, *Introduction to English Legal History,* 5th ed (Oxford: Oxford University Press, 2019) at 135–40.

11 See *Baker v White*, [1690] 2 Vern 215, 23 ER 740 (EW HC Ch).

12 See *Morley v Rennoldson*, (1843) 2 Hare 570, 12 LJ Ch 372 (EW HC Ch).

legal operations of the common law if the effect of a clause is to harm the public good.[13]

An exception was made for conditions that placed restraints on remarriage, often referred to as viduity or widowhood clauses. As one author observed, even Roman law viewed viduity clauses as distinct from those that prohibited marriage in general.[14] Instead, as the jurisprudence evolved, the validity of viduity clauses became dependant on the subjective intentions of the testator, as discussed below. Finally, conditions that imposed "partial restraints" such as restricting the nationality or religion or class of a beneficiary's potential marriage partner, were almost always upheld and enforced by courts.[15]

While general intolerance for complete restraint on marriage informed the public policy of 18th century UK, exceptions to this persisted throughout to the 20th century, many based on rules of construction that had nothing to do with public policy.[16] Some common law judges believed that the rules imported from the ecclesiastical courts could only be applied to testamentary gifts of personalty or to gifts of mixed realty and personalty.[17] Following this logic, complete restraints on marriage connected to gifts of realty were sometimes upheld.[18] Often courts evaded the public policy question altogether by finding a gift to be determinable rather than defeasible in nature. Tortured students of common law property courses may recall that choice of grammar in conveyances has significant real-life consequences for donees or beneficiaries wishing to challenge a condition attached to a gift. The use of "so long as she remains unmarried" in place of "but, if my daughter marries …" legally transforms a condition into a "limitation."[19] In the opinion of many courts, unlike

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13 Public policy was not formally recognized as a doctrine of the common law until the 18th century; however, earlier rulings that void or refused to enforce provisions of the common law—by both the common law courts and the courts of equity—have been framed as such by jurists and scholars. See Henry De Bracton, *De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England)*, vols 1–2 ed by George E Woodbine (London: Humphrey Milford, 1922).

14 Olin Browder Jr, "Conditions and Limitations in Restraint of Marriage" (1941) 39(8) Mich L Rev 1288 at 1298, citing Code 6.40.1; Henry John Roby, *Roman Private Law*, vol 1 (Cambridge: Cambridge University Press, 1902) at 317; and Thomas Wood, *A New Institute of the Imperial or Civil Law* (London, 1704) at 26.

15 *Perrin v Lyon,* [1807] 9 East 170, 103 ER 538 (EW KB) [*Perrin*]. See also Thomas Jarman, *A Treatise on Wills,* 8th ed, vol 2 (London: Sweet & Maxwell, 1951) at 44–45.

16 Browder, *supra* note 14 at 1304.

17 Given that only testamentary gifts of personal property had been the jurisdiction of the ecclesiastical courts prior to the passage of the *Statute of Wills*, *supra* note 9.

18 See *Jones v Jones* (1876), 1 Q B Div 279 at 282.

19 For example: "To my wife, but if she remarries, to my son" is a defeasible estate and vulnerable to a challenge of the condition. "To my wife so long as she remains my

conditions, limitations on testamentary clauses were immune to any sort of public policy censure. Following this reasoning, courts refused to void determinative clauses that imposed marriage restraints even if they amounted to a complete restraint.[20]

Conversely, some marriage clauses were found invalid during this era even if they were viduity clauses or constituted only partial restraints. Again, the reasons for these decisions were often not based on public policy. Instead, the courts voided these conditions because they were found to be *in terrorem*[21] or uncertain in nature.[22]

When the public policy doctrine was applied, its use was informed by the idea of marriage as a valued and essential societal institution. Marriage provided financial security for women and children, it discouraged immoral relations, it was something to be preserved and encouraged for the public good.[23] Attempts to fracture a marriage or discourage someone

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widow" is a determinable estate and subject to a completely different set of legal rules and consequences. For more on this, see Eran Kaplinsky, Malcolm Lavoie & Jane Thomson, *Ziff's Principles of Property Law,* 8th ed (Toronto: Thomson Reuters, 2023) at 288.

[20] Perhaps part of this rationale was connected to the consequences of a void limitation or, in other cases, a condition precedent. Unlike defeasible estates, a voided limitation or condition precedent causes the entire gift to fail, ending in a pyrrhic victory for the beneficiary in question. Browder, *supra* note 14 at 1293–96. For a discussion of this practice and the English cases that resolved the issue in this manner, see *ibid* at 1301–04. Notably, even in cases where the clause raised public policy questions, courts refused to engage with the issue on the basis that if the condition was void for any reason, the entire gift would fail (see *Re Mercer,* 1953 CarswellOnt 325, [1953] OWN 765 (ON SC H Ct J) [*Mercer*]; *Re Gross,* 1937 CarswellOnt 124, [1937] OWN 88 (ON SC CA)).

[21] The *in terrorem* rule, another import from the ecclesiastical churches, can be applied to gifts of personalty or mixed personalty and realty if a clause in a will interferes with a beneficiary's marriage or forbids any contestation of the will. If such a clause is unaccompanied by a gift-over, the clause is merely *in terrorem* and can be ignored by the court. See Browder, *supra* note 14 at 1299, 1303 citing *Marples v Bainbridge* (1816), I Madd 590, (1816) 56 ER 217 (EW HC Ch); *Scott v Tyler* (1788), Dick 712 at 718–19, 21 ER 448 (EW HC Ch); *Long v Dennis* (1767), 4 Burr 2052 at 2055, 98 ER 69 (EW HC KB). See also *Duddy v Gresham*, [1878] 2 LR Ir 442 (IE Ch).

[22] See *Clayton v Ramsden*, [1943] 1 All ER 16, [1943] AC 320 (EW HL) [*Clayton*]; See also *Tarnpolsk, Re, Barclays Bank Ltd v Hyer*, [1958] 3 All ER 479, [1958] 1 WLR 1157 (EW Ch); *Re Blaiberg and Public Trustee v De Andia Yrarrazaval and Blaiberg*, [1940] Ch 385 at 391, [1940] 1 All ER 632 (EW Ch). But see *contra Selby's Will Trusts, Re, Donn v Selby*, [1965] 3 All ER 386, [1966] 1 WLR 43 (EW Ch); *Tuck's Settlement Trusts, Re, Public Trustee v Tuck*, [1978] Ch 49, [1978] 1 All ER 1047 (EW CA Civ) [*Tuck*]. See also Herman Didi, *An Unfortunate Coincidence: Jews, Jewishness, and English Law,* 1st ed (Oxford: Oxford University Press, 2010).

[23] Take for example the 1888 Supreme Court of the United States decision of *Maynard v Hill* in which marriage was described as: "institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and

from ever marrying were prima facie contrary to public policy, but when these kinds of conditions were challenged by a beneficiary, the determining factor was ultimately the testator's true intention. Did the marriage clause in question signify a gift meant only to provide for a widow or a daughter until a future spouse could do so, or did it signify something more malicious in nature? As early as the 18th century, courts signalled that testamentary gifts provided while a person remained unmarried were not to be automatically interpreted "maliciously to a charge of restraining marriage."[24] If a marriage clause was judged to be benevolent in nature it would not be found in contravention of public policy. It was not always clear, however, to whom this benevolence need extend.[25]

The approach in the UK towards these clauses and the doctrine of public policy appears to have held fast in contemporary times, with the last reported decisions in the 1970s and 80s.[26] This legal inertia is likely attributable, in part at least, to the introduction of dependants' relief legislation in England and Wales.[27] The structure of a life estate or an allowance paid to the widow for "the duration of her widowhood" was the emblematic testamentary trend of the 18th, 19th and early 20th century. During the era of coverture, women had their property and personage legally subsumed by their husbands upon marriage, only to see the fee simple of it willed away as part of his estate and often to someone else. Even the *Married Women's Property Acts* of the 19th century were slow in restoring property rights to married women.[28] This legal reality gave rise to dependants' relief legislation, first in New Zealand at the end of the 19th century and later adopted throughout the commonwealth. In contemporary UK cases, widows have successfully argued that gifts containing viduity clauses constituted a testator's failure to make

of society, without which there would be neither civilization nor progress" (*Maynard v Hill* (1888), 125 US 190, 8 S Ct 723).

24 *Scott v Tyler*, *supra* note 21 at 451. For a Canadian example of such reasoning see *Haythornthwaite Estate*, *Re*, 1929 CarswellAlta 106, [1930] 1 WWR 58 (AB SC).

25 In the mid-19th century, some English courts determined that even a marriage clause that required a female beneficiary to never marry was permissible given that the motivations of the testator were to ensure his illegitimate child would not be neglected in the event of its mother's marriage. See *Potter v Richards* (1855), 24 L J Ch 488 (Ch). See also *In re Hewett*, [1918] I Ch 458 (EW Ch). See also Browder, *supra* note 14 at 1298 with respect to cases involving gift-overs upon the remarriage of widows with the gift going to a third party and not the testator's own children.

26 See *Re Wolffe's Will Trusts; Shapley v Wolffe,* [1953] 2 All ER 697 (EW Ch); *Re Tepper's WT,* [1987] 1 All ER 970 (EW Ch); *Tuck*, *supra* note 22; *Blathwayt v Lord Cawley,* [1975] 3 All ER 1047 (UK HL). Also see generally, J G Ross Martyn et al, *Theobald on Wills,* 18th ed (London: Thomson Reuters, 2016) at para 27-037.

