ATTACKING AND DEFENDING GIFTS

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1. Introduction

Some individuals choose to transfer most or all of their assets to their loved ones during their lifetime, rather than under a will after their death. This estate planning option can have many positive results, as they are able to see their family members enjoy their gift. However, this option is not without its potentially negative consequences. When someone gives or transfers the majority of their wealth during their lifetime, there is little to be distributed under their will, which may be unexpected for beneficiaries (or those expecting to be beneficiaries). While these *inter vivos* transfers or gifts are often completed as part of a carefully executed estate plan, sometimes they are completed for the wrong reasons or for

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unlawful reasons. If grounds exist, *inter vivos* gifts or wealth transfers can be set aside. Sometimes, the individual fails to make a valid gift at all, despite the intention to do so. Either scenario results in those assets becoming part of the estate and dispersed to the estate beneficiaries.

This paper will review the conditions required to create a valid gift, grounds for attacking or setting aside *inter vivos* gifts or wealth transfers, and recent relevant case law.

2. A Valid Gift

Often when there is a transfer of an asset for estate planning purposes the transfer is gratuitous, as when the grantor does not accept any payment (or token payment) from the grantee. If the transfer is gratuitous, it must be asked whether it is a valid gift, and if not, should the gratuitous transfer be set aside as void?

Three elements must be present in order to have a valid gift (or to "perfect" a gift):

(1) An intention to donate (sometimes referred to as donative intent, or *animus donandi*);
(2) Acceptance of the gift by the donee; and
(3) A sufficient act of delivery or transfer.[1]

In *Re Lubberts Estate*, Wakeling J. observed:[2]

> A person may make a gift of real or personal property in which she has a legal or equitable interest by *inter vivos* gift or testamentary disposition. J. MacKenzie, Feeney's Canadian Law of Wills § 1.1 (4th ed. looseleaf issue 49 April 2014) & A. Oosterhoff, Oosterhoff on Wills and Succession 113 (7th ed. 2011). *An inter vivos gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift*. [emphasis added]

The distinction between an *inter vivos* gift and a testamentary disposition becomes important in cases where a gift's validity is at issue, for example if the elements of an *inter vivos* gift have

1. See *McNamee v. McNamee*, 2011 ONCA 533 (Ont. C.A.) at para. 24, additional reasons (2011), 69 E.T.R. (3d) 60 (Ont. C.A.); John Poyser, *Capacity and Undue Influence* (Toronto, Carswell, 2014), at p. 438; and Bruce Ziff, *Principles of Property Law*, 6th ed. (Toronto, Carswell, 2014), at p. 160.
2. *Re Lubberts Estate; Hanson v. Mercredi*, 2014 ABCA 216 (Alta. C.A.), at para. 32.

not been met, and the donee attempts to argue that the gift was intended to be testamentary. In a testamentary disposition, no delivery is required, as the gift is intended to take effect after death.

The British Columbia Court of Appeal reviewed the important distinction between the two types of gifts in *Norman Estate v. Watch Tower Bible and Tract Society of Canada*.[3] Citing *Wonnacott v. Loewen*,[4] the court found that cases where documents are held to be testamentary often include the following factual elements: 1) no consideration passes; 2) the document has no immediate effect; 3) the document is revocable; and 4) the position of the donor and donee does not immediately change. The court also observed that:[5]

> Even where an intended disposition is revocable by the maker or where enjoyment of it is postponed until the death of the maker, *if, at the time of its execution, the document is legally effective to pass some immediate interest in the property, no matter how slight, the transaction will not be classified as testamentary*: James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2000), para. 1.20 [emphasis added]

Inter vivos gifts can include outright gifts of money and real or personal property, the transfer of property into joint ownership (both real property and bank accounts), or the transfer of legal title to the property to a trust.

