AND TWO COWS TO MY WIFE … SO LONG AS SHE REMAINS MY WIDOW: THE CONTEMPORARY CASE AGAINST MARRIAGE CLAUSES IN CANADIAN WILLS.

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This article presents the case against all forms of testamentary clauses that impose restraint on marriage in Canadian wills. These include conditions 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 marry in order to obtain or retain their gift. It argues that they should be found contrary to public policy and comprises three parts. First, it confronts and discounts the most common arguments for the preservation of the law as it stands. The article then explains the problems with how courts apply public policy to marriage clauses in Canada outside the province of Quebec. Not only is the current law likely incompatible with Ontario's laws of evidence, but its rationale is also sexist, outdated, and irrelevant to today's values and laws. The third part of this article argues what the contemporary public policy of Canada with respect to marriage clauses should be. It explains that if the doctrine is interpreted and applied in pari materia with a variety of legislative, constitutional, and international law sources, it becomes clear that all testamentary marriage clauses offend public policy.

L'auteure présente les arguments contre toutes les formes de clauses testamentaires qui imposent des restrictions au mariage dans les testaments canadiens. Il s'agit notamment de conditions interdisant à un ou à une bénéficiaire de se marier ou de se remarier, l'obligeant à divorcer de sa conjointe ou de son conjoint actuel, lui interdisant d'épouser une personne en raison de sa race, de son origine ethnique, de sa religion, de son sexe ou de son genre, ou encore subordonnant l'acquisition ou le maintien d'un legs au fait d'être marié ou de se marier. L'auteure indique que ces conditions devraient être déclarées contraires à l'ordre public et son article se divise en trois parties. Tout d'abord, elle recense et réfute les principaux arguments invoqués pour la préservation du droit dans son état actuel. Elle analyse ensuite les problèmes que soulève, ailleurs qu'au Québec, la manière dont les tribunaux canadiens appliquent la notion d'ordre public aux clauses

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relatives au mariage au Canada. Non seulement l'état du droit actuel est vraisemblablement incompatible avec les règles de preuve en Ontario, mais il repose également sur des justifications sexistes, dépassées et étrangères aux valeurs et aux lois contemporaines. Dans la troisième partie, l'auteure précise à quoi devrait correspondre l'ordre public contemporain au Canada en ce qui concerne ces clauses. Elle démontre qu'une interprétation et une application de la doctrine en pareille matière fondées sur un éventail de sources législatives, constitutionnelles et internationales conduisent nécessairement à la conclusion que toute clause testamentaire imposant une condition relative au mariage contrevient à l'ordre public.

Contents

I. Introduction 437

II. Part One: The Usual Arguments. 439

A) These are just gifts 439

1) Women 440

2) Children 443

B) … but are they just gifts? Conditional gifts v unilateral contracts and the doctrine of public policy 446

C) If the government thought this was a problem, they would legislate accordingly 449

III. Part Two: The Contemporary Case Against Marriage Clauses in Canadian Wills 450

A) The use of extrinsic evidence in public policy hearings. 450

B) The legal rationale that governs marriage clauses with respect to public policy is irrelevant 455

1) Won't someone think of the children? 455

2) The fear of a new man 456

3) But it was well intentioned? 457

IV. Part Three: What the Modern-Day Approach to Public Policy and Marriage Clauses in Canadian Wills Should Be 458

A) What informs the doctrine of public policy? 458

B) Legislation 460

1) Dependants' relief legislation 461

2) Family law 461

C) Charter rights and values, tort law and international law. 462

1) The right to privacy and dignity 462

2) The right to marry (or not) 464

V. Pragmatic solutions 469
VI. Conclusion 472

I. Introduction

The title of this article was inspired by the will of James Bigelow. He died in 1847. His wife, Eunice Bigelow, survived him. During the course of their marriage, she bore him 13 children. In his will, James left the family homestead not to Eunice, but to his oldest son Josiah. His remaining personal property was divided among his children, two-thirds of his estate was given to his six boys when they came of age and one third divided among his seven girls as they came of age or married. While James named Eunice as an executor of his will, she was left only the following:

> My will is that my wife Eunice Bigelow so long as she remains my widow, shall have two cows kept for her maintain with meat and flour, and wool, and every other necessary for her age and maintenance, and a girl should her have one left her, and doctor if necessary.[2]

Such provision for a widow was no doubt considered fair, even generous, for its time. However, when viewed with a modern eye, a testamentary provision for a wife and mother of the testator's thirteen children, containing no gift of real property seems outrageous. This is particularly so, given the fact that what little financial security was afforded to Eunice hinged on her remaining faithful to a dead man.

Contemporary family law legislation and dependants' relief acts in Canada prevent such outcomes today, premised on the recognition of unpaid labour performed by spouses like Eunice Bigelow. They allow for a redistribution of an estate regardless of legal title or the terms of a will. If Eunice Bigelow were to challenge her husband's will in an Ontario court today, the distribution of James' estate would be altered in accordance with Ontario's family and estate laws. Eunice would likely receive half, if not the majority, of her late husband's assets.

The story is quite different with respect to the remarriage clause in James Bigelow's will. Even in 2026, if Eunice challenged the clause on grounds of public policy, given the current law, an Ontario court would likely refuse to remove it. This is because the doctrine of public policy, with respect to restraints on remarriage in Canadian wills, remains informed by 18th century values and laws.

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2 *Bigelow v Bigelow*, 1872 CarswellOnt 80, 19 Gr 549 (Ch), at para 1.

The term "marriage clause" is used throughout this article to describe testamentary gifts that come with conditions based on marital or intimate partner status. These include conditions 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 marry in order to obtain or retain their gift. The condition could also cover other kinds of intimate relationships such as common law partners or de facto spouses. In the companion article to this one,[3] I provide a detailed history and contemporary account of the law surrounding marriage clauses in Canadian wills, analyzing over 400 reported decisions containing marriage clauses. What those cases demonstrate primarily is the overall stagnancy of the law. Clauses that seek to prohibit a beneficiary from ever marrying, if challenged, will likely be voided for contravening public policy, as will clauses that clearly seek to fracture a marriage. However, clauses that, on their face, appear to harbour either of those goals may still be upheld if the intention of the testator in making the gift is interpreted by the court as one of benevolence and provision. Remarriage clauses, in particular, are almost always upheld on this ground, interpreted as providing for a widow until she remarries and can be financially supported by her new husband.

Notably, there are two significant exceptions to this state of arrested development. The first is the issue of partial restraints on marriage. Testamentary gifts conditioned on the race, sex, or religion of a beneficiary's marital partner are treated differently than other marriage clauses. Unlike their UK or US counterparts, Canadian courts have voided such conditions on grounds of public policy. The second exception is the province of Quebec. As of 2018, it appears that all forms of testamentary marriage clauses, if challenged in a court of law, will be found contrary to Quebec's public order. The story of how this came to be in Quebec is explained in the companion article to this one and, as I have argued elsewhere,[4] is an important one from which the rest of Canada has a lot to learn. In this article I propose to tackle what remains of this antiquated area of estate and family law and present the case against all forms of marriage clauses in Canadian wills. I do so in three parts.

Part one addresses some of the most common arguments against voiding gifts conditional on marriage in wills. The first and most common

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[3] Jane Thomson, "'And Two Cows to My Wife … So Long as She Remains My Widow': Public Policy and Testamentary Marriage Clauses in Canada" (2025) 103:3 Can Bar Rev 793 [*Companion Article*].

[4] Jane Thomson, "Public Order and Capricious Wills in Quebec: Some Important Lessons for the Rest of Canada" (2025) 7 SCLR (3d) 23 [*Thomson Public Order*].

argument is that these are gifts. Gifts need not be accepted and therefore merit no judicial interference with testamentary autonomy. The short answer to this argument is that to view these clauses as non-coercive is to ignore the current economic reality of those beneficiaries who are typically subject to these clauses. This part also looks at a neighbouring area of law to show that a double standard exists when it comes to marriage clauses in unilateral contracts and conditional gifts. The other most common argument against evolving the public policy on marriage clauses, or any other issue that involves its application, is that this is an issue for the legislatures and not the courts. I explain why, although legislative reform is the preferred route, such reform is not only unlikely but also unnecessary to eliminate the use of marriage clauses in wills.

Part two then takes aim at the current law. It demonstrates how the recent developments in evidence law (at least in the province of Ontario) with respect to public policy hearings in estate cases are likely incompatible with the current application of public policy to marriage clauses. Next, it argues that even if courts can overcome this evidentiary hurdle, the logic behind the current law is outdated and no longer applicable to contemporary times.

Part three of this article argues what the modern-day public policy with respect to marriage clauses in Canadian wills should be; if the doctrine is interpreted and applied in *pari materia* with a variety of legislative, constitutional and international law sources, it becomes clear that all testamentary marriage clauses offend public policy. This article concludes with some pragmatic solutions to the problems presented by the antiquated rules of conditional estates that would allow gifts to stand free of their conditions, regardless of how the clause is drafted.

II. Part One: The Usual Arguments

A) These are just gifts

> "… a gift on condition not to marry leaves the donee free as air to do anything, at pleasure, but to divert it to uses for which it was not intended."[5]

> "Dans certains cas, l'exhérédation peut même constituer une condamnation à crever de faim. Pendant toute sa vie, le justiciable est obligé de respecter les lois et l'ordre public; il serait anormal que cette obligation disparaisse à son décès; la tyrannie posthume demeure la tyrannie."[6]

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5 *Commonwealth v Stauffer* (1849), 10 Pa 350, at 355 [*Stauffer*].

6 Albert Mayrand, "Conflit de deux libertés: liberté de religion et liberté de tester" (1962–63) 65 R. du N. 383, at pp. 387 and 391, cited in *Klein v Klein*, 1966

Before delving into the reasons why marriage clauses should be voided by Canadian courts, it is important to address the most common, knee-jerk reaction to any judicial interference with a condition in a will. It goes as follows: If a beneficiary does not want to comply with a condition attached to a gift, then they need not accept the gift. A gift is voluntary and not coercive in nature and the voiding of such clauses constitutes unnecessary interference with the common law principle of testamentary autonomy. This argument has featured prominently in marriage clause cases.

Certainly, on a case-by-case basis, reasonable people may disagree as to whether the principle of testamentary autonomy should prevail over an application of public policy to a particular will. However, the argument that a testamentary gift need not be accepted by a beneficiary if that beneficiary dislikes the condition attached to it, is overly simplistic and dismissive of the power of testamentary gifts both in previous eras and contemporary times. It disregards the precarious financial position of those who were regularly the subject of marriage clauses at the height of their popularity. It also ignores the glaring reality of how financial stability is most commonly secured by younger generations today.

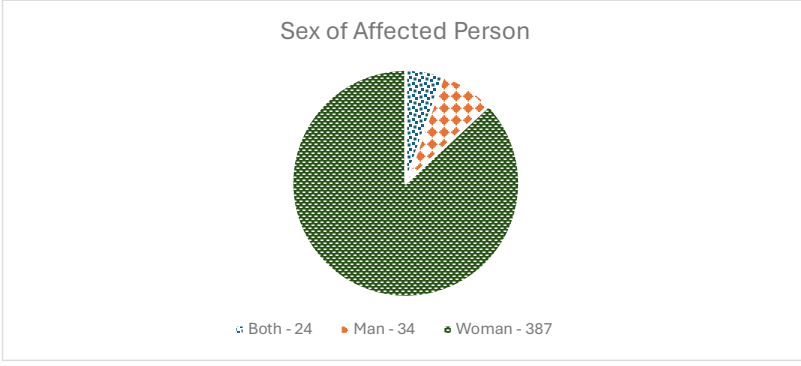
1) Women

First and foremost, marriage clauses have been, and continue to be, disproportionately and overwhelmingly directed at women. Of the 445 cases reviewed for this article, in 387 of them the marriage clause was directed at a woman. In 34 it was directed at a man. 24 cases contained conditions directed at beneficiaries of both sexes.[7]

CarswellQue 109, [1967] CS 300. Author's translation: "In some cases, disinheritance can even constitute a sentence to starvation. Throughout his or her life, a person is obliged to respect the law and public order; it would be anomalous for this obligation to disappear upon death; posthumous tyranny remains tyranny".