27 See e.g. *Inheritance (Provision for Family and Dependants) Act* (UK), 1975, c 63.

28 See Constance Backhouse, "Married Women's Property Law in 19th Century Canada" (1988) 6:2 L & Hist Rev 211.

"reasonable financial provision" for them.[29] However, as discussed below in further detail with respect to the Canadian context, dependants' relief claims are not a panacea to the problem of marriage clauses in wills.

B) The American Experience

In 1941, Professor Olin Browder Jr. published an article that attempted to articulate the "agreed upon" principles in American law with respect to marriage clauses.[30] Browder's work provides a comprehensive review of the UK jurisprudence and the contemporary American jurisprudence of his time. He found the mid-20th century US jurisprudence largely in keeping with the UK precedent. For example, while the statutes in Indiana,[31] California,[32] and Georgia[33] prohibited certain kinds of conditional restraints on marriage in wills, even with clear legislation in place, courts in some of those states refused to invalidate marriage clauses that could be interpreted as limitations instead of conditions.[34] However, Browder's research did note one exception:

> Conditions in partial restraint of marriage, i.e., those against marriage without the consent of specified persons, or against marriage before a certain age, against

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[29] See *P v G (family provision: relevance of divorce provision),* [2004] EW HC 2944 (Fam); *Baker v Baker*, [2008] EW HC 977 (Ch), [2008] All ER (D) 312 (Mar).

[30] Browder, *supra* note 14.

[31] Ind Stat Ann (Burns, 1933) ("A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void" § 7-704).

[32] Cal Civ Code (Deering, 1937) ("Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage" § 710).

[33] Ga Code Ann (1937) ("Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, shall be invalid and void. Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid" § 53-107). Also *ibid* ("Limitations over upon the marriage of a widow shall be valid, unless such limitations are manifestly intended to operate as a restraint upon the free action of such widow in respect to marriage, and are not simply prudential provisions for the protection of the interest of children or others in such event; in such cases they are void" § 85-712).

[34] Browder, *supra* note 14 at 1317, 1320. Notably, the US does not have anything closely resembling the dependants' relief statutes in place in the UK or Canada. While certain tiers of survivorship rights exist depending on the state, investigating how those laws interact with marriage clauses is beyond the scope of this article, given its focus on the Canadian experience. For more information on this topic, see Ralph C Brashier, "Disinheritance and the Modern Family" (1995) 45:1 Case W Res L Rev 83; Carole O Davis, "A Recommendation for Family Maintenance in the United States: A Comparative Study of Canadian and American Provisions for Support of Dependents" (1984) 2:2 Can-Am LJ 151.

> marriage with certain persons or classes, etc., are valid. (It is said that the partial restraint must be reasonable, otherwise it is illegal.)[35]

In Browder's time, if a beneficiary challenged a partial restraint on marriage, American courts would determine whether the restraint was "reasonable" based on the demographics of the local population. If a marriage clause required the beneficiary to marry an Orthodox Jew, the court would hear evidence of what the population of Orthodox Jews was in relation to the beneficiary's place of residence. If a reasonable number of potential marriage partners existed in proximity, the clause would be found to be reasonable and not contrary to public policy.[36] This practice is still followed today across the United States,[37] but a contemporary change in this area of the law may be taking root in the US. Notably the American Restatement (Third) of Trusts, published in 2003, finds the following kinds of clauses in trusts and wills to violate public policy:

> Family relationships. A trust or a condition or other provision in the terms of a trust is ordinarily … invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship.[38]

The Restatement also includes a passage on religious freedom:

> A trust provision is ordinarily invalid if its enforcement would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion.[39]

Examples of offensive clauses in the Restatement include inducement to divorce or termination of a long-term relationship, the requirement of marriage and remaining married. However, the authors note the traditional caveats of remarriage clauses regarding a benevolent intention of the testator or if the restraint "is reasonable under all the circumstances."[40] While this represents a significant departure from the "reasonableness" approach to partial restraints, the Restatement of Trusts, though influential, is not binding on American courts. The 2008 decision of *In re Estate of Max*

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35 Browder, *supra* note 14 at 1290.

36 Albeit an approach that has its roots in English law, see *Perrin*, *supra* note 15 at 181.

37 Jeffrey G Sherman, "Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices" [1999] 1999:4 U Ill L Rev 1273 at 1319–22; Ruth Sarah Lee, "Over My Dead Body: A New Approach to Testamentary Restraints on Marriage" (2012) 14:1 Marquette Elder's Adviser 55 at 65.

38 *Restatement (Third) of the Law of Trusts* § 29 (2003).

39 *Ibid*.

40 *Ibid*.

Feinberg[41] draws into question its level of influence on this particular issue. At issue in *Feinber*g was a marriage clause that required the grandchildren of the testator to be married within the Jewish faith in order to receive their gift.[42] The Illinois Court of Appeal voided the clause for reasons of public policy. In doing so, the court acknowledged past cases where partial restraints had been upheld, but found that this was no longer good law, citing the Restatement of Trusts:

> We hold that under Illinois law and under the Restatement (Third) of Trusts, the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing.[43]

The Illinois Supreme Court reversed on appeal. It determined that public policy, informed by the State's laws surrounding inheritance, weighed more towards testamentary freedom than preventing testamentary interference with the grandchildren's marriages, particularly given that the grandchildren had no independent legal claim to the estate under Illinois' laws.[44] It also distinguished the case at bar from the following example of testator pressuring a beneficiary to change their religion or marital partner included in the third Restatement of Trusts:

> a trust created by an aunt to benefit her nephew, who was to receive discretionary payments until age 18, and all income and discretionary payments until age 30, at which time he would receive an outright distribution of all trust property. However, all of his rights under the trust would end if, before the trust terminated on his thirtieth birthday, he married "a person who is not of R Religion." If he violated this condition, the remainder of the trust would be given to a college.[45]

Without deciding whether "any section of the Restatement (Third) of Trusts, which was adopted in 2003, is an accurate expression of Illinois law",[46] the court held that in the case at bar, the testamentary condition was not coercive in nature as it:

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41 (2009), 235 Ill 2d 256, 919 NE 2d 888 (Sup Ct Ill) [*Feinberg Illinois Supreme Court*].

42 Specifically, the clause required that, at the death of the grandmother, any grandchild "who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be 'deemed deceased for all purposes of this instrument as of the date of such marriage'" (*ibid* at 259).

43 *In re Estate of Feinberg* (2008), 383 Ill App 3d 992 at 996–97, 891 NE 2d 549 (App Ct Ill) [*Feinberg Court of Appeal*].

44 *Feinberg Illinois Supreme Court*, *supra* note 41 at 267.

45 *Restatement (Third) of the Law of Trusts*, *supra* note 38 § 29.

46 *Feinberg Illinois Supreme Court*, *supra* note 41 at 279.

> … operated on the date of [the testator's widow's] death to determine which, if any, of the grandchildren qualified for distribution on that date. The condition was either met or it was not met. There was nothing any of the grandchildren could have done at that time to make themselves eligible or ineligible for the distribution.[47]

Based on the clauses' framing, rather than its purpose, the court found that it did not violate public policy. As the court observed "due process does not require notice of conditions precedent to potential beneficiaries"[48] concluding, "[i]t is impossible to determine whether Erla's distribution plan was the product of her own wisdom, good legal advice, or mere fortuity. In any case … the beneficiary restriction clause does not violate public policy."[49]

Notably, Canadian law with respect to partial restraints on marriage also broke from UK precedent, beginning around the latter half of the 20th century. However, unlike their American counterparts, Canadian judges did not adopt a reasonableness test, nor did they uphold clauses that imposed such restraints on grounds of semantics or drafting. Instead, they began to void such clauses for being contrary to public policy.

C) Marriage Clauses in Canada

1) The Earlier Decisions

There are at least 442 electronically reported cases in Canada that mention a marriage clause; 286 of these were reported by 1960. In the vast majority of these cases, the beneficiary subjected to a marriage clause was female; out of the total data set of 442 cases, 384 are directed at women whereas 34 are directed at men.[50] As discussed in the companion article to this one, a subset of those cases where the marriage clause appears aimed at a man, it in fact targets a woman, seeking to induce a son's separation from

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47 *Ibid* at 280.

48 *Ibid* at 284.

49 *Ibid* at 286. Notably this approach is similar to the civil law doctrine employed in early Quebec decisions regarding partial restraints, discussed below. The Illinois Court of Appeal, for its part, did address this argument, finding, "[n]or are we persuaded by the defendants' argument that the trust provision was to be applied at the time of Erla's death and therefore did not affect future behavior. The provision's clear intent was to influence the marriage decisions of Max's grandchildren based on a religious criterion and thus to discourage marriage by the grandchildren other than to those of the Jewish faith. This provision violated public policy …" (see *Feinberg Court of Appeal, supra* note 43 at 997).