3. Failure to Perfect the Gift

The three elements required to perfect a gift (intention, acceptance, transfer) are required for a valid juridical act. A gift that is missing any of the three requirements is void, not voidable,[6] and the onus is on the person who received the gift to prove on a balance of probabilities that a gift was intended by

3. 2014 BCCA 277 (B.C. C.A.).
4. (1990), 44 B.C.L.R. (2d) 23 (B.C. C.A.), at pp. 26-27.
5. *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, *supra*, footnote 3, at para. 21.
6. The distinction between the two is significant. When a gift is void, a valid gift never arose. A void transaction is one that is invalid; it has no legal force or effect. In contrast, a "voidable" transaction is one that remains valid and can be relied upon unless its validity is challenged and it is annulled, or declared void.

the transferor at the time of the transfer.[7] This is because equity presumes bargains, not gifts.[8]

4. No Intent to Perform Transfer

Of the three elements to perfect a gift, intention is often disputed. In *Bakken Estate v. Bakken,* the court examined the evidence a judge can consider when deciding a transferor's or donor's intentions:

- A party opposing a claim of gift may adduce evidence of intent that arose sometime after the transfer occurred. The modern rule is that evidence of intention that is not contemporaneous to the time of transfer, or nearly so, should not be excluded.[9]

- For evidence to be included, however, the judge must find it relevant to the intention of the transferor *at the time of the transfer*, and the trial judge must assess its reliability, guarding against self-serving evidence that tends to reflect a change in intention.[10]

5. Lack of Delivery

Occasionally, and in particular with respect to transfers of land, there will be evidence of intent to make the gift, but issues will arise as to whether the transfer of the intended gift was in fact completed.

In the recent case of *Kavanagh v. Lajoie*, the Ontario Court of Appeal defined the requirement of a valid transfer:[11]

> For a gift to be valid and enforceable, it must be perfected. In other words, *the donor must have done everything necessary and in his power to effect the transfer of property*. An incomplete gift is nothing more

7. *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.), at paras. 24 and 43. However, this general rule is subject to exceptions where a party seeks to set aside an instrument on the ground of *non est factu*m or where the presumption of advancement is operative (see *Poyser*, at p. 416).
8. *Dyer v. Dyer*, [1788] EWHC Exch. J8, 2 Cox Eq. Cas. 92, 30 E.R. 42 (Eng. Ch. Div.), at p. 93 (Cox Eq. Cas.); *Pecore v. Pecore*, *supra*, footnote 7, at para. 24.
9. *Bakken Estate v. Bakken*, 2014 BCSC 1540 (B.C. S.C.), at para. 74.
10. *Bakken Estate v. Bakken*, *supra*, footnote 8, at para. 74, citing *Pecore v. Pecore*, *supra*, footnote 6, at para. 59.
11. 2014 ONCA 187 (Ont. C.A.), at para. 13.

> than an intention to gift. The donor is free to change his mind. See *Bergen v. Bergen* [2013] B.C.J. No. 2552. [emphasis added]

Professor Ziff, in his book, *The Principles of Property Law*, states at pp. 164 and 165:[12]

> *The transfer of possession does not need to be contemporaneous with the expression of the intention to donate*. Delivery may follow the formation or expression of this intention, or precede it, and it can be effective even if the donee was initially holding the property in some other capacity (for example, as an employee).
>
> . . . If goods are delivered to some person acting as the agent or trustee of the donee, this too might be acceptable. . . .
>
> *In general, in such situations, the critical elements concern whether or not (i) the donor has retained the means of control; and (ii) all that can be done has been done to divest title in favour of the donee*.

In *Re Bayoff Estate*[13] the parties sought a ruling from the court on whether the deceased had succeeded in delivering a gift of certain contents of his safety deposit box shortly before he passed away.

The deceased gave the key to his safety deposit box to the applicant (also the executor under his will), in the presence of his two lawyers, and said "everything there is yours."[14] He also instructed the applicant to go to his bank and clean out the safety deposit box, and he signed a paper authorizing her to do so. However, the bank needed the deceased to fill out certain forms before the applicant could access the box. The deceased died before he could fill out the forms. The box contained several bonds worth over $70,000; two deeds to land; and coins. The parties agreed that the land that was the subject of the deeds was disposed of via the deceased's will, and the applicant did not seek a ruling with respect to the *inter vivos* transfer of the land.