7 As explained in the companion article to this one, over the course of three years, with the assistance of summer 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 445 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 1825. 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. The data set categories include: the date and jurisdiction of the decision, the kind of restraint (total,

Figure 1



Interestingly, several of the clauses aimed at men were, in fact, targeted at a woman as the conditions in those cases aimed at separating a son from his current wife.[8]

Most of the marriage clauses reviewed in this study hinged on the marital status of widows, representing 305 of the reported cases.[9] However, the reach of these clauses extended to many other classes of females known to the testator including the testator's daughters, daughters in law, granddaughters and in some cases, the female housekeeper of the testator.

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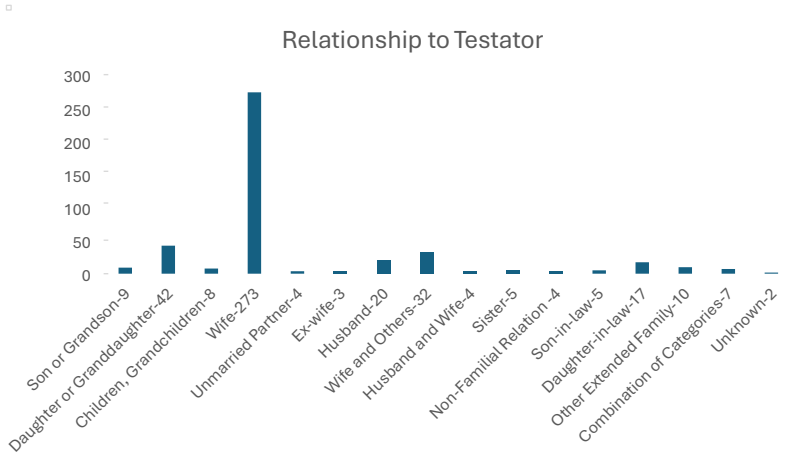
partial, remarriage), the sex of the beneficiary, the relationship of the beneficiary to the testator, whether the condition was upheld or voided by the court and why, whether the condition was followed by the beneficiary, and whether the case involved a dependants' relief claim. Since the publication of the first article, three new cases have been reported (*Sassano v Iozzo*, 2024 ONSC 1517; *Albert v Champness*, 2026 ONSC 1481; *Ward v Ward*, 2026 CarswellOnt 1863); and the data set has been updated accordingly.

[8] In *Royal Trust Co v Jones (No 2)*, 1934 CarswellBC 127, 49 BCR 204 (CA); *Fairfoull Estate v Bullman*, 1973 CarswellBC 314, [1973] BCJ No 356 (SC) [*Fairfoull Estate 1973*]; *McBride*, *Re*, 1980 CarswellOnt 523, 107 DLR (3d) 233 (SC HCJ) [*McBride*]. Also notable is the contrast between traditional viduity clauses aimed at women such as the one in *Leech v Leech*, 1865 CarswellOnt 93, 11 Gr 572 (Ch), which devised land to the wife "provided she does not remarry or misbehave", and those aimed at men. A prime example was the will of Margaret C. Woods Browne, that read: "In the event of my husband remarrying if his wife meets with the approval of our children and is good to them and makes their home life happy I have no objection otherwise my wishes are that anything which he has received or holds in Trust from me shall revert at once to my children. Should he leave her he is to be made welcome by his children." *Browne*, *Re*, 1947 CarswellOnt 75, [1947] 4 DLR 386 (SC HCJ), at para 6 [*Browne*].

[9] Included in this number are gifts made to the widow as well as to other relations such as the testator's children.

Figure 2



Notably, at the height of marriage clause popularity, the financial security of women was highly dependent upon men for a variety of reasons including the laws of coverture, the disenfranchisement of women, and the overt sexism that permeated everything from the ability to work in certain occupations, to work at all after marriage, or even to open a bank account without a husband's signature.[10] Historically, married women worked largely within the home, with no way of earning or saving externally earned funds. Until the passage of the *Married Women's Property Acts*, if they brought any property into a marriage, title to that property was transferred to their husband. Even after the laws of coverture lifted, as discussed below, property acquired during a marriage was almost always done so in the husband's name. While the law has evolved greatly with respect to the rights of surviving spouses to a portion of a deceased spouse's estate, contemporary cases in Quebec and Saskatchewan, discussed in the companion article to this one, demonstrate the economic power some spouses retain over their partners even after their death and the coercive nature of marriage clauses.[11]

While the popularity of viduity clauses peaked in the mid 20th century, cases containing marriage clauses continue to be reported. Furthermore, it is important to remember that these statistics represent only those wills containing marriage clauses that wound up in court. As the case of *Hatch*

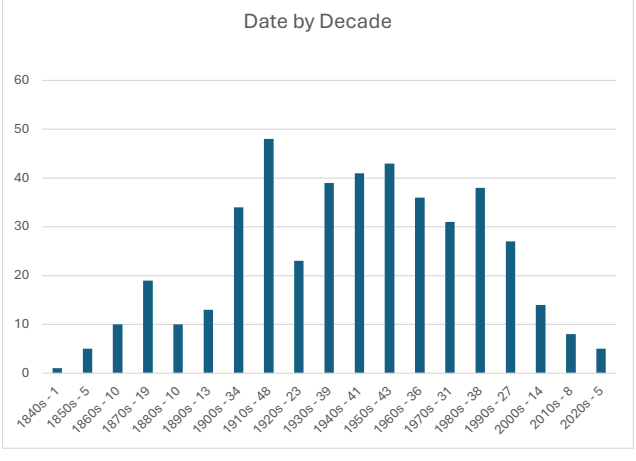
10 See for example, Statistics Canada, "Women's History Month: The Remarkable Life of Sylvia Ostry" (October 11, 2022), online (website): <tinyurl.com/4ksurjyf> [perma.cc/9NZP-JQKG].

11 Saskatchewan: *Hatch v Cooper*, 2001 SKQB 491 [*Hatch*]. (*Companion Article*, *supra* note 3 at 815); Quebec: *Laroche c Lamothe*, 2018 QCCA 1726 [*Laroche*]. (*Companion Article*, *supra* note 3 at 825).

v Cooper[12] shows, women and other vulnerable beneficiaries ignorant of the law may fail to question let alone challenge such clauses.

Certainly, great strides have taken place towards women's equality in Canada since the time of Eunice Bigelow, but there remains a long way to go. We need only look to current statistics to show us that the wage gap between the sexes persists, that women still perform, overwhelmingly, the majority of domestic work within the home when in a heterosexual partnership, and that coercion in the form of financial control remains a problem in Canadian society.[13]

Figure 3



2) Children

The data also shows us that the coercive nature of these clauses has not faded with time when it comes to the children of testators. Access to generational wealth is intrinsically linked with financial stability for those generations that followed the baby boomers. In 1950, North Americans had the greatest chance of achieving a life of rags to riches through a working

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12 *Hatch*, *ibid*. As detailed in the companion article to this one, at the age of 59, Ellie Hatch was left a life estate by her husband of 40 years, conditional on her not remarrying. She attempted to abide by it until she fell on financial difficulties and only then was advised, not only of her rights under Saskatchewan's family law and dependants' relief statutes, but of the potential invalidity of the marriage clause in her husband's will.

13 Statistics Canada, "The gender wage gap persists" (March 5, 2026), online (website): <tinyurl.com/475v3hx6> [perma.cc/8ESX-H9AA]; Canada, Statistics Canada, Family Matters: Sharing housework among couples in Canada: Who does what?, 2020 [*The Daily*] at 1 online: <https://tinyurl.com/5dhvb3ch> [perma.cc/G3R7-XGXC]; *Ahluwalia v Ahluwalia*, 2026 SCC 16.

income rather than through inherited wealth. As one author observed, in the United States, "Inheritances as a proportion of national income fell from 24% in 1900 to around 4% by 1950."[14] In the decades that followed, however, the possibility that a person could be born poor but, through hard work, achieve greatness, began to erode. By the 1970s the ratio had crept back up to 12%. A similar u-shaped trend in the relative proportion of bequests to national income has also been noted in Europe and the higher prevalence of inheritances in those countries has carried on into contemporary times.[15] The reasons for this are many, including wages not keeping pace with inflation, the failure of taxation systems to truly extract equitable payments from the very rich, and a systemic failure to provide basic health care and early childhood education to large portions of the population.[16] An article published in the Economist explains this fact rather starkly: "There is a lottery effect; if your parents owned property, or die early (before they spend their savings on nursing care), then you have a big advantage over others who may be just as hard-working or talented".[17]

In 1980 a typical family home in Toronto cost $75,694,[18] which is the equivalent of approximately $284,725 in today's dollars. In 2026, the average cost of a Toronto home has nearly quadrupled to $1,067,846.[19] Household wages, however, have not kept pace. The minimum wage in 1980 Ontario was $3.00 an hour, roughly equivalent to the sum of $11.28 an hour in 2026. The current minimum wage in Ontario is $17.95 an hour. The average household income, for those fortunate enough to make more than minimum wage, remains too low to afford the downpayment on a house or, alternatively, will be consumed by mortgage payments.[20]

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14 Buttonwood, "Inherited wealth: The return of Bertie Wooster" (March 18, 2014), online: website <https://tinyurl.com/2vbjxuzw> [*Buttonwood 2014*].

15 Organization for Economic Cooperation and Development, *Inheritance Taxation in OECD Countries* (Paris: OECD Publishing, 2021), at 30. See also: Suzanne Lenon and Daniel Monk, eds., *Inheritance Matters: Kinship, Property, Law* (Oxford, UK: Bloomsbury Publishing, 2023).

16 Buttonwood, "Meritocracy in America: Ever higher society, ever harder to ascend" (December 29th, 2004), online (website): <https://tinyurl.com/bdf8v7f4>.

17 *Buttonwood 2014*, *supra* note 14.

18 Toronto Regional Real Estate Board, "Historic Statistics" (2026), online: website <tinyurl.com/yy2yzjmb> [perma.cc/7GT5-R3QA] [TRREB]. Notably, since the global pandemic of 2020, housing prices have skyrocketed in areas that traditionally had more affordable housing prices. Between January 2020 and January 2025, home prices in the province of New Brunswick have increased by 89 per cent: Alex Whalen and Austin Thompson "New Brunswick's population explosion dwarfs homebuilding rate" The Fraser Institute, online: <tinyurl.com/39rbkj2v>.

19 TRREB, *supra* note 18.

20 Statistics Canada, "General Hourly Minimum Wage Rates in Canada since 1965", online: <tinyurl.com/bp9483fm>; Statistics Canada, "Income of individuals by age group, gender and income source, Canada, provinces and selected census metropolitan

A testamentary gift, depending on its size, is for many members of the generations that followed the baby boomers, the most realistic path to a financially secure life, whether it be left to the child of a testator or someone else who, for whatever reason, is the object of that person's bounty. It is this chance at financial security or even financial survival that adds the coercive element to many marriage clauses and erodes the illusion of choice.