50 In 24 of these cases the marriage clause was directed at multiple beneficiaries of both sexes.

a particular wife.[51] Most of the early cases involved viduity clauses, often attached to a life estate. The following are examples of marriage clauses from the 19th and early 20th century:

> "I reserve for my wife, Agnes Oliver, the sole use of so much of the dwelling house and furniture situated on lot No. 8, where I now reside, as she may desire so long as she shall remain my widow, and she shall receive the sum of $180 per annum from my son Robert Oliver."[52]

> "[to my wife absolutely] provided she does not marry or misbehave."[53]

> "… If she marries before the youngest child is of age she gets one cow at the time and three hundred dollars."[54]

Others involved provisions for unmarried or widowed female family members during and after the laws of coverture[55] or inheritances conditional on an approved marriage by the testator's executor.[56] In one early Quebec decision, a testator left his wife property conditional on her not remarrying and his son remaining unmarried. He also included the following clause in his will: "[my wife] is ordered to feed, lodge and clothe and treat the son as the testator had done, till his death, or till the date of his marriage."[57] Though few and far between, sometimes marriage restraints were also imposed by female testators, usually on their children.[58]

In most of these early cases the marriage clause was incidental to the issue at hand.[59] In those cases where a marriage clause was challenged,

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[51] In *Royal Trust Co v Jones (No 2)*, 1934 CarswellBC 127, 49 BCR 204 (BC SC (CA)); *Fairfoull Estate v Bullman*, 1973 CarswellBC 314, [1973] BCJ No 356 (BC SC); *McBride, Re*, 1980 CarswellOnt 523, 107 DLR (3d) 233 (ON SC H Ct J).

[52] *Oliver v Davidson* (1882), 11 SCR 166, 1882 CarswellOnt 62 (SCC).

[53] *Leech v Leech*, 1865 CarswellOnt 93, 11 Gr 572 (UC Ch). Such behavioural clauses were meant to catch any sort of sexual or intimate activity on the part of the widow shy of remarriage. See also *Ward v McKay,* 1907 CarswellNS 19, 41 NSR 282 (NS SC) ("while she remains my widow, retaining a good moral character" at para 2).

[54] *Myles v Myles,* 1920 CarswellNB 3, (1920) 47 NBR 195 (NB SC AD). *Myles* is one of many cases in which a cow was left to a wife on the condition of her viduity. The testamentary gift that inspired the title of this article comes from the 1872 decision of *Bigelow v Bigelow,* 1872 CarswellOnt 80, 19 Gr 549 (ON Ch). That decision is discussed in greater detail in the companion article to this one.

[55] *White v McLagan,* 1902 CarswellOnt 57 at para 3, 1 OWR 59 (ON TC).

[56] *Hamilton, Re,* [1901] OJ No 3, 1 OLR 10 (ON HC).

[57] *Farmer v Smith,* 1906 CarswellQue 156, 29 CS 406 (QC Ct Rev), at para 6.

[58] *Ryan, Re,* 1910 CarswellOnt 410, 16 OWR 1001 (ON H Ct J (Ex Chq Div)); *Perrie Estate, Re,* 1910 CarswellOnt 206, 16 OWR 90 (ON H Ct J (Ex Chq Div)).

[59] In 366 of the reported decisions the marriage clause was not challenged by the beneficiary.

conditions that restrained marriage or remarriage were almost always upheld.[60] Furthermore, like the UK and the US, most of the exceptions to this trend were made for reasons other than public policy.

2) Void for reasons other than public policy

In the 1897 case of *Ernst v Zwicker*, the testator's will sought to reserve "the dower to my daughter-in-law, so long as she remains a widow, should she survive my son, Jonas."[61] The court voided the condition in its entirety given the legal right to a dower was not something the testator could bequeath.[62] In *Re Pettifer*,[63] *Re Bray*,[64] *Re Tuck*,[65] *Re Hamilton*,[66] *Re Schmidt Estate*,[67] and *Re Pashak Estate*[68] marriage clauses were voided because they were found to be *in terrorem*. In *Burns v Grant*, the entire will, along with its viduity clause, was set aside for reasons of undue influence.[69] In *Re Trottier Estate*, the wording "if my wife should remarry after my death, then I wish the above farm and all I may die possessed of to be divided amongst my children, equally" was deemed to be "merely precatory" in nature and lacking the imperative language required to be considered an enforceable condition.[70] In *Re Smith Estate* and *Re Mumby*, widowhood clauses were set aside on the grounds of repugnancy.[71] In *Re*

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60 In 27 of the reported decisions, marriage clauses challenged by beneficiaries for being contrary to public policy were upheld by courts. Notably, the motivations of the testator were also considered even in cases of complete restraint. See for example, Justice's Maybank's inquiry "of whether the testator was endeavouring to terrorize the unmarried female beneficiary into continued celibacy" (see *Crown Trust Co v McKenzie,* [1958] MJ No 59 at para 6, 66 Man R 294 (MB QB)).

61 *Ernst v Zwicker*, 1897 CarswellNS 87, 27 SCR 594 (SCC) at para 2.

62 This fact scenario is to be distinguished from the many cases that put the widow to an election of her dower or a gift under the will which was deemed a proper exercise during the 19th and early 20th century in Canada. See *Westacott v Cockerline,* 1867 CarswellOnt 24, 13 Gr 159 (UC Ch); *Coleman v Glanville,* 1870 CarswellOnt 123, 18 Gr 42 (ON Ch).

63 *Re Pettifer,* [1900] WN 182.

64 *Re Bray,* [1903] OJ No 499, 2 OWR 520 (ON H Ct J).

65 *Re Tuck,* 1905 CarswellOnt 383, 6 OWR 150 (ON Weekly Court).

66 *Hamilton, Re*, *supra* note 56.

67 *Schmidt Estate, Re,* 1949 CarswellMan 43, [1949] 2 WWR 513 (MB KB).

68 *Pashak Estate, Re,* 1923 CarswellAlta 86, [1923] 1 WWR 873 (AB SC).

69 *Burns v Grant,* 1922 CarswellNS 36, 55 NSR 337 (NS SC).

70 *Trottier Estate, Re,* 1944 CarswellAlta 67, [1945] 1 WWR 90 (AB SC) at para 12. A similar decision was made in *Scott Estate, Re*, 1937 CarswellBC 62, [1937] 3 WWR 272 (BC SC).

71 *Smith Estate, Re,* 1956 CarswellMan 62, 20 WWR 254 (MB QB); *Mumby, Re,* 1904 CarswellOnt 517, 4 OWR 10 (ON Div Ct). Notably *Smith Estate, Re* also lacked a gift-over though contained no mention of the *in terorrem* rule (at para 6). Also see *Leonard v Leonard*, 1898 CarswellNB 8, 1 NB Eq 576 (NB SC Eq), where some gifts made to the

Russell Estate, a marriage clause in the testator's will imposed upon his daughter-in law was circumvented by the testator's son's will in which the son exercised his power of appointment over his share of the estate, assigning it to his wife free of the clause.[72]

3) The Dependants' Relief Cases

> The ordinary man, I apprehend, desires to leave his widow a suitable income proportionable to his means for the rest of her life, or until her remarriage, a dower in fact, following the provision made for her by the common law. If he should have an estate of $50,000 he might leave his widow one-half or $25,000, but if subsequently to the making of his will he became possessed of $500,000, it is most unlikely that he would wish to leave her half of this. He might increase her legacy to $50,000, or one-tenth of his estate, but the rest he would leave to his married children.[73]

The above quotation comes from a 1918 Supreme Court of Canada decision. It is perhaps emblematic of the reasons why women's groups began to lobby for the introduction of dependants' relief legislation in Canada. Prior to the adoption of this legislation, the observation of Chief Justice Fitzpatrick was largely born out with little relief available to widows of testators who were financially dependent on whatever was left to them in the wills of their husbands. Testators often left the bulk of their estate to their eldest son, providing no financial independence to their widows. According to former Chief Justice McLachlin, the purpose of dependants' relief legislation, was not only to keep dependants "from becoming a charge on the state" but also represented a "foreshadowing [of] more modern concepts of equality."[74]

The Canadian provinces began to introduce dependants' relief legislation starting with Alberta in 1910.[75] There are several dozen electronically reported decisions involving dependants' relief challenges to wills that contained marriage clauses. Like the greater body of cases, in

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widow were also held to be absolute and therefore the otherwise valid condition of her remarriage attached to the rest of the estate, was repugnant to those gifts alone.

72 *Russell Estate, Re,* 1954 CarswellOnt 286, [1954] OWN 625 (ON H Ct J), aff'd 1955 CarswellOnt 390, [1955] 2 DLR 721 (SCC).

73 *Brodie v Chipman,* 1918 CarswellOnt 9 at para 14, 57 SCR 32 (SCC).

74 *Tataryn v Tataryn Estate,* [1994] 2 SCR 807 at para 16, 1994 CanLII 51 (SCC).

75 *The Married Women's Relief Act*, SA 1910, c 18 (2nd Sess). For a fuller discussion of the history and purpose of this legislation see: Jane Thomson, "Disinheritance, Discrimination, and the Case for Including Adult Independent Children in Dependants' Relief Schemes: Lawen Estate v Nova Scotia" (2021) 44 Dal LJ 641; Cameron Harvey & Linda Vincent, *The Law of Dependant's Relief in Canada*, 2nd ed (Toronto: Thomson Carswell, 2006).

some of the dependants' relief decisions the clause was only incidental to the applicant's claim. In a few of these decisions, the court awarded the beneficiary a portion of the testator's estate free of the marriage clause.[76] In others, while the provision from an estate for the widow was increased, the judgement also preserved the viduity clause attached to her gift.[77] Then there are the decisions in which a widow was granted relief and the court, of its own motion, added a viduity clause to the award.[78] In a 1981 Ontario Supreme Court decision, an order for dependants' relief was ordered to terminate not only in the event of remarriage but also if the applicant established "a permanent relationship with a man with whom she cohabits."[79]

4) Void for reasons of public policy

There were a handful of early decisions where Canadian courts found marriage clauses to be void on traditional public policy grounds. In *Tucker, Re*,[80] a court voided a remarriage clause on the grounds that it imposed "a general restraint on marriage" and took the form of a condition subsequent.[81] *Re Cutter* voided a restraint on a testator's never-married sister for similar reasons.[82] In the cases of *Re Nurse*,[83] *Fairfoull Estate v*

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76 See *Baker Estate, Re*, 1919 CarswellSask 201, [1920] 1 WWR 259 (SK CA); *Marsh, Re*, 1950 CarswellSask 45, [1950] 2 WWR 238 (SK KB); *Wolfe v Wolfe*, 1982 CarswellSask 596, [1982] WDFL 745 (SK QB); *Richards v Person*, 1982 CarswellBC 36, [1982] 2 WWR 668 (BC SC), aff'd 1983 CarswellBC 317, [1984] 1 WWR 573 (BC CA).