After concluding that the deceased did not make a *donatio mortis causa* (a gift in contemplation of death), the court went on to determine whether he had made a valid *inter vivos* gift, or whether there was a lack of delivery. The court found that it was unlikely that there was sufficient delivery. Although symbolic delivery will suffice where it is not possible to physically deliver a gift due to its size or bulk, the court

12. Ziff, *supra, footnote 1, at pp. 164-165*.
13. 2000 SKQB 23 (Sask. Q.B.).
14. *Re Bayoff Estate*, *supra*, footnote 13, at para. 1.

found that it doubted "whether simple delivery of a key can or should be regarded as symbolic delivery of a gift contained in a safety deposit box." In so finding the court cited the case of *Watt v. Watt Estate*,[15] in which delivery of a duplicate set of keys to a boat was found not to be sufficient delivery of a gift. In that case there was no relinquishment of control over the boat.[16]

The court also contrasted the situation before it with that of *Beavis v. Adams*,[17] where the Ontario Court dealt with the gift of a GIC by a donor to her son. The mother delivered the transfer certificate, but had completed the transfer form incorrectly. The court upheld the gift, stating:[18]

> To deny the gift due to the uninformed manner in which the transfer form was executed would be to deny the deceased's express wish confirmed by her own act,

However, an unfulfilled gift will be treated as complete if the donee becomes an executor under the will of the donor: "So long as the intent to make the gift continues until death, by administering the estate, the donee receives control over the donor's property and can perfect the gift. That constitutes delivery of the gift.[19]

The court concluded that the gift was therefore perfected when the applicant became the executor of the deceased's estate and was able to take delivery of the contents of the safety deposit box.

In the recent British Columbia case of *Parmar Estate v. Tiwari*,[20] the court considered a deceased's attempt to make an *inter vivos* gift of a piece of property on Comox Road in Nanaimo ("Comox"). The court found that after the deceased discovered that she had terminal cancer, she had decided to make a gift of Comox to her younger sister. She and her younger sister attended at a notary's office, where she signed a transfer form, a "Form A Transfer" to have the land transferred into her sister's name. However, there was no evidence as to what happened to the transfer form in between that date and the date of the deceased's death approximately two weeks later.

15. (1987), [1988] 1 W.W.R. 534 (Man. C.A.).
16. *Re Bayoff Estate*, *supra*, footnote 13, at para. 14.
17. 1995 CarswellOnt 2385, [1995] O.J. No. 383 (Ont. Gen. Div.).
18. *Beavis v. Adams*, *supra*, footnote 17, at para. 13.
19. See *Strong v. Bird* (1874), 80 All E.R. 230.
20. 2016 CarswellBC 39, 2016 BCSC 30 (B.C. S.C.).

The younger sister registered the transfer a further 10 days after the death.

In the circumstances, the court held that the younger sister had failed to prove delivery of the gift: "[T]he mere act if signing the Form A Transfer is not effective to transfer or deliver anything. … At best, merely signing the Form A Transfer does no more than express an intention to make a gift."[21]

The court also considered the younger sister's claim that the deceased had intended to make a related gift of payment of the taxes associated with the property transfer. The court agreed that such an intention existed, but again found the gift failed for lack of delivery. The deceased had written and signed cheques to the younger sister to cover these amounts, but they remained in her purse on the date of her death. There was no delivery, and therefore no gift.

6. Lack of Acceptance (Gift Declined)

Just as the gift must be delivered, the gift must also be accepted by the donee before it is a valid *inter vivos* gift. The bar is not set particularly high for this element, and acceptance is usually presumed.[22] Professor Ziff writes:[23]

> Acceptance of a gift involves an understanding of the transaction and a desire to assume title. This is a requirement that is treated with little rigor: in the ordinary case, acceptance is presumed to exist. The donee may rebut that presumption by disclaiming – rejecting – the interest.