While writing about marriage clauses in the 1940s, an American academic noted the lack of "sociological data" to prove any coercive effect of such clauses. He wrote that "no instance has been reported of such a provision's having deterred a beneficiary from marriage."[21] This observation was based on a review of US and UK case law where marriage clauses were directly contested by beneficiaries. No mention was made of the myriad decisions concerning a will that contained a marriage clause, but in which the legality of the clause was not challenged. Those cases tell a different story. Out of 445 decisions reviewed for this article in well over 100,[22] the beneficiary followed the condition; a young widow never remarried,[23] a daughter or a sister died having never married at all,[24] a son left his wife.[25] Of course, it is impossible to say whether it was the marriage clause that stopped these people from marrying, remarrying, or remaining married. All we know for certain is that they followed the condition.

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areas", online: <tinyurl.com/3ymaphxh>. See also Kevin Maimann, "House prices dropping in Canada's most expensive cities, but still out of reach for many", CBC News (7 April 2026), online: <tinyurl.com/3kjwr5ej> [perma.cc/CFN6-ZLPT].

21 Olin Browder Jr., "Conditions and Limitations in Restraint of Marriage" (1941) 39:8 Mich L Rev 1288, at 1327 [*Browder*].

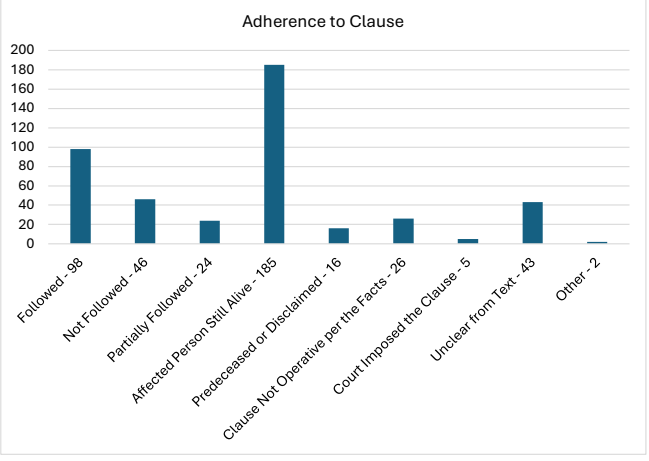
22 This figure includes cases where the clause was followed by the beneficiary and cases where some but not all of the beneficiaries followed the marriage condition (the latter scenario is indicated in the represented chart as "partially followed".) Only those decisions where the beneficiary died, having never married, remarried or divorced their partner, are counted in this official number. Notably, in the 185 cases in which the beneficiary was still living, the condition had been followed to the date of trial. Many of these cases involved elderly widows, who had not yet remarried, with life expectancies of less than 10 years at the time of the hearing.

23 *Williams Estate*, *Re*, 2006 NLTD 21, 2006 CarswellNfld 31.

24 *Annis*, *Re*, 1960 CarswellOnt 214, 24 DLR (2d) 78 (SC HCJ); *Haythornthwaite Estate*, *Re*, 1929 CarswellAlta 106, [1930] 1 WWR 58 (SC).

25 *Fairfoull Estate 1973*, *supra* note 8.

Figure 4



Notably, Quebec judges in contemporary decisions have had no difficulty in finding a causal connection between a conditional testamentary gift and the infringement of a beneficiary's right to marry, their privacy, or their right to choose a particular civil status. While older Quebec cases found no connection, insisting that a widow was "free to remarry" despite the presence of a viduity clause,[26] the Court of Appeal of Quebec made it clear in 2018 that such clauses intruded on basic *Quebec Charter* rights and were accordingly contrary to public order.[27] The significance of these decisions with respect to the public policy of the rest of Canada is discussed further in Part Three of this article.

B) … but are they just gifts? Conditional gifts v unilateral contracts and the doctrine of public policy

Another fact worth noting is the long-running double standard that exists with respect to the law of contracts and the law of gifts. A unilateral contract is one that is accepted by the performance of a condition which serves as the contract's consideration. A conditional gift is perfected when a condition is met or may be defeasible and subject to divestment if a condition is broken. Most conditional gifts are made by way of wills but *inter vivos* conditional gifts include gifts conditional upon marriage and *mortis causa* or deathbed gifts.

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26 *Dontigny Estate v R*, 1974 CarswellNat 197, [1974] 1 FC 418 (AD), at para 15; *Henry Kouri v Le Sous-Ministre du Revenu du Quebec et Cecile Beaudry-Kouri* (24 April 1987), Sherbrooke: 450-02-000579-857 (QC CP).

27 *Laroche*, *supra* note 11, at para 67.

While conditional gifts and unilateral contracts are considered legally distinct, the difference between them is sometimes difficult to ascertain. For example, it is unclear how the conditional gift contained in the will of Toronto lawyer Charles Millar, that promised the sizeable residue of his estate "to the mother who has since my death given birth in Toronto the greatest number of children as shown by the registrations under the Vital Statistics Act" was not, in fact, a unilateral contract.[28] It was an offer made by Charles Millar by way of his will and honoured by his executors in whom, upon his death, the legal title of his estate was vested. Consideration was the performance of the act which a large number of women attempted.[29]

Why this matters has to do with the different treatment of marriage clauses in the law of contract versus that of gifts. In contract law, conditions in restraint of marriage, including remarriage, have long been considered contrary to public policy.[30] A caveat to this general rule that has been noted[31] is the 1987 SCC decision of *Caron v Caron*[32] in which Justice Wilson held that a contract between husband and wife in which alimony would cease on the wife's remarriage was not subject to the general public policy concerning contracts and remarriage:

Nor, in my opinion, can the appellant derive much comfort from the ancient common law principle that contracts in restraint of marriage are contrary to public policy: *Lowe v Peers* (1768), 4 Burr. 2225, 98 E.R. 160; *Archer v Soc. of the Sacred Heart of Jesus* (1905), 9 O.L.R. 474 (C.A.); and *Bradley v Bradley* (1909), 19 O.L.R. 525 (C.A.). The clause in the separation agreement is not within the principle of these cases, which deal with promises not to marry or promises to pay someone money if they marry a particular person. A contract is not invalid merely because, as in the case of the clause before us, it may constitute a disincentive to one of

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28 *Estate of Charles Millar, Deceased, Re*, 1937 CarswellOnt 108, [1938] SCR 1 [*Millar*].

29 Time, "Medicine: Baby Race" (December 24, 1934), online (website): <tinyurl.com/56fcn52b> [perma.cc/2P34-ZWHD]; R. H. Carley, "Testamentary Eccentricity" (1966) 14:2 Chitty's LJ 55.

30 "Had there been an agreement by the defendant not to marry again it would have been void on the ground of public policy." *Bradley v Bradley*, 1909 CarswellOnt 578, 14 OWR 810 (Div Ct), at para 23. Indeed, one of the first reported decisions that invalidated restraints on marriage is the contract case of *Baker v White* (1690), 2 Vern 215, 23 ER 740 (EW HC Ch).

31 Brandon Kain and Douglas Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" (2007) Annual Review of Civil Litigation 1, at 28.

32 1987 CarswellYukon 8, [1987] 1 SCR 892.

the parties to marry: G.H. Treitel, The Law of Contract (London, Stevens & Sons) 6th ed. (1983), at p. 332.[33]

With great respect, it is unclear how a contract to receive spousal support so long as you do not remarry is different from a contract where you receive consideration for the promise not to remarry. The soundness of this judgment aside, separation agreements have also come to be recognized as exceptional in Canadian law from all other forms of contract.[34]

In Ontario, actions "brought for a breach of a promise to marry or for any damages resulting therefrom" have been outlawed.[35] And yet gifts given on the condition of marriage can be recovered through legal action if the marriage is called off.[36]

Given how indistinguishable some scenarios of unilateral contract and conditional gift can be, one can't help but wonder why there are two distinct lines of public policy precedent within the common law system, most clearly reflected in Ontario which has codified this double standard into its statutes.[37] Of course, one might argue that it is the public policy of contract law with respect to restraints on marriage that should be brought in line with that of conditional gifts in wills and not vice versa. Parts Two and Three of this article explain why that is a bad idea.

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33 *Ibid*, at para 13.

34 In cases since 2009, the Supreme Court has recognized the unique vulnerabilities present in the context of domestic contracts and provided a list of factors a court must consider when the validity of the contract is challenged by a party after its execution. These included the presence or absence of independent legal advice, any power imbalances between the negotiating parties, and how far the terms of the contract stray from the objectives of the family law they seek to replace. For a detailed discussion of this see: Jane Thomson, "Both Sides Now: Common Law Relationships as Status in Canada" (2024) 75 UNBLJ 25. Also see: Luke Taylor, "Domestic Contracts and Family Law Exceptionalism: An Historical Perspective" (2020) 66:2 McGill L J 303.

35 *Marriage Act, RSO 1990, c M.3*, s 32 [*Ontario Marriage Act*].

36 The common law on gifts in contemplation of marriage, with a particular emphasis on engagement rings, provides for a gift given in contemplation of marriage to be recoverable on timely demand if the donor was not responsible for ending the engagement. The *Ontario Marriage Act*, *ibid*, s 33, has removed the element of fault, effectively making all gifts given in contemplation of marriage and conditional on marriage, recoverable if the marriage does not take place and a timely request of the gift's return is made—unless it can be proven that the ring was meant to be an absolute gift. *Newell v Allen*, 2012 ONSC 6681, at para 22.

37 For an early acknowledgement of the double standard concerning contract law and the law of gifts with respect to public policy see: *Crowder v Sullivan*, 1904 CarswellOnt 688, 4 OWR 397, at para 14.

C) If the government thought this was a problem, they would legislate accordingly

The economic realities that lend a coercive element to these clauses, and the asymmetry of the law with respect to contracts and gifts aside, there is a final argument against the use of public policy on testamentary marriage clauses that needs to be addressed: If this truly were a problem, the use of marriage clauses in wills would be banned outright by provincial and territorial estate legislation. Therefore, a lack of legislative action against testamentary marriage clauses signals a lack of concern on the part of governments with respect to their legality.

First and foremost, legislative reform in this particular area of the law is, pragmatically speaking, a daunting prospect at best. Progressive reforms to dated family and estate law statutes are frequently waylaid by changing governments, the power of lobbyists, political will, interest and prioritization. Given that in many provinces, common law partners remain excluded from division of family property rights, rights on intestacy and/or dependants' relief claims, testamentary clauses that offend public policy might well be triaged to a lower range of concern.[38] Indeed, provincial governments – the very bodies with jurisdiction to legislate on the issue – have instead advocated for the doctrine's use to void passages in wills. For example, in the decision of *McCorkill v McCorkill Estate*, in which a testator left his estate to a White supremacist organization in West Virginia, the Attorney General of New Brunswick, an intervening party, asked that the gift be voided in accordance with public policy.[39]

More fundamentally, the fact that an action does not contravene a statute does not mean that it should be legal. This is particularly so when the action concerns one that, as I argue below, seeks to interfere with a beneficiary's basic rights such as privacy, personal autonomy, or equality. This argument was perhaps best explained by a young Bora Laskin who took issue with the notorious decision of *Christie v York Corp.*[40] in a short legal commentary published in the 1940 edition of the Canadian Bar Review. In *Christie*, the Supreme Court of Canada found that the refusal of service to Black patrons was a business decision and not contrary to public order or any other law of Quebec. The case was decided long before the introduction of human rights legislation in Quebec that now prevents

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38 For example, in 2020 the government of Nova Scotia announced that it was going to include common law couples in its division of marital property scheme. See, Wendy Martin, "N.S. overhauling Matrimonial Property Act to give common-law couples more rights", *CBC News* (9 February 2020), online: <tinyurl.com/aeu7f2xw> [perma.cc/7P2B-BRMB]. Six years and counting, this reform has not occurred.