77 *Trott Estate, Re*, 1949 CarswellMan 51, [1949] 2 WWR 738 (MB KB); *Schmidt, Re*, 1952 CarswellOnt 55, [1952] OR 532 (ON CA); *Mannion v Canada Trust Co*, 1981 CarswellOnt 2502, 10 ACWS (2d) 162 (ON Surr Ct); *Clark Estate, Re*, 1922 CarswellAlta 44, [1922] 2 WWR 691 (AB SC (AD)).

78 *Green, Re*, 1959 CarswellNS 26 at para 18, 17 DLR (2d) 74 (NS SC); *Burnie, Re*, 1970 CarswellNS 176 at para 20, 7 NSR (2d) 38 (NS SC (TD)); *Bateman, Re*, 1965 CarswellSask 98, 55 DLR (2d) 763 (SK QB); *Menkes, Re*, 1976 CarswellOnt 196 at para 13, 28 RFL 246 (ON SC H Ct J); *Carnduff Estate, Re*, 1957 CarswellSask 30 at para 13, 22 WWR 160 (SK CA).

79 *Moores v Hughes*, 1981 CarswellOnt 493 at para 39, 136 DLR (3d) 516 (ON SC H Ct J). See also *Holland v Clements Estate*, 1991 CarswellOnt 545 at para 40, [1991] OJ No 1365 (ON Ct J (GD)), where Kurikso J held that an "appropriate" dependants' relief reward would normally entail a periodic payment of support to a dependant spouse "so long as she remains unmarried or not living in a common law relationship."

80 *Tucker, Re*, 1910 CarswellSask 37, 16 WLR 172 (SK Chambers).

81 *Ibid* at para 5.

82 *Cutter, Re*, 1916 CarswellOnt 333, 31 DLR 382 (ON SC).

83 *Re Nurse*, [1921] OJ No 437, 20 OWN 428 (ON SC HC Div).

Bullman,[84] *McBride, Re*,[85] *Quinn v Eastern Trust Co*,[86] *Re Hurshman*,[87] and *Webster c Kelly*[88] clauses that were interpreted as promoting the separation of married couples were voided for reasons of public policy.

D) The Break in the Canadian Jurisprudence

Prior to the 1960s Canadian courts followed the UK's lead when it came to partial restraints on marriage.[89] In *Renaud v Lamothe,*[90] the Supreme Court of Canada upheld a gift to a testator's grandchildren conditional upon them being born of a marriage "contracted in accordance with the laws and the rites of the holy Catholic, Apostolic and Roman Church."[91] The Supreme Court of Canada's ruling focused mainly on whether or not public policy and testamentary freedom in Quebec should be interpreted in accordance with the legal precedent of England or France, settling on the former, "[n]ow—and this is not disputed—full and complete testamentary freedom comes to us from England. France has never known it."[92] Embedded in this reasoning was a rejection of a beneficiary's "freedom of conscious" in favour of the freedom of conscious of the testator.[93] In *Re Curran*,[94] the testator's estate was to be divided among her grandchildren if they reached the age of 25 and at that time were "a member of a Roman Catholic Parish and if then married be married to

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84 *Fairfoull Estate v Bullman*, 1974 CarswellBC 214, [1974] 6 WWR 471 (BC SC).

85 *McBride, Re*, *supra* note 51.

86 *Quinn v Eastern Trust Co*, 1963 CarswellPEI 2, 39 DLR (2d) 743 (PE SC).

87 *Hurshman, Re*, 1956 CarswellBC 235, 6 DLR (2d) 615 (BC SC).

88 *Webster c Kelly* (1890), MLR 7 SC 25 (QC CS).

89 With one exception, the extraordinary case of *Kimpton c Canadian Pacific Railway* (1888), MLR 4 SC 338 (QC CS) [*Kimpton*], in which Justice Michel Mathieu voided a clause in a Quebec will that restricted an inheritance to those who professed the Protestant religion on public policy grounds.

90 *Renaud v Lamothe*, 1902 CarswellQue 17, 32 SCR 357 (SCC) [*Renaud*].

91 *Ibid* at para 1 [translated by author].

92 *Ibid* at para 11 [translated by author].

93 *Ibid* at para 12 [translated by author]. Notably the discussions of the lower courts in this case were more interesting in their nuance. In the Superior Court of Quebec, Justice Taschereau held the condition to be invalid and unwritten as contrary to the freedom of religion and hence to public order (see *Lamothe c Renaud*, 1901 CarswellQue 82 at paras 3–7, 15 BR 400 (QC KB)). The Court of Appeal of Quebec set aside the judgement on the reasoning that the beneficiaries had not known of the will's condition before making their choice of religion and therefore suffered no coercion that would compromise their freedom of religion: *ibid* at paras 12–19. This line of reasoning was also discussed and applied in *Klein v Klein*, 1966 CarswellQue 109, [1967] CS 300 (QC CS) [*Klein*], discussed below, ending however in a much different legal outcome for the beneficiaries in question.

94 *Re Curran*, 1939 CarswellOnt 167, [1939] OWN 191 (ON H Ct J).

one of the same Faith."[95] When a grandchild challenged the condition on the basis of restraint of marriage, the court had this to say:

> The testatrix, a devout Roman Catholic, was evidently opposed to mixed marriages. She decided to distribute her estate so as to hold out an inducement to her Protestant grandchildren to return to what she believed to be the true Church. She also desired to prevent, if possible, any further wandering from her Faith by her grandchildren marrying Protestants. That is not a matter in which the public has the slightest concern.[96]

Similarly, in *Re Kennedy*,[97] the court upheld the validity of a conditional gift to the testator's daughter provided that the daughter marry a protestant. The daughter married a catholic without the mother's knowledge. Though citing no legal support for the statement, the court held "[a] condition that a person must or must not marry a person of a specified religious faith is a valid condition."[98]

The 1956 British Columbia case of *Re Hurshman*[99] involved the following marriage clause:

> If my said wife shall have predeceased me, or having survived me, upon her death, one-half of the Trust Fund and of any of my property and estate not then converted shall be given to my daughter GEORGIA WOOD HURSHMAN provided she is not at that time the wife of a Jew[.][100]

Unlike the earlier case of *Kennedy* where the testator had no knowledge of her daughter's marriage, the testator in *Hurshman* was well aware that his daughter had married a Jewish man. It was clear to the court that his intention was to fracture their union.[101] Justice McInnes voided the condition on the basis that it promoted separation of a married couple.[102] While he made no effort to hide his disgust at the testator's antisemitism, it was clear that he believed himself powerless to void the condition based solely on the fact that it was discriminatory:

> … any propensity toward racial discrimination has no place in this country and while it may be open to a testator to lay down the conditions upon which his children may or may not share in his bounty, yet insofar as those conditions

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95 *Ibid* at 191.
96 *Ibid* at 193–94.
97 *In re Kennedy Estate*, 1949 CarswellMan 72, [1950] 1 WWR 151 (MB KB).
98 *Ibid* at para 23.
99 *Hurshman, Re*, *supra* note 87.
100 *Ibid* at para 1.
101 *Ibid* at para 4.
102 *Ibid* at para 6.

> involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the Courts to assist him in the fulfilment of his aims.[103]

Justice McInnes perceived no problem, however, with finding the condition to be *malem prohibitum*, an obscure rule imported from the ecclesiastical courts. This allowed for the preservation of the daughter's gift while avoiding its condition precedent.[104]

Notably, *Hurshman* was the last case reported in Canada where a court believed discriminatory conditions in wills, regardless as to whether they were connected to marriage clauses, were immune to the doctrine of public policy.[105] This shift of position with respect to discrimination by will began to have a direct impact on cases involving partial restraint marriage clauses in Canada.

In the 1966 decision *Klein v Klein*,[106] the Superior Court of Quebec was asked to consider whether the following testamentary clause contravened public policy:

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[103] Justice McInnes' reference to clear language pertained to cases where English courts had voided discriminatory provisions for being uncertain. See *Clayton*, *supra* note 22. Also see *Royal Trust Co v Richter*, 1964 CarswellBC 30 at para 17, 43 DLR (2d) 417 (BC CA).

[104] For a helpful explanation of the ancient rules of *malum prohibitum* and *malum in se* see Noel Cox, "Conditional Gifts and Freedom of Testation: Time for a Review" (2001) 9 Waikato L Rev 24 at 118. See also Angela Campbell, "I Do, I Will" (2014) 47:2 UBC L Rev 367 at 375.