In the Tax Court of Canada decision of *Leclair v. R.*,[24] the court found that a gift failed due to lack of acceptance. In this case, a father transferred property into the name of his 23-year-old daughter without consideration when he became indebted to the Canada Revenue Agency ("CRA"). The daughter was never advised of the transfer and only discovered it when she received a letter from the CRA. Immediately, she consulted a lawyer and transferred the title back to her father. The court observed that there was no doubt that the action, taken by the father in transferring the property to his daughter without consideration,

21. *Parmar Estate v. Tiwari*, *supra*, footnote 20, at para. 172.
22. *Weisbrod v. Weisbrod*, 2013 SKQB 282 (Sask. Q.B.), at para. 23; *Benquesus v. R.*, 2006 TCC 193 (T.C.C. [General Procedure]), at paras. 7-9.
23. Ziff, *supra*, footnote 1, at p. 161.
24. 2011 TCC 323 (T.C.C. [General Procedure]).

would be considered, at first sight, as an outright gift. However, the court concluded that the gift was void *ab initio* as there was no knowledge or acceptance of the gift, and once the gift was known, it was repudiated within an acceptable time by transferring the property back to her father.[25]

7. Common Law Grounds of Attack

(a) Non est factum

Non est factum is the plea that a deed or other formal document is declared void for want of intention. However, *non est factum* places the legal onus on the person attacking the transfer or gift to prove "no intention." This is distinct from the ground of attack discussed above where the onus is on the person alleging that a valid gift was made or a valid wealth transfer occurred.[26] *Non est factum* is a defence developed in the court of common law, not equity:[27]

> [W]here a document was executed as a result of a misrepresentation as to its nature and character, and not merely its contents, the defendant was entitled to raise the plea of *non est factum* on the basis that his mind at the time of the execution of the document did not follow his hand.

Non est factum was proven in the case of *Servello v. Servello*,[28] where the mother thought she was signing power of attorney documents, when really she was signing a transfer of the title to her property into her son's name. The court found that *non est factum* applied and the transfer of an interest in the property to her son was void:[29]

> Whatever it was that [the mother] thought she was signing at the time, I am confident that she did not believe that she was signing a document that transferred her entire property, including the home property, to Antonio. She had made it clear throughout her life that she intended to treat her children equally upon death, and there was no reason for her to transfer the entire home property to one of her eight children.

25. *Leclair v. R.*, *supra*, footnote 24, at para. 19.
26. Poyser, *supra*, footnote 1, at p. 455.
27. *Marvco Color Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577, [1982] 2 S.C.R. 774 (S.C.C.).
28. 2014 ONSC 5035 (Ont. S.C.J.), affirmed 2015 ONCA 434 (Ont. C.A.).
29. *Servello v. Servello*, *supra*, footnote 28, at para. 44.

Another recent case where *non est factum* was pleaded was *Belchevski v. Dziemianko; Lapajkoski Estate v. Dziemianko*:[30]

> *Non est factum* is a difficult plea to make out; it requires that the party signing a document must have a fundamental [mis]understanding as to the nature or effect of the document and must not be guilty of carelessness in signing the document without being aware of its contents: see *Marvco Color Research Ld. v. Harris*, [1982] 2 S.C.R. 774; *Bhuvanendra v. Sivapathasundram* 2014 ONSC 278 at para. 49; and *Roth Estate v. Juscheka*, 2013 ONSC 4437 at para. 143.