39 2014 NBQB 148 at para 82.

40 [1940] SCR 139.

establishments like the York Tavern from engaging in discrimination based on a person's race. Nevertheless, Professor Laskin (as he was then) argued that it would be absurd to state that absent such behaviour being barred by way of statute, a business was free to engage in any sort of discriminatory practice it fancied. He argued that such an interpretation of the law was out of step with the values of the 20th century as well as other areas of existing law in the regulation of public commerce and industry. He believed that, on the contrary, unless such discrimination was expressly *allowed* by legislation, the common law should deem it illegal.[41]

To be clear, the best solution to testamentary marriage clauses is to ban their use in wills in every province and territory in Canada by way of legislation. This article argues why, absent any forthcoming legislative intervention, any clause in a will that makes a gift conditional on the marital state or the intimate partner status of a beneficiary, should be void on grounds of public policy.

III. Part Two: The Contemporary Case Against Marriage Clauses in Canadian Wills

A) The use of extrinsic evidence in public policy hearings

A starting point in this argument is that the current evidence law, when it comes to public policy challenges to testamentary clauses, may be largely incompatible with the traditional "intention of the testator" approach of common law courts to marriage clauses. As explained in the companion article to this one in detail,[42] when it comes to a marriage clause in a will, even those clauses that at first glance appear to encourage divorce or marriage at all, can pass public policy scrutiny if the motivation behind the gift was one of benevolence and provision. At the very least, this approach now seems largely incompatible with the law of Ontario.

In 2016 the Court of Appeal for Ontario held that the evidentiary rules that govern estate matters before courts of construction were equally applicable to public policy challenges regarding wills. In *Spence v BMO Trust Co*,[43] affidavits were used to prove that a father's decision to leave his daughter nothing by way of his will was motivated by racism. The application judge set aside the entire will on the grounds of public policy.[44] Justice Cronk allowed the appeal, finding that the doctrine of

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41 Bora Laskin, "Tavern Refusing to Serve Negro – Discrimination" (1940) 18:4 Can Bar Rev 314.

42 *Companion Article*, *supra* note 3, at 800.

43 *Spence v BMO Trust Co*, 2016 ONCA 196 [*Spence*].

44 *Spence v BMO Trust Co*, 2015 ONSC 615.

public policy had no application to such a scenario. Part of her majority reasons focused on what she held was an improper use of extrinsic evidence at the application level. Justice Cronk held that the common law court of construction rule—that extrinsic evidence of a testator's direct intention is inadmissible except in rare circumstances—applied equally to applications of the public policy doctrine to wills.[45] She concluded "where the testator's wishes are neither ambiguous nor equivocal" a court should not hear extrinsic evidence of a testator's motivations for expressing those wishes.[46]

Those familiar with estate law might argue that this ruling alone is not completely fatal to the current jurisprudence on marriage clauses in wills as there remain other permissible ways to infer a testator's motive. However, Justice Cronk's reasons appear to oppose the consideration of a testator's motives under *any* circumstance in applications of public policy to wills:

> The law does not require a testator to explain, let alone to defend, her reasons for her testamentary dispositions. Indeed, in my view, the privacy of those reasons is inherent in the principle of testamentary freedom.[47]

> … [if] extrinsic evidence is not admissible to establish what a testator intended, still less should it be admissible to question *why* the testator made a particular bequest.[48]

To be clear, the Court's view in *Spence* was that the motives of a testator in making an otherwise lawful and inoffensive statement in a will, should not matter with respect to a public policy inquiry. If this is the case, however, then a double standard exists for those cases where the motives of the testator have not only been relevant, but key to saving clauses that otherwise appear to contravene public policy on their face.[49] The chief

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[45] The two exceptions to this common law rule are: 1) that the will contains a latent ambiguity or 2) that the testator made a gift to someone he knew was dead. Albert Oosterhoff, C. David Freedman, Mitchell McInnes, and Adam Parachin, *Oosterhoff on Wills*, 9th ed. (Toronto: Thomson Reuters Canada, 2021) [*Oosterhoff*], at 532–533.

[46] *Spence*, *supra* note 43, at para 100.

[47] *Spence*, *supra* note 43, at para 102.

[48] *Spence, supra* note 43, at para 98 (emphasis added).

[49] Interestingly, the Quebec decision of *Marinacci v Bartolomucci*, 1997 CarswellQue 3572 (CS) provides a counternarrative to the Court of Appeal for Ontario's decision in *Spence*. In that decision, in which the testator executed a codicil that disinherited a granddaughter unless she left her partner, the court allowed parol evidence to establish that the motivation behind the clause was discriminatory and based on racism. Further the court voided the entire codicil based not only on the attempt to fracture a union but because of the discriminatory motivations of the testator. While it is open for jurisdictions

example of such cases being conditions on remarriage, separation, or widowhood.

This was the issue in the 1995 Nova Scotia decision of *MacDonald Estate*, the last decision in which a marriage clause was contested in common law Canada.[50] In *MacDonald*, a testamentary clause left a gift of capital to the testator's niece on the condition that she divorced or became widowed from her current husband. In finding that the clause did not offend public policy, Justice Stewart found the motives of the testator to be "supportive and not coercive or punitive" and that they did not "intend to induce divorce."[51] While part of Justice Stewart's reasoning was based on facts gleaned from the will and its codicils,[52] it also relied heavily on evidence that the husband of the niece had incurred financial difficulty during the lifetime of the testator, at one time declaring bankruptcy and, at another, defaulting on a mortgage despite the financial assistance of the testator. In his reasons, Justice Stewart detailed the history of the niece's family's financial troubles, noting that they eventually returned to Nova Scotia from Ontario in 1992, where the niece's husband was "unemployed for a period and of necessity the family had to rely upon social assistance."[53] The source of this information is not cited in Justice

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outside of Ontario to follow the Quebec jurisprudence, due to the general reluctance of common law jurisdictions to engage with civil law decisions, this is less likely to occur. For more on this discussion see: *Thomson Public Order*, *supra* note 4.

50 *MacDonald v Brown Estate*, 1995 CarswellNS 22, 139 NSR (2d) 252 (SC) [*MacDonald*]. Another decision that voided a marriage clause in the same year was the Newfoundland decision of *Murley Estate v Murley*, 1995 CarswellNfld 143, [1995] NJ No 177 (TD), a case which contained a number of challenged clauses, one of them was: "to Helene Murley the right to live in the residence bequeathed to Timothy C.N. Michael Murley as long as she lives and remains single." In Justice Riche's opinion, the larger issue presented by the clause was whether or not it constituted a license and on what terms. The only thing Riche J. wrote about its restraint on marriage was "[t]he provision relating to marriage, of course, would have no validity as being contrary to public policy": at para 10.

51 *MacDonald*, *ibid*, at para 28.

52 These included codicils that cancelled bequests to the other great-nephews and nieces of the testator in order to augment her son's share; the reference to her son as the apple of the testator's eye on more than one occasion in the will itself; and the alteration of yet other bequests from capital to income to ultimately benefit the niece's son: *Ibid*, at para 27. Also, the fact that the will left open the possibility for the niece to theoretically inherit an unconditional gift if her aunt predeceased her, as well as the fact that the will provided the income of the trust and a $200 monthly allowance (as opposed to the $400,000 gift made to each of her brothers) to be paid to the niece from the trust demonstrated that it wasn't an "all or nothing" conditional bequest: *Ibid*, at para 29.

53 *Ibid*, at paras 9–11, 31. See also *Thompson, Re*, *Lloyds Bank Ltd v George*, [1939] 1 All ER 681 (Ch) where the testator's motivations to protect his daughter from her husband's spendthrift ways justified a marriage restraint that otherwise could have been interpreted as promoting divorce.

Stewart's decision. One can only assume it was received by way of affidavit or parol evidence as these findings of facts by the judge were not attributed to the will. One wonders what the outcome of *MacDonald* would have been absent that case's extrinsic evidence, given that the ratio of *Spence* suggests such evidence should be inadmissible with respect to public policy issues in private wills.

Interestingly, in the much earlier case of *Fairfoull v Bullman*, the British Columbia Supreme Court voided a marriage clause on public policy grounds. That clause left the testator's son a life estate if, by the time the testator died, the son had divorced his wife:

> provided my son ROBERT FAIRFOULL is not, at the time of payment to my said son, the husband of Florence Fairfoull to pay to my said son one of such equal parts of the income from my estate for life.[54]

In his initial decision, the trial judge's reasoning was based primarily on the affidavit evidence of the son's wife who swore "that the husband and wife separated at the insistence of the husband prior to the execution of the codicil. The reason given by Robert Fairfoull to her was that the income from his father's estate would not be paid to him unless he lived separate and apart."[55]

This testimony, coupled with the clause in the will, convinced Justice Hutcheon to void the condition in the will for its interference with a marriage.[56] In a rare "reconsideration" of his reasons, Justice Hutcheon accepted the evidence of the son's sisters, who both swore that their brother's marriage had never been stable due to his addiction issues and that the will was not the cause of his separation.[57] Nevertheless, Justice Hutcheon affirmed his earlier finding based not on the extrinsic evidence of the three women but on the face of the will itself:

> I have examined the will carefully but fruitlessly to discover some purpose of the disposition other than to promote the severance of Robert Fairfoull, Jr., of his marriage with Florence Fairfoull. The law of this province is that if the object of the gift is to promote the separation of a married couple that object is against the policy of the law and the condition is to be struck down. The only intention that I can ascribe to the provision in the will before me is to bring about, not merely the separation of a husband and wife, but the end of the marriage.[58]

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54 *Fairfoull Estate 1973*, *supra* note 8, at para 4.

55 *Ibid*, at para 5.

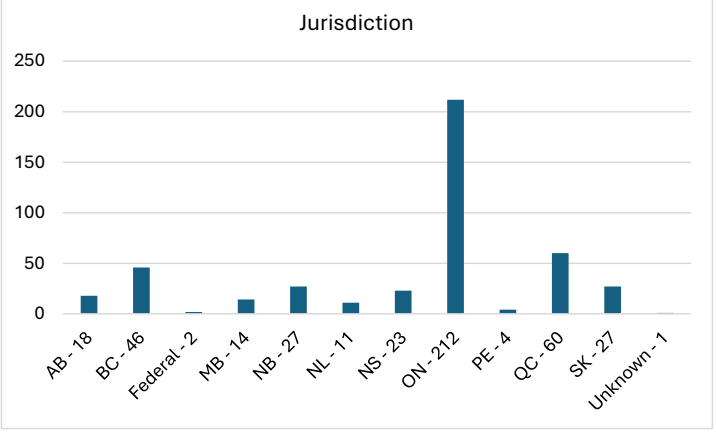
56 *Ibid*, at paras 7, 11.

57 *Fairfoull Estate v Bullman*, 1974 CarswellBC 214 (SC), [1974] 6 WWR 471, at paras 5–7.

58 *Ibid*, at para 12.