[105] Apart from *Lamothe v Renaud* and *Curran*, other wills that discriminated on the basis of religion were found not to violate public policy, based solely on English precedent. See *Harrison v Commis*, 1928 CarswellSask 39, [1928] 1 WWR 880 (SK KB, Chambers); in *Going, Re*, 1950 CarswellOnt 92, [1951] 2 DLR 136 (ON SC (CA)), the Court of Appeal for Ontario refused to rule on the issue of a conditional bequest based on a nephew's religion because the condition was a condition precedent and therefore the gift would be void regardless. However, in his concluding remarks, Justice of Appeals Laidlaw noted the precedent of *Curran*. Of course, there were other decisions involving wills that discriminated on the basis of religion where the validity of the clause was not questioned by the courts. See *Laurence v McQuarrie,* 1894 CarswellNS 6, 26 NSR 164 (NS SC); *MacDonald v Jones*, 1907 CarswellNS 61, 3 ELR 241 (NS Full Court); *Starr, Re*, 1946 CarswellOnt 40, [1946] 2 DLR 489 (ON SC (CA)); *Delahey, Re*, 1950 CarswellOnt 416, [1951] 1 DLR 710 (ON H Ct J); *Mercer*, *supra* note 20. But see also *contra Kimpton*, *supra* note 89.

[106] *Klein*, *supra* note 93. While these two decisions were decided under a codified provision of Quebec's Civil Law, then Article 760, which provided that a condition "contrary to good morals, to law or to public order" voided a gift in a will, this term had been equated to the common law doctrine of public policy by the Supreme Court of Canada in the earlier decision of *Renaud, supra* note 90.

> Should any of my children marry out of the Jewish faith, the share of the said child, or the balance unpaid thereof as at the time of the said marriage, shall devolve to my other children or child, as the case may be, the issue of the latter to take the place of the deceased parent.

In voiding the condition, the Court specifically referenced and rejected the Supreme Court of Canada's earlier decision in *Renaud v Lamothe*.[107] The Court also exhaustively reviewed the Canadian, English and even American jurisprudence on clauses in wills concerning the Jewish faith and uncertainty, ultimately rejecting them all for the broader principle found in the civil law doctrine[108] that such clauses were a violation of a beneficiary's freedom of religion and contrary to the public policy of Quebec.[109] Notably, in reasoning similar to the American decision of *Feinberg*, the court was only prepared to find so on the basis that the beneficiary knew of the testamentary clause before the testator died, and therefore had felt pressure to conform to the condition of the clause regardless of his religious beliefs.

In the 1996 case of *Fox v Fox Estate*, the Court of Appeal for Ontario found that an executor had misused her powers as estate trustee to transfer her son's interest in his late father's estate to her grandchildren. The son alleged that this action was based on him marrying outside the family's religion.[110] Although the decision was ultimately decided on issues related to trust law, in a concurring opinion, Justice Galligan provided a much broader take on such clauses than the Superior Court of Quebec in *Klein*, finding that the executor's actions constituted a breach of public policy. Specifically, he held that "it would be contrary to public policy to permit

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[107] *Klein*, *supra* note 93 ("It is suggested that what is contrary to good morals should be decided in accordance with the civil law and not the common law and if the view of what is good morals in Quebec differs from that of Ontario, so be it" at 309).

[108] Specifically, the academic writings of civil law professors and jurists: André Morel, *Les Limites de la Liberté Testamentaire* (Paris: Librairie Générale de Droit et de Jurisprudence, 1960) at 132; Pierre-Basile Mignault, *Droit Civil Canadien*, vol 4 (Montreal: Wilson et Lafleur, 1899) at 14, 17; Hervé Roch, *Traité de Droit Civil de Québec*, vol 5 (Montreal: Wilson et Lafleur, 1953) at 38; Albert Mayrand, "Conflit de Deux Libertés: Liberté de Religion et Liberté de Tester" (1962–63) 65 R du N 383 at 387, 391.

[109] In Quebec this fell under what was then Article 760 of the CCLC which provided that any conditional gift in a will would be found void if that condition offended good morals, law or public order. Now this matter is governed by Article 757 that reads "A condition that is impossible or that is contrary to public order is deemed unwritten" (c 57, art 716(5) CCQ (1992); c 6, art 41 CCQ (2002)). No mention of this nuanced approach is made in the 1997 decision of *Marinacci c Bartolomucci,* 1997 CarswellQue 3572, 1997 CanLII 9242 (QC CS) [*Marinacci*], discussed below.

[110] *Fox v Fox Estate*, 1996 CarswellOnt 317, [1996] OJ No 375 (ON CA).

a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother."[111]

In 1997 the Superior Court of Quebec decided *Marinacci c Bartolomucci*. At issue was a hand-written codicil in which a testator left his granddaughter a share of his estate provided she leave her partner, whom she later married. The codicil, translated from Italian, read:

> I, Stefano Marinacci, upon my death I leave everything that belongs to me to my nephews Nico Marinacci Stefano Bartolomucci and Rosi Bartolomucci on the condition that [she] leaves Wadiijafaar.[112]

During the course of the trial, testimony of witnesses confirmed the reason why the condition was placed on the granddaughter's gift was because her mother, the testator's daughter, "did not want her father's money to go to an Arab."[113] The court voided the codicil in its entirety, finding that it was written for discriminatory purposes and therefore contravened public order, as set out in Article 757 of the Civil Code:

> la condition imposée à Rosy était illégale, contraire à l'ordre public et discriminatoire en ce qu'elle la déshéritait parce que Wadii Jafaar était arabe … la condition consistant à interdire toute relation amoureuse entre Rosy et un étranger, ce qui, dans l'état actuel des moeurs, contrevient aux droits de la personne; que la seule raison d'être du testament olographe étant de déshériter Rosy à moins qu'elle ne quitte Wadii Jafaar, ce testament n'a pas de considération légalement valide et est nul et sans effet.[114]

The trial judge found the clause to be illegal, contrary to public policy and discriminatory. While the Quebec Charter of Rights and Freedoms is referenced in the decision, the case contains no direct application of s 13 of the Charter, that, as discussed below, prohibits discriminatory clauses in wills. In some ways, *Marinacci* is the modern-day sequel to *Hurshman Estate.* In *Hurshman* the trial judge believed his hands tied when it came to discriminatory clauses and voided the condition instead based on marriage restraint. In *Marinacci,* while the clause clearly sought

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111 *Ibid* at para 18.

112 *Marinacci*, *supra* note 109 at para 3.

113 *Ibid* at para 17 [translated by author].

114 *Ibid* at para 40 ("the condition imposed on Rosy was illegal, contrary to public policy and discriminatory in that it disinherited her because Wadii Jafaar was an Arab… the condition consisting in prohibiting any romantic relationship between Rosy and a foreigner, which, in the current state of morality, contravenes human rights; since the sole purpose of the holographic will was to disinherit Rosy unless she left Wadii Jafaar, the will was not legally valid and was null and void." [translated by author]).

to fracture a marriage, the presiding judge's ruling emphasized the racism of the clause as the main reason why it was contrary to public policy.

Subsequent decisions, including two judgements, one of the Court of Appeal of New Brunswick and the other, the Court of Appeal for Ontario, have affirmed that conditions in wills that openly discriminate against a beneficiary or seek to perpetuate discrimination will be found contrary to public policy.[115] Additionally, dependants' relief cases in British Columbia have overturned provisions in wills for discrimination on the basis of sex and sexual orientation of the beneficiaries.[116] Based on these decisions, it is difficult to imagine that a clause forbidding the marriage of a beneficiary to marry a person of a specific race, religion, nationality or other immutable factor, would withstand public policy scrutiny in Canada today.

E) La Plus ça Change …

Despite the evolution of Canada's public policy with respect to partial marriage restraints in wills, its application remains stagnant when it comes to clauses that provide for a beneficiary only in the event of remaining single, widowhood or separation. Three contemporary cases present as outliers to this conclusion, however none of them provide clear precedent for common law courts to follow if faced with a marriage clause challenged on grounds of public policy.

The first of these decisions is the 1995 decision of *Murley Estate v Murley*.[117] In it, Justice Riche of the Supreme Court of Newfoundland and Labrador found several clauses in a will to be contrary to public policy. The will contained the following gift to the testator's niece:

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115 See *Spence v BMO Trust Co*, 2016 ONCA 196 at para 55; *McCorkill v McCorkill Estate*, 2014 NBQB 148 at para 62. An exception to this is a set of charitable bequests cases that restricted the class of eligible beneficiaries to members of a particular religious faith. In some of those cases the clause was found not to contravene public policy: see *University of Victoria Foundation v British Columbia (Attorney General)*, 2000 BCSC 445; *Ramsden Estate, Re*, 1996 CarswellPEI 98, 139 DLR (4th) 746 (PEI SC (TD) [In Chambers]). In others it was: see *Canada Trust Co v Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, [1990] OJ No 615 (ON SC CA); *Royal Trust Corp of Canada v University of Western Ontario,* 2016 ONSC 1143. See Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on *Spence v. BMO Trust Co.*" (2019) 36 Windsor YB Access Just 138; Jane Thomson, "Welcome the Newest Unworthy Donor" (2023) 61-1 Alta L Rev 137.

116 *Grewal v Litt*, 2019 BCSC 1154; *Prakash v Singh*, 2006 BCSC 1545; *Peden v Peden Estate*, 2016 BCSC 1713; *Patterson v Lauritsen*, 1984 CarswellBC 381, 58 BCLR 182 (BC SC).

117 1995 CarswellNfld 143, [1995] NJ No 177 (NF TD).

> Helene Murley, is to live in my residence here with her son Timothy C.N. Michael Murley as long as she lives & remains single. In the event of marriage, she will have no claim on living accomodations [sic] or otherwise ownership.[118]

In his construction of the will, Justice Riche found the interest left to the testator's niece to be a license, meaning that she held no propriety interest in the home and her right to live in the residence would terminate when she vacated the property. In doing so, however, he also commented that "[t]he provision relating to marriage, of course, would have no validity as being contrary to public policy."[119] Justice Riche's reasons give no consideration to any possible benevolent intentions the testator might have had for providing for his niece until her marriage. Unfortunately, his reasons also lack any analysis or citations for his public policy finding.