However, the court found that *non est factum* had no application to the facts of this case. The parents understood the true nature and character of the transaction (they transferred title in their home to joint tenancy with their daughter) at the time of transacting.[31] Also there was sufficient evidence to show that the parents intended to give the home to their daughter as a "complete and unconditional gift." The lawyer who executed the transfer spoke Macedonian (the parents' language), was a senior member of the Ontario bar, had completed thousands of real estate transactions, and always made sure his clients understood what he was doing and the documents they were executing. During his meeting with the parents, he took contemporaneous notes that confirmed a gift during their lifetime and clearly explained what joint tenancy meant.[32]

8. Lack of Capacity

If the donor lacked the requisite capacity to make the gratuitous transfer, then the gift is open to attack. If the transferor lacked capacity to give, then he/she could not properly form the intention to give and the gift is not perfected. A gift or other *inter vivos* wealth transfer is void, not voidable, for want of capacity.[33] The legal onus is on the person alleging it was a gift to prove that the person who gave them the gift had the capacity to do so. While the general presumption of capacity exists, it can easily be rebutted by evidence or circumstances that put capacity in doubt.[34]

In England and Canada, the widely accepted seminal case on determining capacity to give is *Ball v. Mannin,*[35] which found

30. 2014 ONSC 6353 (Ont. S.C.J.), at para. 18.
31. *Belchevski v. Dziemianko*, *supra*, footnote 30, at para. 20.
32. *Belchevski v. Dziemianko*, *supra*, footnote 30, at para. 21.
33. Poyser, *supra*, footnote 1, at p. 356.
34. Poyser, *supra*, footnote 1, at p. 356.

that a person had capacity if the person was "capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him."[36]

This standard to determine requisite capacity to give has been refined over the years through various cases and is now divided into two requirements. In order to be capable of making a gift, a donor has to have:

(a) the ability to understand the nature of the gift; and

(b) the ability to understand the specific effect of the gift in the circumstances.[37]

These requirements may also be applied when the title in a house is transferred to joint tenancy, with the transferor retaining dominant possession with intent to pass to the donee upon death.[38]

When determining the requisite capacity to give, one must also take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the standards or criteria for *testamentary* capacity arguably may apply.[39] This means that the donor has to meet the same standard or criteria as a testator (as evolved from *Banks v. Goodfellow*)[40] and must be able to:[41]

(1) Understand the nature of the act and its effects;

(2) Understand the extent of the property of which he or she is disposing;

(3) Be able to comprehend and appreciate the claims to which he or she sought to give effect; and,

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35. (1829), 1 Dow & Clark 380, 6 E.R. 568 (Eng. H.L.).
36. *Ball v. Mannin*, *supra*, footnote 35.
37. *Royal Trust Co. v. Diamant*, [1953] 3 D.L.R. 102 (B.C. S.C.) at p. 111; and *Bunio v. Alberta (Public Trustee)*, 2005 CarswellAlta 262, [2005] A.J. No. 218 (Alta. Q.B.) at paras. 4 and 6 (additional reasons (2005), 15 E.T.R. (3d) 89 (Alta. Q.B.)).
38. Poyser, *supra*, footnote 1, at p. 357.
39. *Re Beaney*, [1978] 2 All E.R. 595 (Eng. Ch. Div.); *Mathieu v. St Michel*, [1956] S.C.R. 477 (S.C.C.), at p. 487. See also the case of *Verwoord v. Goss*, 2014 BCSC 2122 (B.C. S.C.), where the court held that the "requisite capacity to make *inter vivos* gifts is the same as testamentary capacity" relying on *Re Rogers*, 1963 CarswellBC 51, [1963] B.C.J. No. 133 (B.C. C.A.), at para. 204.
40. (1870), 39 L.J.Q.B. 237, L.R. 5 Q.B. 549 (Eng. Q.B.).
41. Poyser, *supra*, footnote 1, at p. 44.

(4) Be of sound mind and not suffering from any "insane delusion" that would influence the testator's will in disposing of his or her property and bring about a disposal of it which, if the mind had been sound, would not have been made.