The Supreme Court of Canada refused leave on the appeal of *Spence*.[59] Since then, *Spence* has been cited at least 28 times, in eight different jurisdictions.[60] The vast majority of those citations focuses on the portion of Justice Cronk's reasons emphasizing the importance of testamentary freedom. So far, none have involved public policy challenges to marriage clauses. However, given the case's prevalence, there is reason to believe the specific ruling in *Spence* concerning the admission of extrinsic evidence to prove motive will likely conflict with future cases that involve marriage clauses especially since the overwhelming majority of cases involving marriage clauses have been reported in Ontario:

Figure 5



59 *Spence v BMO Trust Co*, 2016 CarswellOnt 9351, [2016] SCCA No 96.

60 *Marder v Geller*, 2025 ONSC 6611; *Watson v Lopes*, 2025 ONSC 5934; *Twinn v Alberta (Public Trustee)*, 2025 ABKB 507; *Small Estate (Re)*, 2025 MBCA 63; *Drumonde v Spellay*, 2025 ONSC 3221; *Corbin v The Shepherds' Trust*, 2024 ONSC 4402; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10, Martin and O'Bonsawin JJ, dissenting; *Mansour v Girgis*, 2024 ONSC 1611; *Ihnatowych Estate v Ihnatowych*, 2024 ONCA 142; *Anderson v Anderson*, 2023 ONSC 6643; *Shafman v Shafman*, 2023 ONSC 1391; *Barsoski Estate v Wesley*, 2022 ONCA 399; *Gefen Estate v Gefen*, 2022 ONCA 174; *Angelis v Siermy*, 2022 BCSC 31; *Stewart v Stewart*, 2021 ONSC 1222; *Moses v Moses*, 2021 ONSC 587; *Morin Estate (Re)*, 2020 ABQB 725; *Kates Estate*, 2020 ONSC 7046; *Bone v Bone*, 2020 ABCA 323; *Adams Estate v Wilson*, 2020 SKCA 38; *Lawen Estate v Nova Scotia (Attorney General)*, 2019 NSSC 162; *Taylor et al v Ginoogaming First Nation*, 2019 ONSC 328; *P Monaghan (Est of J Jones) v R Jones (Est of RE Jones)*, 2018 PESC 6; *Quaggiotto v Quaggiotto*, 2018 ONSC 345; *Koziarski Estate v Sullivan*, 2017 ONSC 2704; *Poitras v Poitras Estate*, 2016 CarswellOnt 12938, 2015 ONSC 5049; *Lavoie v Trudel*, 2016 ONSC 4141; *Sweetnam v Williamson Estate*, 2016 ONSC 4058.

It is not clear whether the law concerning marriage clauses was brought to the Court of Appeal's attention in *Spence*. However, the Court's ruling with respect to extrinsic evidence and public policy applications makes it difficult, if not impossible, to apply the current law concerning public policy challenges to clauses that prohibit remarriage or are contingent on a beneficiary's widowhood or separation, in Ontario. Recall that such clauses are, at first instance, contrary to public policy. As detailed in the companion article to this one, clauses that prohibit a beneficiary from marrying, and clauses that induce the separation of a married couple, have been contrary to public policy for centuries. However, courts have upheld even clauses of this kind where the testator was found to have had a benevolent purpose in making them. However, absent admissible evidence to prove this, courts in Ontario face great difficulty in determining the motivations of the testator with any degree of proof or certainty, unless those motivations are spelled out on the face of the will.

However, even if such a motive is discernable, this argument ignores the larger reason why all marriage clauses should be void for reasons of public policy. The rationale behind preserving viduity clauses or any other kinds of marriage clauses attributable to "acts of benevolence" on the part of the testator no longer keeps pace with contemporary social values that inform applications of public policy.

B) The legal rationale that governs marriage clauses with respect to public policy is irrelevant

Even if courts elect to hear evidence concerning a testator's motive for a marriage clause, the various reasons that underpin this approach have lost their mooring in contemporary Canadian society, a fact Justice Benoit observed in *Béland-Abraham c Abraham-Kriaa* nearly 40 years ago.[61] Let's look at them individually.

1) Won't someone think of the children?

One concern, with respect to viduity clauses in particular, is the fear that if free to remarry, a mother will cast out or neglect her minor children in the wake of a new marriage. How likely of an occurrence this was in previous centuries is the subject of another paper. It is notable though that this rationale was used to uphold marriage clauses in cases where testators assigned the gift-over of the estate in the event of a mother's remarriage to

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[61] *Béland-Abraham c Abraham-Kriaa*, 1988 CarswellQue 65, [1988] RJQ 1831 (CS), at paras 30–31.

a third party and not to the testator's children.[62] Regardless, this rationale is completely out of step with contemporary Canadian society. Aside from the obvious presumption that a mother (or any parent) will continue to love and provide for her children regardless of her marital status, given the criminal laws that exist to preserve the welfare of minor children and the family laws that promote the best interest of the child, this reasoning holds no weight today. This view is best expressed in the 1991 decision *British Columbia (Public Trustee) v Cameron Estate*,[63] in which the BC Supreme Court dismissed an application by the Public Trustee with respect to the will of a deceased mother. In its application, the Public Trustee argued that in leaving her entire estate to her husband, the testator had failed to make adequate provision for their 11-year-old daughter. The trustee's reasons included protection of "the child's interests against unexpected circumstances such as a remarriage by the defendant ..." The Court dismissed the application, finding that in leaving her estate to her husband, who in turn had demonstrated nothing but care for their child, the testator had discharged her moral duty to her daughter.[64]

2) The fear of a new man

> … I said your wife is a young woman liable to marry again, and if she did so and retained her share in the property it would allow her to bring another husband there and occupy the place and perhaps use it more than he should …[65]

A second concern fueling the rationale was that any property left to a woman would be subsumed legally by her husband if she married or remarried.[66] This legal reality ended with the introduction of the third wave of Married Women's Property Acts in the late 19th century. Indeed, the law is the exact opposite today. A widow remains in control of what

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62 "The position taken in several of these cases is that the testators had the interests of their children foremost in their minds, that a remarriage of their widows would prejudice those interests, and so the restraint in such cases is justified. It seems to have been overlooked that if the forfeited property is given over to a third person when such a condition is enforced, the result is hardly the best provision for the needs of the children." *Browder*, *supra* note 21, at 1298. See also *Browne*, *supra* note 8, at para 6.

63 1991 CarswellBC 173, [1991] BCWLD 1216 (SC).

64 *Ibid*, at para 33.

65 *Burns v Grant*, 1922 CarswellNS 36, 55 NSR 337 (SC), at para 5.

66 *Reference Re Hamilton*, 1912 CarswellOnt 659, 23 OWR 549 (SC HCJ). The testator in *Luke*, *Re*, 1939 CarswellOnt 112, [1939] OWN 25 (HCJ) came up with a more generous but likely unenforceable clause: "unto my beloved wife, Emily Irene Luke, to use the income therefrom and so much of the corpus thereof as she may have need of for her comfort, maintenance and support during her lifetime, the said property whether real or personal to be under the control of my said wife and to be separate, apart and free from all marital control in the event of her re-marriage".

happens to her gift, even upon the event of remarriage, due to the legality of domestic contracts codified in the family law statutes of every province and territory in Canada.

3) But it was well intentioned?

Finally, there is the more general idea that a marriage clause could be benevolent in nature, seeking only to support a widow or a single person before they are able to marry or remarry. While men sometimes found themselves the subject of such clauses, overwhelmingly they were directed at female beneficiaries. As the late Professor Jeffrey Sherman observed, gender stereotypes not only informed the legal rationale behind marriage clauses but also served to reinforce them, based on assumptions about the roles men and women played within the family economy:

> Now where the trust is for a married daughter, it must be conceded I think that there is more reason [to uphold the validity of a condition that gives the life tenant an absolute interest in the event of divorce] than where the trust is for a married son … This is because a wife is in such a state of dependence upon her husband and frequently so far under his control, that a gift of trust income to her during marriage and of the principal to be disposed of by her absolutely in case of divorce from her husband, obviously can muster more of [an] argument in its support than can the case of a similar bequest in trust for a married son.[67]

This rationale is, of course, based on antiquated notions concerning the ability of women to earn an income from work outside of the family home. The emancipation of women in the work force, gaining speed after World War II, also transformed the dynamics of marriage between men and women. Today, while examples of "traditional marriages" persist, most Canadian women do not marry solely or primarily for financial security.[68] Nor are unmarried women the responsibility of their male relatives. To be clear, given the evolving meaning and purpose of marriage in contemporary Canadian society, there is no guarantee that a marriage will bring financial security to anyone.[69]

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[67] *Davidson v Wilmington Trust Co*, 2 A.2d 285 (Del Ch 1938), at 289. While *Davidson* was an old case, Sherman noted that such a gender-based distinction has driven American decisions even as late as 1972. Jeffrey G. Sherman, "Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices" [1999] U Ill L Rev 1273 at 1309 [*Sherman*].

[68] Mary-Jo Maur, Nicholas Bala & Claire Houston, *Family Law: Text, Cases, Materials & Notes*, 10th ed (Toronto: Thomson Reuters, 2021).

[69] As noted by the Supreme Court of Canada in *B (G) c G (L)*, 1995 CarswellQue 120, [1995] 3 SCR 370, at para 69; also see *Laroche*, *supra* note 11, at para 70.

What remains then is simply the jealous and controlling nature of marriage clauses, and viduity clauses in particular, perhaps best encapsulated by a US court at the height of their popularity:

> It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood.[70]

IV. Part Three: What the Modern-Day Approach to Public Policy and Marriage Clauses in Canadian Wills Should Be

A) What informs the doctrine of public policy?

Anyone familiar with the doctrine of public policy has no doubt heard the cautionary quote that associates it with an unruly horse.[71] Some might also be familiar with Lord Denning's horse-themed retort.[72] While the past centuries have seen different judicial takes on the doctrine's use—particularly in the area of wills—one thing has remained consistent: the application of public policy by courts to clauses in wills perceived to harm the public good. While most jurists agree it is to be applied sparingly and only in the clearest of cases, it continues to be applied to gifts in wills. Indeed, as noted above, its use has been championed not only by advocates but also by governments that presumably could solve the issue by way of legislation.[73]

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70 *Stauffer*, *supra* note 5, at 355. Interestingly, while the effect of these clauses was to remove power and autonomy from a surviving widow, somewhat perversely, the presence of a viduity clause provided a widow with a modicum of power when it came to her life estate; it allowed a widow to disclaim her life estate in favour of her children and trigger the doctrine of acceleration, allowing the children's interests to vest immediately: *Brannan v British Columbia (Public Trustee)*, 1991 CarswellBC 103, [1991] BCWLD 1342 (CA); *McGavin v National Trust Co*, 1998 CarswellBC 794, [1998] BCJ No 810 (CA). An absence of a viduity clause attached to a widow's life estate did not attract the doctrine's application, leading some courts to conclude "if the life tenant disclaims her interest in the Trust Estate, the Trust Estate does not vest immediately in the possession of the Settlor's children pursuant to the doctrine of acceleration." *de la Giraudais v de la Giroday*, 1998 CarswellBC 1615, [1998] BCJ No 1575 (SC), at para 35.

71 *Richardson v Mellish* (1824), 2 Bing 229 at 252.

72 "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice": *Enderby Town Football Club v Football Assn Ltd* (1970), [1971] Ch 591 (Eng CA), at 606–607.

73 Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on Spence v BMO Trust Co." (2019) 36 Windsor YB Access to Just 138 at 155.