The second contemporary decision in which a viduity clause was voided is the 2016 decision of *Anderson v Anderson Estate*.[120] However the clause was avoided by way of British Columbia's wills variation legislation and not public policy. Betty Anderson, the testator's wife of 22 years, was left a life estate with several conditions attached, including that she not remarry or live "in a marriage-like relationship."[121] The testator left the remainder of his estate to his adult children from a previous marriage. Ms. Anderson successfully challenged her husband's will, receiving an undivided 50% interest in the parties' marital home and a sum of $90,000 with no conditions attached. The marriage clause itself was not directly addressed by Justice Meiklem. Instead, he concluded after a lengthy dependants' relief analysis:

> In my view, it is contrary to contemporary moral standards that a long-term, caring and dedicated spouse with a notional legal claim to equal division of family assets should be limited to a qualified life interest, with the entire estate going on her death to the testator's independent adult children.[122]

For those who hope for public policy's progression out of the 18th century on this matter, the 2001 decision of *Hatch v Cooper*[123] offers the strongest flickers of hope. It contains the most modern and robust analysis of public policy and marriage clauses outside of Quebec. The plaintiff, Ellie Margaret Hatch, was widowed at the age of 59. She had a grade 8 education and met her husband at the age of 15 when she got a job at a hotel owned and managed by him. After they married, Ms. Hatch worked in the hotels

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118 *Ibid*.
119 *Ibid* at para 10.
120 2016 BCSC 13.
121 *Ibid* at para 5.
122 *Ibid* at para 58.
123 2001 SKQB 491 [*Hatch*].

owned by Mr. Hatch and managed their homelife. At the time of their marriage, Mr. Hatch had a net worth of approximately $10,000. During their joint working lives, they accumulated a net worth in excess of $1 million.[124] Mr. Hatch's will granted his widow a life estate in their farm. If she remarried, the estate was to be split between the testator's brothers and, curiously, Ms. Hatch's brothers.[125]

For many years Ms. Hatch attempted to live in accordance with the terms of her late husband's will but eventually fell upon financial difficulty. Unable to sell the farmland due to the conditions of her bequest, she began to explore her legal options and, as a consequence, learned about her family law and dependants' relief rights to the estate. She sued the lawyers, whom had drafted her husband's will and later advised her on it, in negligence for failing to inform her of her basic rights under Saskatchewan's *Matrimonial Property*[126] and *Dependants' Relief*[127] acts as well as the potential invalidity of the will's viduity clause.[128] Justice Klebuc (as he then was) found for Ms. Hatch with respect to the family law and dependants' relief portion of her suit, and awarded damages. However, Justice Klebuc did not find the lawyers negligent for their failure to advise the widow of potential public policy issues with respect to the viduity clause.[129]

In his analysis of the public policy issue, Justice Klebuc cited the Quebec decisions of *Desparts c Petit*[130] and *Béland-Abraham c Abraham-Kriaa*,[131] in which marriage clauses were found contrary to public order. He then analogized the provisions of the Quebec Charter referenced in those decisions to provisions of the *Saskatchewan Human Rights Code*.[132] Justice Klebuc also recognized a common source that could inform Canada's public policy with respect to these clauses, the right to marry, recognized by the *Universal Declaration of Human Rights*[133] to which Canada is a signatory. Justice Klebuc's analysis suggested that, if asked, he would have found the marriage clause in *Hatch* contrary to public policy. However, given that Justice Klebuc was tasked only with deciding the issue of negligence he instead concluded:

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124 *Ibid* at para 4.

125 *Ibid* at para 5.

126 *Matrimonial Property Act*, SS 1979, c M-6.1 [*MPA*].

127 *Dependants' Relief Act*, RSS 1978, c D-25 [*DRA*].

128 *Hatch*, *supra* note 123 at para 11.

129 *Ibid* at paras 85–92.

130 1988 CarswellQue 64, [1988] RJQ 2259 (QC CS) [*Desparts*].

131 1988 CarswellQue 65, [1988] RJQ 1831 (QC CS) [*Béland-Abraham*].

132 *Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

133 *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

> I need not decide whether the provisions thereof apply and trump the common law regarding restraint of marriage clauses, for I am satisfied that an ordinary competent lawyer would not have been aware of the aforementioned public policy argument upon reviewing the jurisprudence and legal texts available in 1983.[134]

Instead, the leading case in common law Canada remains the Nova Scotia decision of *MacDonald v Brown Estate,*[135] decided the same year as *Murley*. It follows the traditional jurisprudential approach to marriage clauses alive and well during the life of Jane Austen, with the bequest at issue not unlike something out of Austen's novels. The testator, one Philip Gordon Allen Wambolt Brown, left a series of gifts to various family members, including his niece and two nephews. The nephews were to receive their gifts outright with no conditions attached. The niece's gift was to be held in trust until she became "widowed or divorced from her present husband" at which time the capital was to be paid to her "for her own use absolutely."[136] The will also instructed the estate trustees to pay the niece the annual income of the trust during her lifetime or until her separation or widowhood. If she died while still married to her current husband, the capital would go to her first-born son.[137]

The niece challenged the conditions of the gift on public policy grounds as a restraint against marriage. The estate and litigation guardian of the niece's son defended the will, arguing that the clause did not offend public policy as the intentions of the testator were to benefit the niece's son and to provide for the niece should she find herself in financial difficulty following a divorce or widowhood. Justice Stewart found that the validity of the marriage clause depended on "whether the testator's purpose, aim, object or motive was pure inducement to divorce or whether it was protective" which was a "question to be determined with each case being decided on its 'circumstances, the nature of the provision, the extent to which it would naturally tend to induce divorce or separation, the motives of the settlor, and the like'."[138] Drawing on extrinsic evidence that the testator distrusted the niece's husband who had always had difficulties with money and that the son of the niece was the testator's favourite nephew, Justice Stewart found that the clause did not contravene public policy. He concluded that the motives of the testator were "supportive and not coercive or punitive" and did not "intend to induce divorce."[139]

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134 *Hatch*, *supra* note 123 at paras 91–92.

135 1995 CarswellNS 22, 139 NSR (2d) 252 (NS SC).

136 *Ibid* at para 16.

137 *Ibid* at paras 15–17.

138 *Ibid* at para 22.

139 *Ibid* at para 28.

Since the decision of *MacDonald*, estate cases containing marriage clauses continue to surface, with the latest decision reported in March of 2024.[140] However, not since *Murley* has a marriage clause been found to violate public policy. This is likely because in the 30 plus cases decided since the 1995 decisions, the marriage clause was at most incidental to the issues at bar.[141] The exception to this legal inertia can be found in the jurisprudence of Quebec's courts.

F) The Province of Quebec

As of 2018, it is difficult to imagine any form of marriage clause that, if challenged by a beneficiary, would not be found contrary to public policy in Quebec. Though often discounted from quantitative studies of Canadian legal issues given that it is a civil law jurisdiction, as I argue elsewhere,[142] the story of Quebec and marriage clauses in wills is relevant to the rest of Canada when it comes to evolving the common law doctrine of public policy. While Quebec offers some alternative legislative relief for beneficiaries seeking to challenge specific kinds of marriage clauses, ultimately the illegality of marriage clauses in Quebec came about through the law of its public order.

In Quebec, the application of public policy to wills is codified in article 757 of the *Civil Code*.[143] Article 747 provides that testamentary conditions contrary to "public order" are "deemed unwritten."[144] In *Renaud v Lamothe,* discussed above, the Supreme Court of Canada equated the interpretation and application of Quebec's codified public order provisions to that of the common law doctrine of public policy.[145]

How the legal status of testamentary marriage clauses in Quebec differs from the rest of Canada stems from three different sources of

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140 *Sassano v Iozzo*, 2024 ONSC 1517.

141 The exceptions being *Hatch,* as discussed above, as well as *Fitzpatrick v Schneeberg,* 1998 CarswellNB 272, [1998] ANB No 306 (NB Prob Ct), where a viduity clause was rendered moot by a division of marital property claim by the widow that was agreed to by the estate. See also *DeLeeuw v DeLeeuw*, 2003 BCSC 1472, where a widow successfully challenged her husband's will under BC's former *Wills Variation Act*, RSBC 1996, c 490. She received a 50% interest in the outstanding preference shares held by her husband's estate; however, her life estate, that was subject to a viduity clause, remained unaltered.

142 Jane Thomson, "Public Order and Capricious Wills in Quebec: Some Important Lessons for the Rest of Canada" (2025) 7 SCLR (3d).

143 CCQ, CQLR c CCQ-1991. As did its former iterations, see Article 760 CCLC, SQ 1980, c 39.

144 CCQ, *supra* note 143, art 757.

145 *Renaud*, *supra* note 90 at para 6.

Quebec law. Quebec's Charter of Human Rights and Freedoms[146] which at least partially applies to wills, the amendment to the 1991 Quebec Civil Code with respect to viduity clauses, and, ultimately, how these legislative changes have informed the application of public order to all forms of marriage clauses by Quebec's courts. The evolution of marriage clause jurisprudence in Quebec is perhaps best understood as three separate periods. Pre-Quebec Charter, early post-Charter and those decisions rendered after the new Civil Code came into effect in 1994.