This means that a higher threshold could apply if a person is giving the majority of his or her assets and a lower threshold if there is a smaller size of gift.[42] For example, in *Re Beaney*,[43] an elderly woman made a gift of her house, her largest asset, later in life, and effectively pre-empted the operation of her will. The court determined that the criteria to be applied to determine capacity were equivalent to those under *Banks v. Goodfellow*, in other words, the criteria for testamentary capacity.

In the recent case of *Foley v. McIntyre*,[44] the court was asked to determine (among other things) whether a father had capacity to give monies from certain investments to his daughter prior to his death. After the father's death, his son contested the *inter vivos* transfers. At the time of the transfers, the father was living in a nursing home, had suffered from multiple ischemic attacks, suffered transient delirium, needed assistance with daily living and was prone to falls.[45] However, no medical diagnosis was ever made of dementia nor were there any mental or cognitive diagnoses or evidence in his medical records of any concern of a dementing illness. Also, the father (not a substitute decision maker) consented to the advance directive of a do-not-resuscitate order.[46] The court found that the father was capable to give as he "knew his donee daughter, was well aware of his investment portfolio, and himself initiated and executed an intention to gift, thus demonstrating his capacity to do so."[47]

The Court of Appeal recently dismissed an appeal in this matter,[48] noting that the trial judge's finding that the father did not lack capacity was a finding of fact which was entitled to deference, absent an error of law or principle or unreasonableness.[49]

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42. Poyser, *supra*, footnote 1, at p. 356. See also *Foley v. McIntyre*, 2014 ONSC 194 (Ont. S.C.J.) at para. 143, affirmed 2015 ONCA 382 (Ont. C.A.), additional reasons (2015), 8 E.T.R. (4th) 189 (Ont. C.A.).
43. *Re Beaney*, *supra*, footnote 39.
44. *Foley v. McIntyre* (Ont. S.C.J.), *supra*, footnote 42.
45. *Foley v. McIntyre* (Ont. S.C.J.), *supra*, footnote 42, at paras. 92-93.
46. *Foley v. McIntyre* (Ont. S.C.J.), *supra*, footnote 42, at para. 130.
47. *Foley v. McIntyre* (Ont. S.C.J.), *supra*, footnote 42, at para. 178.
48. *Foley v. McIntyre* (Ont. C.A.), *supra*, footnote 42.

In the recent British Columbia case of *Parmar Estate v. Tiwari*,[50] the court considered the question whether *inter vivos* or testamentary capacity criteria should apply to the deceased's pre-death gift of a property ("Comox") to her younger sister. The party challenging the gift argued that because the gift was made less than two weeks before death, the relevant test for capacity should be that applied to testamentary dispositions, rather than to *inter vivos* gifts. The argument was that the situation was analogous to a transfer into joint names, with a right of survivorship, which gift only takes effect on death, and therefore is akin to a testamentary disposition.

The court disagreed that the test for testamentary capacity was the appropriate test in the circumstances before it. There was no evidence that the transfer was to take effect only on death. Further, the type of transfer at issue was found to be "neither complex nor unusual" for the deceased.[51] Only a few months earlier she had given two other properties:[52]

> Comox was not her only asset, and certainly not her most valuable asset. As a result, the content of what [the deceased] needed to understand was both less extensive and less complicated than that to which she would have had to address her mind if she had been disposing of all or most of her estate. In that light, in my opinion, the capacity required was that required to make an *inter vivos* gift.

9. Common Law Coercion / Duress

If a donor has been coerced into giving a gift, or has made a gift under duress, the common law defence of duress or coercion may be available to render that gift void.[53] Outright coercion occurs rarely and is hard to prove.[54] While common law coercion is distinct from equitable undue influence (discussed below), common law coercion/duress can be alleged concurrently with undue influence.[55] At common law, the defence of duress was only available where there was actual or threatened violence