As for what is and is not contrary to public policy, all attempts by courts to contain the doctrine to certain established heads[74] have been eroded by changing values and laws of any given society. As Justice McCardie of the English Court of King's Bench once observed:

> The Courts have not hesitated in the past to apply the doctrine [of public policy] whenever the facts demanded its application ... The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal C.J. in Horner v Graves … "Whatever is injurious to the interests of the public is void, on the grounds of public policy."[75]

It is common practice of Canadian courts to determine public policy *in pari materia* with existing legislation to fill gaps in the common law where necessary.[76] Past applications of the public policy doctrine, or Quebec's codified version of it, have been informed by Canada's Constitution and democratic system of government,[77] federal and provincial statutes,[78] the principles of the common law and previously established heads of public policy,[79] political speeches,[80] and Canada's *Charter of Rights and Freedoms*.[81] In applying some of these sources to the issue of marriage clauses, the case for why they contravene public policy becomes clear.

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74 See, e.g., *Janson v Driefontein Consolidated Mines Ltd*, [1902] AC 484 (HL), at 491–492; *Estate of Charles Millar, Deceased, Re,* 1937 CarswellOnt 14, [1937] 3 DLR 234, at paras 40–56.

75 *Naylor, Benzon and Co, Limited v Krainische Industrie Gesellschaft*, [1918] 1 KB 331, aff'd CA [1918] 2 KB 486, at 342–343.

76 Bruce Ziff, "Welcome the Newest Unworthy Heir," (2014) 1 ETR (4th) 76 [*Ziff Unworthy Heir*] at 87; Jane Thomson & Ashleigh Keall, "Silent All These Years: Public Policy, Expressive Harm, and the Legacy of Christie v York Corporation" (2022) 73 UNBLJ 232, at 235–236.

77 *Brassard v Langevin*, 1877 CarswellQue 6, 1 SCR 145, at para 72 citing *The British North America Act 1867*, 30 & 31 Vict, c 3 (UK).

78 *Re Wren*, 1945 CarswellOnt 62, [1945] 4 DLR 674 (SC HCJ), at para 13; *Walkerville Brewing Co Ltd v Mayrand*, 1929 CarswellOnt 104, [1929] 2 DLR 945 (CA); McCorkill v McCorkill Estate, 2014 NBQB 148, at para 62.

79 *Brissette v Westbury Life Insurance Co*, 1992 CarswellOnt 999, [1992] 3 SCR 87; *Uber Technologies Inc v Heller*, 2020 SCC 16, at para 110; *Millar, supra* note 28. For further reading on what informs the doctrine see: *Oosterhoff*, *supra* note 45, at 765–790.

80 *Canada Trust Co v Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, [1990] OJ No. 615 [*Canada Trust Co*], at paras 99–101.

81 *Ibid*; Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill LJ 511 at 517 [*Grattan & Conway*].

B) Legislation

There is, of course, a careful line to tread when arguing that public policy should reflect current day legislation. It raises the question of the need for the doctrine's application in light of other legislative remedies. For example, some might argue that the fact that Ellie Hatch[82] could have sued her late husband's estate for a division of marital property under Saskatchewan's *Family Property Act* and further relief under its *Dependants' Relief Act* rendered the role of public policy vis-à-vis the remarriage clause in her will, moot. After all, the purpose of this legislation is, in large part, to ensure a fair financial outcome due to separation or widowhood for women whose contributions to the family economy are largely unpaid.

However, as explained in the companion article to this one, this legislation has not proven a cure-all for the issue of marriage clauses. Even if a widow applies for dependants' relief, a court might increase her gift but preserve a marriage clause attached to it. In at least five reported dependants' relief decisions, courts *added* marriage clauses to the award on their own motion.[83] Further, while most provincial family law statutes[84] allow a surviving spouse to bring an action for division of marital property against the estate of their spouse, the presumptive award is only for 50% of the family property. If the estate is largely comprised of property that cannot be categorized as family property, the effectiveness of this legal route is significantly lessened for widows faced with a marriage clause attached to their gift. More so, this protection, where available, is often afforded only to spouses who were legally married to the deceased.[85] While many provinces offer dependants' relief legislation to married

82 *Hatch*, *supra* note 11.

83 *Moores v Hughes*, 1981 CarswellOnt 493, 11 ETR 213; *Menkes*, *Re*, 1976 CarswellOnt 196, 28 RFL 246; *Re Burnie's Will*, [1970] NSJ no 3, 7 NSR (2d) 38; *Green*, *Re*, 1959 CarswellNS 26, 17 DLR (2d) 74; *Trott Estate*, *Re*, 1949 CarswellMan 51, [1949] 2 WWR 738.

84 The jurisdictions of PEI, British Columbia and the Yukon allow for no such applications.

85 *Marital Property Act*, RSNB 2012, c 107, ss. 1, 4(1)-4(10); *Family Law Act*, RSNL 1990, c F-2, ss. 2(e), 21(1)-21(2); *Family Law Act*, RSO 1990, c F.3, ss. 1(1), 5(2), 7(1); *Matrimonial Property Act*, RSNS 1989, c 275, ss. 2(g), 12(1)-12(4). Notably in both *Hatch*, *supra* note 11, and *Anderson v Anderson Estate*, 2016 BCSC 13, while the widows availed themselves of their family law and dependants' relief rights, the result was approximately 50% share of the family property held by the estate, based on what the widow would have obtained in the event of a divorce. It is a metric employed by many courts even in the case of dependants' relief claims when amending a will to ensure a testator has made adequate provision for his widow. This course of action is helpful when a widow is faced with a life estate scenario and wants to own property in fee simple. However, gifts of fee simple or money conditional only on viduity would be more effectively dealt with by voiding of the viduity clause.

spouses, this is not always the case for common law partners who might receive a gift with a re-partnering clause attached. It is also worth noting that gifts conditional only on viduity would be more effectively dealt with by voiding of the viduity clause, sparing a widow the additional cost and burden of bringing more complicated claims in family law and dependants' relief, not to mention sparing the courts from hearing them.

Therefore, instead of supplanting the need for public policy, the enactment of these laws shows us what the public policy concerning marriage restraints—in particular those placed on former partners—should be. Canada's family law statutes and the dependants' relief legislation, situated in some form in every province and territory, bolster rather than diminish the case against marriage clauses in wills.

1) Dependants' relief legislation

Described as a "foreshadowing [of] more modern concepts of equality"[86] by Justice McLachlin (as she then was), dependants' relief is one of the earliest examples of a legislated redistribution of property and wealth, regardless of ownership or title, following family breakdown.[87] The first dependants' relief statutes were adopted in Canada at the beginning of the 20th century. They allowed for the widows, children (and eventually widowers)[88] of a testator to sue an estate for financial relief if the testator's will failed to provide for the adequate maintenance of particular surviving family members.[89] Although dependants' relief statutes give courts broad discretion to attach conditions to awards, and courts have on occasion imposed viduity conditions in the past, the legislation itself does not make a surviving spouse's entitlement conditional on her not remarrying.

2) Family law

Starting in the 1970s, marital property regimes were adopted by Canada's provinces and territories, allowing not only for an equal division of assets

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86 *Tataryn v Tataryn Estate*, 1994 CarswellBC 283, [1994] 2 SCR 807, at para 16.

87 In the mid 19th century, apart from Dower Acts, certain legislation existed to assist women following marriage breakdown, such as *New Brunswick's Married Women's Property Act* that provided "A married woman who was deserted 'or compelled to support herself' was authorized to retain any property she accumulated as a result of her own labor, safe from the control of her husband or his creditors" however these were subject to judicial interpretation often not in favour of the female petitioner. See Constance Backhouse, "Married Women's Property Law in 19th Century Canada" (1988) 6:2 L & Hist Rev 211.

88 Both Alberta and Saskatchewan initially restricted access to their statutes to widows. See Cameron Harvey & Linda Vincent, *The Law of Dependants' Relief in Canada*, 2nd ed (Toronto: Thomson Carswell, 2006) at 2.

89 *Oosterhoff*, *supra* note 45, at 923–928.

between divorcing couples, but also the ability in nearly every jurisdiction for a surviving spouse to sue the estate of the deceased for a division of property. No family law scheme in Canada bars a spouse from accessing this sort of financial relief if she chooses to remarry or re-partner.[90]

The right to spousal support is also not conditional upon the decision to re-partner or remarry. While *dum casta* clauses were inserted as a matter of course in divorce decrees in the 19th century[91] they began to fall out of favour in the mid 20th century[92] and were banned by Canadian legislation starting in the 1980s.[93] Today, remarriage is not an automatic terminating event of spousal support, nor is it even a determinative factor in a review of spousal support.[94]

C) Charter rights and values, tort law and international law

1) The right to privacy and dignity

Of course, it is not simply Canadian family legislation that informs the public policy of marriage clauses in Canada, as not all marriage clauses are conditional upon viduity. Another important source that should inform Canada's public policy on this topic comes from the right to privacy, expressed not only in the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter,* but also in our tort law and various Federal and provincial privacy statutes.

Referencing the *Quebec Charter*, the Court of Appeal in *Laroche* provides a detailed explanation of how marriage clauses run contrary to a person's right to privacy:

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90 The predecessor of marital property acts, the provincial Dower Acts, provided a widow with a life estate interest in a portion of her husband's estate which was free of any condition concerning remarriage. Interestingly this too was undermined by marriage clauses in wills. There are many cases on the issue of election where a will required a widow to exercise her Dower rights or take a larger gift under the will that came with a marriage clause attached. See, e.g.: *Westacott v Cockerline*, 1867 CarswellOnt 12, 13 Gr 79 (Ch).

91 These clauses operated to terminate any order of maintenance if the former wife ceased to remain "chaste". See: *Weingarden v Weingarden*, 1979 CarswellOnt 400, 1 ACWS 149 (Ont CA), James G. McLeod annotation: <https://tinyurl.com/5cfypn7f>.

92 *Wachtel v Wachtel*, [1973] 1 All ER 829 (CA).

93 See, e.g.: *Family Law Act*, RSO 1990, c F.3, s 56(2); *Marital Property Act*, RSNB 2012, c 107, s. 40(1).

94 Melanie Kraft & Aaron Franks, "Remarriage & Spousal Support" (2005) 24 CFLQ 95.

> In the case of *Godbout v City of Longueuil*, the Supreme Court defines the right to privacy as "the right to make fundamentally personal decisions free from undue external interference."
>
> In that case, a person's employability depended on his or her place of residence. The Supreme Court decided that "[…] the right to be free from unjustified interference in making a decision as to where to establish and maintain one's residence seems to me to fall squarely within the scope of the Quebec Charter's guarantee of "respect for [one's] private life". So, "[…] only those choices that are of a fundamentally private or inherently personal nature will be protected".
>
> If the choice of where a person wants to live is a fundamentally personal decision, it is clear to me that the choice to live in a de facto union with another person is just as fundamentally personal. In fact, few decisions are as personal as the choice to live in a marital-type relationship with the person of one's choice.[95]

Laroche and the Supreme Court of Canada's decision in *Godbout* involved an application of Quebec's *Charter*. In the rest of Canada, the right to privacy in various contexts has been recognized, not only as a *Charter* right but also in the adoption of torts and statutes governing violation of privacy between individuals.[96] Marriage clauses constitute a severe intrusion on one's privacy and personal decisions. Public policy towards such clauses should be informed, in *pari materia*, by the existence of the right to privacy in Quebec and the rest of Canada.