1) The Pre-Charter decisions

As discussed above, the Superior Court of Quebec's decisions in *Klein* and *Marinacci* rejected the ratio of *Renaud* when it came to partial restraints, that is marriage clauses that discriminated on the basis of religion and ethnicity. However, until the late 1990s, most marriage clauses in Quebec wills were interpreted in a manner similar to the rest of Canada with the validity of the clause hinging on the perceived intention of the testator.[147]

In *Dontigny Estate v R*,[148] a pre-Quebec Charter decision of the Federal Court of Appeal, an elderly widow challenged a viduity clause that stood in the way of a tax exemption. She challenged its validity arguing that it violated public order as it interfered with her "basic right to marry." [149] Justice Choquette of the Federal Court of Appeal disagreed, finding that the clause:

> … did not constitute an impairment of the basic right to marry or not to marry, as maintained by the appellant. The widow retains complete freedom in this respect. The testator for his part was merely exercising his right to dispose of his property as he saw fit, the condition being laid down in the interests of his children.[150]

2) The Early Post-Charter Decisions

In 1975, Quebec adopted its Charter of Human Rights and Freedoms which came into force in 1976. Unlike the Federal Charter of Rights and Freedoms or human rights legislation in the rest of Canada, Quebec's Charter applies, in at least one way, to wills. Section 13 states, "[n]o one may in a juridical act stipulate a clause involving discrimination."[151] The

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146 *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*].

147 See: *Whelan c Whelan,* 1893 CarswellQue 316, 3 CS 442 (QC CS). See also Madeleine Cantin Cumyn, "La Liberté Testament et la Charte des Droits et Libertés de la Personne" (1982) 84:5-6 R du N 223 at 230–37.

148 1974 CarswellNat 197, [1974] 1 FC 418 (FCA) [*Dontigny*].

149 *Ibid* at para 15.

150 *Ibid*.

151 *Quebec Charter*, *supra* note 146, s 13.

making of a will in Quebec is defined as a juridical act in Article 704 of the Civil Code.[152]

In 1982, Professor Madeleine Cantin Cumyn speculated on the impact of the Quebec Charter with respect to marriage clauses:

> By recognizing the freedom to choose one's civil status as having the same value as freedom of religion, the pre-Charter doctrine denying the existence of this freedom is set aside. Moreover, it is hard to see how the courts will be able to avoid ruling on the validity of civil status clauses. Moreover, they will have to do so in light of the fact that section 49 does not require proof of intention in order to conclude that a freedom has been unlawfully infringed. The search for the purpose pursued by the testator is rejected in favour of proof only of the effect of the clause on the exercise of the legatee's freedom. Any clause relating to the civil status of a legatee must be considered unwritten if it has the effect of obliging him, in order to benefit from the legacy, to renounce his right to marry, remarry, or remain single. The same would apply to a clause relating to the legatee's divorce, whether it has the effect of preventing or promoting a divorce. Freedom of association includes the right to maintain or terminate an association already established.[153]

Despite professor Cumyn's prediction, beneficiaries challenging marriage clauses post-1976 relied on Quebec's Charter with varied success. Particularly in the earlier, post-Charter decisions, courts disagreed as to when or even if the Charter applied to marriage clauses. As evidenced by the most contemporary decisions in Quebec, the role of the Charter appears to have shifted from direct application to informing what the public order of Quebec should be with respect to such clauses.

In the 1984 decision of *Nantel c Nantel*,[154] a bequest to the testator's daughter, to be held in trust until the death of her current husband, was challenged on public policy and Charter grounds. After her father's death, the daughter divorced her husband. The daughter argued, in part, that the condition was contrary to public policy.[155] The daughter also claimed that the clause discriminated against her on the grounds of sex and marital status.[156] The court denied the application, finding first that the clause did not offend public policy under the rationale that it did not incite the daughter to kill or divorce her husband. Justice Lévesque

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[152] CCQ, *supra* note 143, art 704. A will is a unilateral and revocable juridical act drawn up in one of the forms provided for by law, by which the testator disposes by liberality of all or part of his property, to take effect only after his death. In no case may a will be made jointly by two or more persons (see *ibid* at c 64, art 704).

[153] Cumyn, *supra* note 147 at 233 [translated by author].

[154] 1984 CarswellQue 483, [1984] CS 876 (QC CS).

[155] *Ibid* at para 4.

[156] *Ibid* at para 6.

further held, without engaging in any detailed analysis, that the clause was not discriminatory with respect to the Charter as it did "not oblige [the daughter] to widowhood, celibacy, marriage, divorce or remarriage."[157] Instead the effect of the clause was to prevent the daughter's former husband, whether through inheritance or alimony, from accessing any of the money left to his daughter.[158]

In the 1987 case of *Henry Kouri v The Deputy Minister of Revenue of Quebec and Cécile Beaudry*,[159] Justice Genest found that viduity clauses were not discriminatory with respect to s 10 of the Charter, which outlines the grounds on which equal treatment is based and defines discrimination as "where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."[160] Justice Genest believed the plaintiff's claim failed as he viewed "the right" at issue to be the right to receive a gift under a will. This, he held, was not a right at all, let alone one protected under s 10. As he viewed it:

> What the testator prohibits is to continue to receive a legacy if his wife, who, moreover because of her status as a wife, received it under the will, no longer receives it. The discrimination is therefore not based on her civil status, the prohibited act is to receive a legacy and the right, if it is one, to receive a legacy, is not one of the fundamental rights recognized by the Charter. The present case therefore does not pass the test of section 10 of the Charter.[161]

Citing *Dontigny Estate,* Justice Genest found that the clause in the will did not "destroy or compromise the right of the [beneficiary] to marry" because it did not have the power to do so, given that the acceptance of the gift with its condition was voluntary in nature.[162]

In other Quebec decisions of this time period, courts found that marriage clauses could be discriminatory and therefore contravene the Charter, but that this depended on the financial circumstances of the beneficiary and the size of the gift. In *Desparts v Petit*,[163] a 76-year-old widow, found herself unable to sell the home she had been left by her husband due to the viduity clause attached to her gift. Her lawyer challenged the clause on public policy grounds and the Charter. Justice

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157 *Ibid* at para 19 [translated by author].

158 *Ibid.*

159 *Henry Kouri v Le Sous-Ministre du Revenu du Quebec et Cecile Beaudry-Kouri* (24 April 1987), Sherbrooke: 450-02-000579-857 (QC CP) [*Henry Kouri*].

160 *Quebec Charter*, *supra* note 146, s 10.

161 *Laberge c Québec (Sous-ministre du Revenu)*, 1991 CarswellQue 419 at para 23 [translated by author], [1990] RDFQ 27 (CQ) [*Laberge*].

162 *Ibid.*

163 *Desparts*, *supra* note 130.

Savoie voided the clause but held that not every viduity clause was automatically discriminatory and in contravention of a beneficiary's Charter rights:

> Une clause obligeant un légataire à garder viduité n'aura pas la même conséquence si elle s'adresse à un légataire qui a d'autres moyens de survie, qui travaille déjà et pour qui le legs ne représente qu'un surplus et non une nécessité primordiale.[164]

He explained that if the beneficiary was someone like Madame Desparts, a widow who was "older," had "never worked" and was someone "whose survival depend[ed] solely" on the gift, "the widowhood clause, if not followed, would jeopardize [her] own existence and would therefore constitute a clause contrary to the Charter and particularly unjust discrimination."[165] Justice Savoie's reasoning in *Desparts* also considered s 6 of the Charter that provides: "Everyone has the right to the peaceful enjoyment and free disposal of his property, except to the extent provided by law." *Desparts* was cited in support of voiding a similar viduity clause in *Laberge v Quebec*.[166]

Four years later, in *Central Guaranty Trust Co v Lefebvre-Gervais*,[167] Justice Bishop of the Superior Court of Quebec held the following clause to be valid and specifically not in contravention of public policy or discriminatory with respect to civil status:

> My trustees are directed to stop all or part of the pension to my wife Iona should she elect to remarry and this the month following her wedding should:
>
> — her new husband not be working
>
> — her new husband be without a substantial income.
>
> Full pension to be reinstated as soon as Iona and new husband start divorce procedures.[168]

The widow, who was 38 when the testator died, eventually remarried a fellow pensioner. Because her new husband was retired, the court found

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164 *Ibid* at para 44 ("A clause requiring a legatee to maintain her widowhood will not have the same consequence if it is addressed to a legatee who has other means of survival, who already works and for whom the legacy represents only a surplus and not a primary necessity." [translated by author]).

165 *Ibid* at para 45 [translated by author].

166 *Laberge*, *supra* note 161.

167 *Central Guaranty Trust Co v Lefebvre-Gervais*, 1992 CarswellQue 67, [1992] RJQ 2264 (QC CS) [*Lefebvre-Gervais*].

168 *Ibid* at para 9.

that he was "not remunerated for any work which he may do."[169] At the time of the proceeding, the widow was in her 50s and the children of the marriage were independent adults and all over the age 30. The trustee sought advice on a number of issues concerning the will, including whether the clause was contrary to public policy or the Quebec Charter.