49. *Foley v. McIntyre* (Ont. C.A.), *supra*, footnote 42, at para. 31.
50. *Parmar Estate v. Tiwari*, *supra*, footnote 20.
51. *Parmar Estate v. Tiwari*, *supra*, footnote 20, at para. 151.
52. *Parmar Estate v. Tiwari*, *supra*, footnote 20, at para. 152.
53. Poyser, *supra*, footnote 1, at p. 490.
54. Poyser, *supra*, footnote 1, at p. 312.
55. Poyser, *supra*, footnote 1, at p. 490, citing *Royal Bank of Scotland plc v. Etridge (No. 2)* (2001), [2002] 2 A.C. 773, [2001] UKHL 44 (Eng. H.L.), at para. 8.

or imprisonment.[56] Equity extended it to include economic duress.[57] In *Lei v. Crawford*,[58] in the context of contract law, the Ontario Superior Court of Justice noted that:[59]

> Duress involves coercion of the consent or free will of the party entering into a contract. To establish duress, it is not enough to show that a contracting party took advantage of a superior bargaining position; for duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner. See: *Brooks v. Alker* (1975), 9 O.R. (2d) 409 (H.C.J.); *Underwood v. Cox* (1912), 26 O.L.R. 303 (C.A.); *Burris v. Rhind* (1899), 29 S.C.R. 498; *Piper v. Harris Mfg. Co.* (1888), 15 O.A.R. 642.

10. Common Law Fraud

Justice Perrell, in the recent case of *Holley v. Northern Trust Co., Canada*,[60] reviewed the elements for common law fraud:

> The constituent elements of a common law fraud, deceit, or fraudulent misrepresentation claim, as they are variously called, are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages: *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 87; *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Q.B.), aff'd (1992), 1992 ABCA 211, 3 Alta. L.R. (3d) 124 (C.A.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

Arguably, based on the elements above, if someone was induced into making an *inter vivos* gift based on a knowingly false statement, and the donor suffered damages, the gift could be set aside on the ground of common law fraud.

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56. *Marr v. Clark* (1977), 3 B.C.L.R. 154 (B.C. S.C.), at para. 15.
57. *Marr v. Clark*, *supra*, footnote 56.
58. *Lei v. Crawford*, 2011 ONSC 349 (Ont. S.C.J.), additional reasons 2011 CarswellOnt 1307 (Ont. S.C.J.).
59. *Lei v. Crawford*, *supra*, footnote 58, at para. 7.
60. 2014 ONSC 889 (Ont. S.C.J.), additional reasons (2014), 12 C.B.R. (6th) 206 (Ont. S.C.J.), affirmed 2014 ONCA 719 (Ont. C.A.), additional reasons (2014), 20 C.B.R. (6th) 113 (Ont. C.A.).

11. Equitable Grounds of Attack

(a) Undue Influence

Undue influence is also a common ground of attack on an *inter vivos* gift or wealth transfer. The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions where an individual exerts such influence on the grantor or donor that it cannot be said that his/her decisions are wholly independent. Gifts found to have been made under undue influence are voidable, not void.[61] The onus to prove undue influence is on the party that alleges it and the standard is the normal civil standard: balance of probabilities. The equitable defences of *laches* and acquiescence are available when a gift is attacked on the grounds of *inter vivos* undue influence.[62]

Testamentary undue influence is different than *inter vivos* undue influence.[63] Specifically, "conduct necessary to set aside a gift or other *inter vivos* wealth transfer on the grounds of actual undue influence is broader and more amorphous than the narrow band of conduct that is necessary to set aside a will or other testamentary wealth transfer."[64] For testamentary undue influence to exist, the conduct must amount to coercion, and there is no presumption of undue influence.[65] However, courts have imported the principles of testamentary undue influence where the person making the gift or wealth transfer is on his or her deathbed.[66]

Undue influence in the *inter vivos* gift context is usually divided into two classes: (1) direct or actual undue influence; and (2) presumed undue influence or undue influence by relationship.[67]