When it comes to decisions related to marriage or intimate relationships, the dignity of the beneficiary is intertwined with their right to privacy:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating those choices to any one conception of the good life.[97]

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95 *Laroche*, *supra* note 11, at paras 59–61 (author's translation), citing *Godbout c Longueuil (Ville)*, 1997 CarswellQue 883, [1997] 3 SCR 844, at paras 98, 99.

96 See e.g. *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145; *R v Morgentaler*, [1988] 1 SCR 30 (Wilson J, concurring); *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *Douez v Facebook*, 2017 SCC 33; *Jones v Tsige*, 2012 ONCA 32; *Privacy Act*, RSBC 1996, c 373.

97 *R v Salituro*, 1991 CarswellOnt 124, [1991] 3 SCR 654, at para 48 [*Salituro*].

The passage above comes from the Supreme Court decision of *R v Salituro* in which the common law rule that rendered a wife incompetent to testify against her husband was changed to exclude irreconcilably separated spouses.[98] The decision is now over 30 years old, but Justice Iacobucci's analysis, similar to the Court of Appeal of Quebec's decision in *Laroche*, remains directly relevant as to why marriage clauses, that overwhelmingly and disproportionately affect widows, contravene public policy. Like marriage clauses, Justice Iacobucci's reasons note that the justifications for the common law rule of evidence had not "survived" contemporary times and were simply "a product of history":[99]

> To give paramountcy to the marriage bond over the value of individual choice in cases of irreconcilable separation may have been appropriate in Lord Coke's time, when a woman's legal personality was incorporated in that of her husband on marriage, but it is inappropriate in the age of the Charter …[100]

> Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action … then the rule ought to be changed.[101]

2) The right to marry (or not)

As other scholars have noted, the central reasoning behind why courts have voided certain marriage clauses in wills has historically been based upon society's view of the institution itself. The value of marriage was paramount and it justified courts overriding the wills of individuals that sought to prevent or fracture the institution. It was the basis for legitimate procreation,[102] it was sanctioned by God,[103] it was the cohesive that held together society and civilization,[104] and it served as a guard against immoral behaviour.[105]

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98 *Ibid*, at para 52. The decision was eventually supplanted by legislation: *Canada Evidence Act*, RSC 1985, c C-5, s 4(2).

99 *Salituro*, *supra* note 97, at para 45.

100 *Ibid*, at para 48.

101 *Ibid*, at para 52.

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

103 *Lowe v Peers*, Wilm 364 at 371, 97 Eng. Rep. 138 (1770) as cited in *Browder*, *supra* note 21, at 1289.

104 *Maynard v Hill* (1888), 125 US 190, 8 S Ct 723.

105 *Browder*, *supra* note 21, at 1327.

Some might argue that none of these arguments are relevant in contemporary times. At least one author has argued that the reason for the doctrine's application to marriage clauses was the legal difficulty historically involved in dissolving a marriage. Clauses conditioned on a beneficiary's divorce were contrary to public policy because they encouraged beneficiaries to neglect their legal duties to the institution. Given the lack of legal obstacles to exiting a marriage in modern times, the argument follows that marriage clauses should no longer be considered contrary to public policy.[106]

An initial response to this argument might be that even in the contemporary context, marriage is obviously still very important to many people. A veneration of marriage can still be seen in greater society, from popular culture's barrage of television programs aimed at finding marriage partners, wedding dress shopping, wedding planning, to marriage counselling and coaching. The statistics concerning married persons in Canada bear this out as well. In her dissenting decision in *Walsh v Bona*, Justice L'Heureux-Dubé cited a study that predicted that by 2022, the number of unmarried and married couples in Canada would be even.[107] However, according to the most recent data from Statistics Canada, while the percentage of unmarried couples has increased, this prediction has not come true. According to Statistics Canada, the number of married versus cohabiting couples remains at a ratio of nearly four to one.[108] Even in Quebec, the province where popular belief might state otherwise, married persons still outnumber common law couples by nearly two to one.[109]

Further, marriage still matters to the state. Although it has become easier to obtain a divorce in Canada following the enactment of a no-fault

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106 Darryn Jensen, "The 'Policy' That Invalidates Testamentary Conditions" (2019) 39:3 Oxford J Leg Stud 553 at 561.

107 *Walsh v Bona*, 2002 SCC 83, at para 122.

108 *Walsh v Bona* was released in 2002. At that time 12,242,239 Canadians were married whereas 2,465,655 lived in common law relationships. The number of married Canadians in 2020 was 14,360,073. In contrast, only 3,745,644 Canadians were living in unmarried, cohabiting relationships: Statistics Canada "Estimates of population as of July 1st, by marital status or legal marital status, age and sex" online: website <tinyurl.com/42k5ry47> [*Statistics Canada Marital Status*].

109 In 2020 2,474,272 Quebecois identified as legally married whereas 1,542,174 were living as common law couples. Only the territory of Nunavut comes close to an equal number of married (7,471) and common law couples (6,964). In all other provinces and territories in Canada the vast majority of cohabiting couples are legally married, with couples usually outnumbering common law relationships many times over. *Statistics Canada Marital Status*, *ibid*.

divorce,[110] practically the process is not one of simply exiting a contract. Parties seeking a divorce on a no-fault basis are still required to live separate and apart for a year before obtaining a divorce order. Courts remain under an obligation to order a divorce only when they are convinced there is no prospect of reconciliation between spouses.[111] While parties can contract out of some of the obligations and duties attached to marriage, this process remains subject to a variety of family law considerations not applied to any other kind of legal contract.[112] Divorce also has wide ranging implications for a person's financial benefits, insurance coverage, estate management, and taxes—not to mention the legal fees involved. The reason for this is that marriage is still something more than contract. Its existence as an important status, encouraged by the state, prevails to this day as noted by the Court of Appeal for Ontario:

> The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society.[113]

However, there is a second and better response to this argument. It is not the importance of the institution of marriage itself that drives the contemporary public policy argument against marriage clauses. Rather it is the importance we place on the personal autonomy involved in decisions concerning marriage that justifies the application of public policy in this instance. What is now most sacred to Canadians is the choice to marry or not to marry, the choice of who we marry or do not marry,[114] and the legal battles that have been fought in Canada to ensure as many people as possible have this autonomy.[115]

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[110] *Divorce Act*, SC 1967-68, c 24; *Divorce Act*, RSC 1985, c 3 (2nd Supp) [Modern *Divorce Act*].

[111] *Modern Divorce Act*, *ibid*, ss. 8, 10. Notably the *Divorce Act* was recently overhauled in 2021. Section 10, the "no prospects of reconciliation" section was left in. See also *KLS v DRS*, 2012 NBCA 16, in which the trial judge refused to grant the parties a divorce due to the fact that they continued their sexual relationship while living separate and apart.

[112] *Rick v Brandsema*, 2009 SCC 10, at para 40, citing *Miglin v Miglin*, 2003 SCC 23, at paras 73–74.

[113] *Halpern v Toronto (City)*, 2003 CarswellOnt 2159, [2003] OJ No 2268 (CA) [*Halpern 2003*], at para 107.

[114] See *Better, Re*, 1983 CarswellOnt 612, [1983] OJ No 1173 (SC HCJ), where the testator's children were left the bulk of his estate provided that they marry. The children, both of the age of majority but unmarried, tried to collapse the trust through the application of the rule in *Saunders v Vautier*. They were unsuccessful because of the marriage clause rendering their gifts conditional in nature.

[115] *EGALE Canada Inc v Canada (Attorney General)*, 2003 BCCA 251 [*EGALE 2003*]; *Halpern 2003*, *supra* note 113, at paras 41–42; *Hendricks c Québec (Procureur*

In *Halpern v Toronto (City)*, a case in which same-sex couples fought and won the right to marry, the Court of Appeal for Ontario held:

> Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.[116]

In Canada the mental capacity required to legally marry is low.[117] Marriage remains open to even those persons who have "been declared mentally incompetent or having had a guardian for person or property".[118]

Article 16 of the 1948 *Universal Declaration of Human Rights*[119] recognizes the right to marry as a fundamental freedom:

> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Canada voted in favour of the *Declaration*. The right to marry has been acknowledged by the Court of Appeal of Quebec, the Court of Queen's

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Général) 2002 CarswellQue 1890, [2002] RJQ 2506.

116 *Halpern 2003*, *supra* note 113, at para 5.

117 *Calvert (Litigation Guardian of) v Calvert*, 1997 CarswellOnt 581, 32 OR (3d) 281 (CJ GD), at paras 53–55.

118 *Tanti v Tanti et al*, 2020 ONSC 8063, at para 44.

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

Bench for Saskatchewan,[120] the Federal Court,[121] and the Supreme Court of Canada.[122]

Therefore, rather than the importance of the institution itself, it is interference with the autonomy surrounding all decisions relating to marriage that presents the final and significant problem with marriage clauses. This is why a testamentary gift, conditional on a testator's gay son marrying the female surrogate who gave birth to his child, should be found contrary to public policy.[123] It is also why a bequest left to a young woman "so long as she is single" or to a widow "so long as she does not remarry" should be voided in accordance with the doctrine. As a society, we view all decisions around marriage as a core and personal right and any interference with these decisions should not be aided by our courts of law.

Of course, there is significantly little law to prevent testators, while still alive, from attempting to interfere with the personal lives of those around them through the coercive use of money.[124] However, such power cannot be wielded by the dead without the assistance of the courts. This point was perhaps best made by the late Professor Jeffrey Sherman. He recognized that a system of testation with a certain degree of testamentary autonomy was necessary for a variety of reasons, including the provision of a level of dignity and autonomy to individuals concerning the distribution of their property.[125] However, he believed that clear limits were needed as to what courts should enforce when it came to the whims of individual testators:

> Allowing property owners to determine who will enjoy their wealth after their deaths is necessary to avoid the harms [that would occur absent any system of organized testation], but allowing them to use their wealth to "control other people's lives" is not necessary. Consequently, testamentary restraints on legatees'

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120 *Laroche*, *supra* note 11; *Hatch*, *supra* note 11, at para 91.

121 *Habib v Canada (Minister of Citizenship & Immigration)*, 2008 FC 924 at paras 22–23.

122 *RS v PR*, 2019 SCC 49, at para 126.

123 See: Kathianne Boniello, "Manhattan businessman's will ordered gay son to marry woman who gave birth to his child" (August 19, 2012), online (website): <tinyurl.com/2unytzsw> [perma.cc/4K4R-JNU7]; Emalee G. Popoff, "Testamentary Conditions in Restraint of the Marriage of Homosexual Donees" (2014) 7:1 Drexel L Rev 163.

124 Albeit, there is nothing to prevent public policy's application to conditional *inter vivos* gifts if perfecting or retaining the gift requires the assistance of the courts, *Ziff Unworthy Heir*, *supra* note 76. The same logic applies to a settled, *inter vivos* trust that imposes a marriage clause on its beneficiary.

125 *Sherman*, *supra* note 67, at 1295–1298.

