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Revival of Dormant Law: Unconscionable Procurement

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Death can be an uncomfortable topic of conversation, but its inevitability necessitates prudent planning by way of a will. Even the best laid (estate) plans can go awry, especially when complex familial dynamics are exposed and accentuated in estate litigation.

Such was the case in a decision heard by the Court of Appeal for Ontario. In *Gefen Estate v Gefen* 2022 ONCA 174, the court noted that the family dynamics were discordant and characterized by conflict. Elias and Henia Gefen, were married spouses and Holocaust survivors who immigrated to Canada in the early 1950s. Over the course of their marriage, they accumulated a considerable real estate portfolio and amassed a sizable estate. The Gefens had three children: Harvey, Harry, and Yehuda (also known as Eddy). Elias and Henia had executed mirror wills (typical for spouses). On the passing of Elias, his estate passed to Henia, and she was named as the sole executor. Henia sought to convey almost all of the Gefens' real estate portfolio and assets to Harvey, thereby substantially excluding Harry and Eddy from sharing in the familial assets.

Harry and Eddy made three key claims, of which the third pertains to a previously dormant equitable doctrine:

1. In making their mirror wills, Elias and Henia Gefen had effectively made a mutual wills agreement, which prevented either surviving spouse from making changes to their will without the others' consent;
2. A secret trust was created by Elias two months prior to his passing wherein all assets received by Harvey from Henia were to be held in trust for the three brothers;
3. Henia's *inter vivos* transfers to Harvey were impermissible due to the application of the doctrine of unconscionable procurement.

The Court of Appeal for Ontario rejected all of the claims outlined above.

Application of Equitable Doctrines in Ontario

The move towards integration of equitable principles in Canadian law has perhaps been borne out of a recognition that the rigidity and inflexibility of a court of law alone would be insufficient in addressing case-specific challenges. In order to better achieve justice, each individual case needed to be addressed by an arbiter of facts. The very nature of legislative law-making makes it almost impossible to have case-specific judgments. Rather, the dual application of equity and law allows the courts to render decisions that are both legally precise, but also achieve justice.

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An unfortunate by-product of the fusion of the chancery court (English courts of equity) and the court of law is the dormancy of long developed equitable doctrines. A given doctrine that could have been well developed, has simply gone by the wayside. Such a dormancy would not render the doctrine invalid or inapplicable. An example of a dormant equitable doctrine is the doctrine of unconscionable procurement which was historically used by those contesting *inter vivos* transfers made by a testator. In both the lower trial decision and in the appeal in *Gefen Estate*, Harry relied on the doctrine to reverse portions of the *inter vivos* gift made by Henia to her son Harvey.

Unconscionable Procurement in Ontario

The doctrine of unconscionable procurement had long been dormant in Ontario, having last been referred to by the Court of Appeal for Ontario in decisions dating in 1880[2] and 1913[3].

If the doctrine of unconscionable procurement is applied, it has the effect of rendering a transfer of wealth as voidable. For the doctrine to apply, the objector has the onus of demonstrating two elements:

1. A significant benefit; and
2. The active involvement of the person receiving the benefit in the arrangement of the transfer.

If these two elements are set out, there is then a rebuttable presumption that the donor of the gift is not understanding the transaction. The recipient of the benefit must then establish that the donor bestowed the gift in a voluntary and deliberate manner.

In writing for a unanimous bench, Justice Peppall noted that the decision in *Gefen Estate* "in the absence of full legal argument on the existence and desirability of the doctrine of unconscionable procurement, […] this decision should not be taken as approval or rejection of unconscionable procurement being part of the law in Ontario." Justice Peppall noted that because the issue was claimed by Henry in his appeal, the doctrine would be analyzed within the context of the case before the bench. In her decision, Justice Peppall noted that the successful application of the doctrine would serve to benefit the transferor, who in this case, was Henia Gefen. The doctrine of unconscionable procurement could not be applied to retroactively divert the gift equally among the three brothers, which was the desired outcome of Henry and Eddy's appeal.

Although the application of the doctrine of unconscionable procurement was successful in part, it did not benefit the claimants. The key takeaway from the decision is that its use to reverse an *inter vivos* gift in the lower judgment is sufficient to render its effective revival as a part of the law in Ontario. Considering that the doctrine was last applied in a Court of Appeal for Ontario case in 1913 and has since, never been outright rejected or overturned, the doctrine is valid law in Ontario.

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[2] Lavin v. Lavin, 1880 CarswellOnt 52, 27 Gr. 567 (Ont. Ch.), affirmed (1882), 7 O.A.R. 197 (Ont.C.A.)
[3] Kinsella v. Pask 1913 CarswellOnt 781, 12 D.L.R. 522, 28 O.L.R. 393 (Ont. C.A.)

Moving forward, claimants seeking to contest *inter vivos* transfers of significance will be able to seek application of the doctrine.