Justice Bishop upheld the clause. With respect to public order, he held that the intention of the testator was to "dissuade his widow and any prospective suitor from marrying after his death if the suitor did not have adequate means to support her …" so as "to ensure that his children, rather than the new husband, would benefit from the revenues of his trust."[170] Given that the trustee had a measure of discretion concerning how much of the money should go to the children in the event of the widow's remarriage, and that the condition was based on the testator's concern for the welfare of his children, Justice Bishop found that the marriage clause was not contrary to public order.[171]

As for the widow's rights under the Quebec Charter, Justice Bishop held that the condition did not infringe any of them nor was it discriminatory in nature. In his view, the clause did not discriminate in a way to impede the widow from remarrying, only remarrying a husband who could not financially support her.[172] While Justice Bishop appeared to entertain the fact that the viduity clause at issue created a distinction for the purposes of discrimination, given that the widow was "penalized if she desire[d] to remarry an unemployed husband who may not be able to support her" he qualified this observation by adding "however, this distinction is not essentially based on her civil status, that is on her remarriage as such, but on the financial position of her new husband."[173]

Finally, there was the 1988 decision of *Beland-Abraham c Abraham-Kriaa*[174] where the court voided a viduity clause based on public policy informed by the Quebec Charter. Notably, Justice Benoit found no discrimination on the part of the testator with respect to s 13 of the Charter, writing, "[i]t is a misinterpretation of the difficulty to claim that the clause in the will is discriminatory. The testator did not engage in unlawful discrimination. It does not prevent the plaintiff from remarrying."[175]

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169 *Ibid*.

170 *Ibid* at para 17.

171 *Ibid* at para 51.

172 *Ibid* at para 91. See also *Dontigny*, *supra* note 148; and *Henry Kouri*, *supra* note 159. In those cases, the court found no violation of a Charter right, with the only "right" at issue being that to receive a testamentary gift.

173 *Lefebvre-Gervais*, *supra* note 167 at para 89.

174 *Béland-Abraham*, *supra* note 131 [translated by author].

175 *Ibid* at para 19 [translated by author].

Despite finding that the clause was not discriminatory in nature, Justice Benoit nevertheless voided the clause given that it infringed the right to marry. He held that the right to remarry was recognized by s 50 of the Charter as a human right.

Unlike the contemporary judgements in this era, Justice Benoit agreed with Prof. Cumin—that the old law concerning the specific intention of the testator with respect to marriage clauses was now irrelevant when such a clause infringed the Charter.[176] He also held that finding that a testamentary condition offended public order did not require consideration of "the value of the legacy nor the effects of the loss for the beneficiary"[177] and concluded that widowhood clauses were "now always illegal and contrary to public order."[178]

Justice Benoit's finding—that if a testamentary condition violated a Charter right or freedom it therefore contravened public order—began to take hold, despite the fact that it remains unclear how a will can violate a Charter right if the Charter right in question is not directly applicable to a will absent proven discrimination.[179] Regardless, more contemporary decisions involving capricious conditions in wills, that did not involve marriage clauses, aligned themselves with this view.[180] In tandem with the 1991 overhaul of Quebec's Civil Code, it would prove instrumental in the demise of all marriage clauses in Quebec wills.

3) The Contemporary Quebec Decisions

Article 757 of Quebec's Civil code came into effect in 1994. The public order provision that pertained to wills was preserved, but added to it was a second paragraph that provides the specific example of viduity clauses in wills as contrary to public order:

> A condition that is impossible or that is contrary to public order is deemed unwritten.

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176 *Ibid* at para 31.

177 *Ibid* at para 21 [translated by author].

178 *Ibid* [translated by author].

179 Recall that the Quebec Charter applies to wills via an application of s 13, that is, if a testamentary condition is alleged to be discriminatory. Perhaps impair or impact is a better word to describe the effect of such clauses, nevertheless Justice Benoit held that "La clause porte atteinte au droit de la demanderesse." (see *Béland-Abraham*, *supra* note 131 at para 29). The Chief Justice of Quebec in *Laroche c Lamothe*, 2018 QCCA 1726 [*Laroche*], in a similar finding uses the term "violation du droit" (see *ibid* at para 83).

180 *Landry, Re,* 2004 CarswellQue 1042 at paras 44-45, [2004] RJQ 1613 (QC CS); *Savard c Curtin-Savard*, 2012 QCCS 3523 at para 42.

> Thus, a clause limiting the rights of a surviving spouse in the event of a remarriage or new civil union is deemed unwritten.[181]

So far only three reported decisions have applied the ban on viduity clauses set out in Article 757 even though several wills cases, heard after 1994, contained such clauses.[182] In two, the court merely voided a viduity clause in accordance with the code with little to no analysis.[183] However, as with the early post-Charter decisions, loopholes persisted with respect to certain marriage clauses. Ultimately the issue had to be determined in the 2018 Court of Appeal of Quebec decision *Laroche c Lamothe.*[184]

The condition at issue in *Laroche* left the testator's common law partner "a pension of $20,000" "until she live[d] together with another man."[185] While the Court of Appeal of Quebec agreed with the lower judgement that the beneficiary's situation—allowing a man to live with her after his place was destroyed in a fire—did not attract the terms of the condition, the judgment opined at length on the application and breadth of the new legislation.

An initial issue canvassed by Justice of Appeal Bélanger was the fact that Article 757 speaks only to remarriage or the formation of a new civil union.[186] The clause in *Laroche* was conditioned on the beneficiary merely cohabiting with a new partner, which, in Quebec, would amount to a de facto union,[187] and was not included in Article 757. All members of the court agreed that wording of the Article was merely a "non-limiting" example of clauses that offended public order. The court split, however, on why the clause at issue was illegal.

Justice of Appeal Bélanger, for the majority, found that the clause contravened public order and the Charter because it was discriminatory within the meaning of s 13. She held that it discriminated against the beneficiary on the ground of civil status, enumerated under s 10 of the Charter and compromised the beneficiary's right to privacy under s 5. [188]

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[181] CCQ, *supra* note 143, art 757.

[182] *Bell c Molson*, 2012 QCCS 5498 at para 31; *Royal Trust Corp v Webster*, 2000 CarswellQue 1962, [2000] RJQ 2361 (QC CS); *Kadar v Reichman (Succession)*, 2014 QCCA 1180.

[183] *Myrand c Simard*, 1997 CarswellQue 1325, 20 ETR (2d) 312 (QC CS); *Gosselin c Gosselin,* 2009 QCCS 4396.

[184] *Laroche*, *supra* note 179.

[185] *Ibid* at para 7 [translated by author].

[186] *Ibid* at para 28.

[187] De facto union is the term used in Quebec to describe unmarried couples who are not in a civil union.

[188] *Laroche*, *supra* note 179 at paras 47–52.

In so finding, she gave no consideration to the testator's intention with respect to the clause: "[i]n analyzing the validity of the condition in light of the Charter, we do not have to question the intentions of the testator, but rather to examine the effect of the clause for the legatee."[189]

Chief Justice Savard disagreed that the clause was discriminatory but agreed that it violated the beneficiary's right to privacy and that this alone was sufficient to render it contrary to public order in accordance with Article 757.[190]

The ratio of *Laroche* is that all marriage clauses are contrary to public order in Quebec. It does not matter whether they prevent remarriage or re-partnering of any sort, and the validity of these clauses does not depend on the testator's intention.[191] While clauses that seek to provide for a person until they marry or upon separation have yet to be challenged in Quebec, there is every reason to believe that the rationale employed by the Chief Justice of the Court of Appeal of Quebec in *Laroche*—that they too constitute a violation of a beneficiary's right to privacy—is applicable to those conditions as well. However, this is decidedly not the law in the rest of Canada.

4. Conclusion

After an extensive review of over 400 reported decisions, this article has provided a detailed explanation of the current state of Canadian law with respect to testamentary marriage clauses. Clauses that seek to prohibit a beneficiary from ever marrying, if challenged by that beneficiary, will likely be voided for contravening public policy as will clauses that clearly seek to fracture a marriage. However, such clauses that, on a prima facie basis, appear to harbour either of these goals may still be upheld if the intention of the testator is perceived to be one of benevolence and provision. This rationale is the reason why remarriage clauses are almost always upheld, interpreted as providing for a surviving spouse until the spouse remarries and can be financially supported by a new partner. In the cases reviewed, that surviving spouse is almost always a widow. The overwhelming majority of viduity clauses—and marriage clauses in general—have and continue to be directed at women.

As noted in the introduction to this article, the current law of Canada with respect to marriage clauses is the same as it was at the time of Jane

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189 *Ibid* at para 31 [translated by author].

190 *Ibid* at para 66. Notably this judgement effectively overrules any findings to the contrary made in *Lefebvre-Gervais, supra* note 167, without referencing decision.

191 *Ibid* at para 34.

Austen's England. In truth, it is better characterized as the law which governed at the time of her great grandmother. Why this should be of concern to everyone is that the legality of marriage clauses is governed primarily through the doctrine of public policy, a legal tool that is supposed to be informed by the contemporary laws and values of a society. As it stands, in 2025, the public policy in Canada concerning these conditional gifts in wills, imposed mainly on women, remains imbued with 18th century values.

There are two notable exceptions to this fact. The first concerns marriage clauses that seek to impose partial restraints. Conditions on testamentary gifts that prohibit marriage to a person of a specific ethnicity, gender, race or religion will likely be voided for reasons of public policy if challenged in a Canadian court. The second major exception is the Province of Quebec. The public policy of that province, unlike the rest of Canada, is informed by contemporary laws and values such as the rights protected by the Quebec Charter. Given the 2018 Court of Appeal of Quebec decision of *Laroche c Lamothe*, it is likely that all marriage clauses are contrary to public order in that province.

In the companion article that follows and builds on this one, I argue that the rationale that fuels these two legal exceptions should serve as the northern star for our courts of common law when they are asked to interpret and apply public policy to a testamentary marriage clause. Drawing on a number of legal and public policy arguments, I make the case for the voiding of marriage clauses in wills on grounds of public policy, rendering the law in the novels of Jane Austen and her contemporaries legal history rather than the legal reality of Canadians today.