> conjugal and religious choices are per se undesirable; society's aid should not be enlisted to enforce such restraints …[126]

Requesting a court of law to police the intimate relationship decisions of the living in accordance with the wishes of the dead, is not only a waste of judicial resources, it is an embarrassment to those who believe the doctrine of public policy should be guided by contemporary laws and values. As Justice Iacobucci once wrote, in justification of the Supreme Court's modification of another common law rule based on sexist and antiquated social values, "[t]he courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society."[127]

V. Pragmatic solutions

This article has argued that absent legislative intervention, courts in the rest of Canada should, on public policy grounds, refuse to sanction clauses in private wills or testamentary trusts that seek to interfere with a beneficiary's decisions concerning marriage or intimate relationships. Some of these clauses can simply be voided without impacting the gift itself. However, as discussed in the companion piece to this article, if the gift contains a condition precedent or if the gift is determinable in nature, voiding the condition or the determinable limitation will cause the entire gift to fail, ending in a pyrrhic victory for the beneficiary in question.[128]

Notably, there exist some creative ways to preserve such gifts in accordance with the traditional rules of construction. The doctrine of *malum prohibitum* has been employed by Canadian courts to save gifts of personalty or mixed realty and personalty with contingent marriage clauses that have offended public policy.[129]

Determinable estates are a more complicated matter. Apart from being the bane of courts' (and law students') existence, these interests have long been the subject of critical scrutiny by academics and law

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126 *Ibid*, at 1284.

127 *Salituro*, *supra* note 97 at para 57.

128 Eran Kaplinsky, Malcolm Lavoie, & Jane Thomson, *Ziff's Principles of Property Law*, 8th ed. (Toronto: Thomson Reuters, 2023), at p. 288.

129 *Re Hurshman*, *Mindlin v Hurshman*, 6 DLR (2d) 615, 1956 CarswellBC 235 (SC), at paras 7–12; *McBride*, *supra* note 8, at paras 13–15; *Fairfoull Estate 1973*, *supra* note 8, at para 7. The doctrines *malum prohibitum* and *malum in se* are obscure rules imported from the ecclesiastical courts, 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.

reform commissions.[130] They stand for the proposition that minute variations in grammar, regardless of the testator's or drafter's intention, determine the nature of a legal interest conveyed by trust, deed or will.[131] They cause uncertainty, not only for courts, but for trustees, beneficiaries and remainder persons with respect to the nature of a legal interest. Absent legislative intervention, they are also immune to the rule against perpetuities. As one commentator noted, they fail to fulfill "any worthwhile purpose in the context of modern property law. The associated complexities can only be viewed as remnants of an age when form was a rival to substance."[132]

Form's triumph over substance has both an inane and a sinister side to it. Determinable estates can serve as a tool in the hands of the remainder person to enforce the cruelest or most preposterous conditions, given that the recipient is helpless to challenge the condition, knowing that if she does, her life estate or gift will fail.

Perhaps, in light of this, courts have construed determinable estates as defeasible ones, even when the magic words of "so long as" or "until" appeared in the conveyance, allowing them in turn to void an offending condition rather than the entire gift. The seminal decision of *Sifton v Sifton*,[133] the leading case in Canada for the principle of uncertainty, is a perfect example. In that decision the impugned clause read "the payments to my said daughter shall continue only so long as she shall continue to reside in Canada".[134] The language of this clause, at least according to Canadian authority, indicates a determinable estate. However, the Privy Council believed that because the clause was separate from that which

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130 Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (Toronto: Ontario Law Reform Commission, 1996) at 64, online: <tinyurl.com/28bkrs2t> [perma.cc/WEE7-94CZ]; Peter Devonshire, "Possibilities of Reverter and Rights of Re-entry for Condition Broken: The Modern Context for Determinable and Conditional Interests in Land" (1990) 13:2 Dal LJ 650 at 682 [*Devonshire*].

131 In *Tilbury West Public School Board v Hastie*, 1966 CarswellOnt 76 at paras 7-10, Justice Grant grappled with the language that distinguished determinable and defeasible estates, finding that words such as "while," "during," "as long as," "until" "whilst" "till" "so long as" were "apt for the creation of a determinable fee whereas words which form a separate clause of defeasance, such as "provided that," "on condition that," "but if," or "if it happen that," operate as a condition subsequent." 1966 CarswellOnt 76 at para 7. Citing *Cheshire's Modern Real Property*, 9th ed., Justice Grant noted "if the terminating event is an integral and necessary part of the formula from which the size of the interest is to be ascertained, the result is the creation of a determinable interest; but if the terminating event is external to the limitation, if it is a divided clause from the grant, the interest granted is an interest upon condition." At para 9.

132 *Devonshire*, *supra* note 130 at 682.

133 *Sifton v Sifton*, 1938 CarswellOnt 99 [*Sifton*].

134 *Ibid*, at para 4.

dictated the general terms of payment for the trust (even though the clause appears to have followed immediately after those terms, in the same paragraph),[135] the words of the impugned clause did not "qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event."[136] The condition was voided for reasons of uncertainty and the daughter's gift was preserved accordingly.

Justice Laskin once remarked that,

> … the construction of a limitation upon a fee simple as being a condition subsequent or as giving rise to a possibility of reverter upon a determinable interest is often difficult unless a name is put to the interest in the document creating it, or unless the consequences which flow from the one interest or the other are spelled out.[137]

He found the indicia of magic words from the leading case law in Canada uncompelling, given that it conflicted with earlier U.K. decisions on the subject.[138] Given the use of boilerplate terms in wills and trusts, often based on old precedents or templates generated from drafting software, one wonders whether testators, or those who draft their wills, intend or even appreciate the serious legal ramifications contained within the grammar of a conveyance.[139]

Of course, like marriage clauses, it is open to each province and territory in Canada to pass legislation abolishing determinable interests. However, as with marriage clauses, the legislative priority of governments in this area of reform is likely low.[140] As custodians of the common law, it is equally open to our courts to abolish these common law interests.

On a practical level, if a gift has vested and the beneficiary does not automatically relinquish the gift upon the advent of reverter, absent vigilantism, the person holding the reverter will need to seek the assistance

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135 *Sifton v Sifton*, 1937 CarswellOnt 43 at para 3.

136 *Sifton*, *supra* note 133 at para 29. See also: *Moncton (City) v Canada (Minister of National Defence)*, 1987 CarswellNB 71; *Essex Roman Catholic Separate School Board*, *Re*, 1977 CarswellOnt 429; *McColgan*, *Re*, 1969 CarswellOnt 151.

137 *North Gower (Township) Public School Board v Todd*, 1967 CarswellOnt 218, at para 7.

138 *Ibid*.

139 Indeed, in *Caroline (Village) v Roper*, 1987 CarswellAlta 363 (QB), at para 15, the Alberta Court of Queen's Bench took the rare step of rectifying a conveyance, changing its language to reflect that it was a determinable and not a defeasible estate, based on the intentions of the grantor.

140 The recommendation of the Ontario Law Reform Commission that the law concerning determinable interests be changed is now over 30 years old. *Supra* note 130.

of the courts to recognize the right as enforceable. A court could decline to do so, in similar ways that courts refuse to enforce contracts that contravene public policy.[141]

Notably in at least one of the reported decisions, a widow took matters into her own hands, creatively securing the value of her life estate before it could be taken away in the event of her remarriage, with the support of the court.[142] Of course, if a gift contains a "kill clause" that instructs the revocation of a gift if its condition is found to be contrary to public policy[143] a gift challenged on the basis of public policy could likely not be saved. However, short of this, as Professor Bruce Ziff once said, "[i]t must be acknowledged that the law can do only so much to make the world a better place. Nevertheless, it should do as much as is feasible."[144]

It is hoped that in voiding these clauses or in refusing to give them effect, a message will eventually be sent to those lawyers who advise testators on the legality of these clauses when drafting their wills. In *Hatch v Cooper* Justice Klebuc concluded that the public policy arguments against marriage clauses in wills were something "that an ordinary competent lawyer [in 1983] would not have been aware of …".[145] The goal of this article and its companion is to change that.

VI. Conclusion

The jurisprudence involving marriage clauses in private wills in Canada, with the notable exception of Quebec, has evolved to the following rules. Clauses that forbid a person from ever marrying or marrying someone outside of a certain religion, race etc., will likely be found void for reasons of public policy. However, if the restraint is one of remarriage or provides

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141 *Browder*, *supra* note 21, at 1328; also see *Leech v Leech*, 1865 CarswellOnt 93, 11 Gr 572 (Ch), at para 3.

142 See *Palmer v Palmer*, 1919 CarswellBC 129, [1919] 3 WWR 1028 (SC), where a ranch wife leased the farm left to her as a life estate for 21 years. Her children argued that "as the widow might become divested of any interest in the estate at any time by remarriage she could not execute such a lease without leave of the Court or without the consent of the children." The court disagreed, finding that the widow's life estate interests could not be cut down on mere speculation.

143 In *Royal Trust Corporation of Canada v The University of Western Ontario*, 2016 ONSC 1143, a testator left a gift to several institutions with the following instruction: "In the event that one or more of the foregoing provisions shall be declared to be of a non-charitable nature, or, if the qualifications set forth for receipt of an award referred to above are adjudged by a court of competent jurisdiction to be void for public policy, *then the provision for such gift shall be deleted*": at para 8.

144 *Ziff Unworthy Heir*, *supra* note 76, at 85.

145 *Hatch*, *supra* note 11.

a gift only until marriage or the event of separation or divorce, the clause may be upheld unless it can be proven that the motives of the testator were of a malevolent nature.

This article has argued that all marriage clauses should be given no force or effect by Canadian courts of law. Absent legislative reform, if challenged, testamentary marriage clauses should be voided on grounds of public policy.

As Professor Browder wrote in 1941 "The crying need today is for a re-examination of the problem upon principle, to ascertain just what the public interest in this country demands."[146] This article has argued that the logic behind the law on marriage clauses has lost its legal mooring in contemporary society. Marriage clauses in wills overwhelmingly target women and the law that upholds them is based on antiquated and sexist notions of a woman's right to her personal autonomy. The current approach to these clauses is likely incompatible with the most recent developments in evidence and estate law in Ontario. It is completely out of step with the right to privacy and "the right to make unfettered decisions about one's own life."[147] The sources of law that inform the issue, including the *Charter of Rights and Freedoms*, international law, tort law, contract law, family law and dependants' relief legislation, all point towards the conclusion that marriage clauses, in all of their forms, are contrary to public policy.

The alternative to an evolved public policy on this issue is the unsavoury spectacle of courts enforcing the highly intrusive and offensive whims of the dead upon the living. Policing the intimate relationship decisions of beneficiaries in accordance with testamentary provisions should be on par with other acts in which Canadian courts refuse to engage. These include enforcing conditions that seek to fracture parental/child relationships;[148] induce a beneficiary to commit an illegal or immoral act;[149] or punish a child for their sexual orientation.[150]

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146 *Browder*, *supra* note 21, at 1305.

147 *R v Morgentaler*, [1988] 1 SCR 30 (Wilson J, concurring) at para 10.

148 "[S]o calculated to separate mother and child and break down parental control and filial love and respect, and so coupled with harsh and cruel penalties that [it was] undeniably against public policy and void." *Carples' Estate*, 250 NYS 680, 689 (Sur Ct 1931); see also *Dodd v Piper*, [1946] 2 All ER 503 (Ch).

149 *Mitchel v Reynolds* (1711), 1 Pr Wms 181, 24 ER 347; *Egerton v Earl Brownlow*, (1853) 4 HL Cas 1.

150 *Peden v Peden Estate*, 2006 BCSC 1713; *Patterson v Lauritsen*, 1984 CarswellBC 381, 58 BCLR 182 (SC).

The exercise of public policy as a doctrine of the common law has always been to prevent individual private applications of the common law that contravene a larger purpose of public good. In the end it is a decision particular to the jurisdiction in which it is made. In Canada, a testamentary clause that seeks to interfere with a beneficiary's right to marry, to remarry, to not marry, or simply to share their life with someone —a right that permeates our jurisprudence, our legislation and our values as a society—should not be assisted by our courts of law.