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61. *Longmuir v. Holland*, 2000 BCCA 538 (B.C. C.A.).
62. Poyser, *supra*, footnote 1, at p.529.
63. Poyser, *supra*, footnote 1, at p.529.
64. Poyser, *supra*, footnote 1, at p.489.
65. Poyser, *supra*, footnote 1, at pp. 306, 325, and 529.
66. Poyser, *supra*, footnote 1, at p. 529; *Keljanovic Estate v. Sanseverino*, 2000 CarswellOnt 1312 (Ont. C.A.), leave to appeal refused (2000), 143 O.A.C. 398 (note) (S.C.C.).
67. *Allcard v. Skinner* (1887), 36 Ch. D. 145 (Eng. C.A.), at p. 171. Poyser, *supra*, footnote 1, at p. 473. Note also that there is a distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity, see Poyser, at p. 478.

12. Actual Undue Influence

Actual undue influence arises where intent to gift is secured by unacceptable means. No relationship is necessary between the person making the gift and the person receiving it to attack a gift on the grounds of actual undue influence.

Actual undue influence, in the context of *inter vivos* gifts or transfers, has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating."[68] Actual undue influence occurs when someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[69] The conduct amounting to actual undue influence however, often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence.[70]

13. Undue Influence by Relationship

This second class of undue influence does not depend on proof of reprehensible conduct. In this class, equity will intervene as a matter of public policy to prevent abuse of the influence that is inherent in certain relationships.[71]

Relationships that qualify as "special relationships" are often determined by a "smell test",[72] which asks, does the "potential for domination inhere in the relationship itself"?[73] Relationships where presumed undue influence has been found include solicitor and client, parent and child, guardian and ward, "as well as other relationships of dependency which defy easy categorization."[74] A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable because of age, illness, cognitive decline or heavy reliance on an adult child.[75]

68. *Allcard v. Skinner*, *supra*, footnote 67, at p. 181.
69. *Allcard v. Skinner*, *supra*, footnote 67; *Bradley v. Crittenden*, 1932 CarswellAlta 75 (S.C.C.), at para. 6.
70. Poyser, *supra*, footnote 1, at p. 492.
71. *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 (B.C. C.A.), at para. 14.
72. Poyser, *supra*, footnote 1, at p. 499.
73. *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at para. 42.
74. *Goodman Estate v. Geffen*, *supra*, footnote 73, at para. 42.
75. *Stewart v. McLean*, 2010 BCSC 64 (B.C. S.C.); *Modonese v. Delac Estate*,

Once such a relationship is established, the onus moves to the person alleging a valid gift to rebut it. The donor must be shown to have entered into the transaction as a result of his or her own "full, free and informed thought."[76] It is often difficult to defend a gift made in the context of a special relationship. The gift must be from a "spontaneous", or unprompted, act of a donor able to exercise free and independent will.[77] In order to be successful in attacking a gift based on presumed undue influence, the transaction or gift must be a substantial one, not a gift of a trifle or small amount.[78]

The presumption of undue influence can be rebutted by showing:[79]

(a) no actual influence was used in the particular transaction or there was no opportunity to influence the donor;[80]

(b) the donor had independent legal advice or the opportunity to obtain independent legal advice;[81]

(c) the donor had the ability to resist any such influence;[82]

(d) the donor knew and appreciated what she was doing;[83] or

(e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.[84]

In *Zeligs Estate v. Janes*,[85] the court found that there was a presumption of undue influence between an adult daughter and her mother in the context of the transfer of the mother's

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2011 BCSC 82 (B.C. S.C.) at para. 102, affirmed (2011), 73 E.T.R. (3d) 159 (B.C. C.A.), additional reasons (2012), 73 E.T.R. (3d) 163 (B.C. C.A.), additional reasons (2012), 73 E.T.R. (3d) 165 (B.C. C.A.).

76. *Goodman Estate v. Geffen*, *supra*, footnote 73, at para. 45.
77. See *McKay v. Clow*, [1941] S.C.R. 643 (S.C.C.), at p. 664.
78. *McKay v. Clow*, *supra*, footnote 77. See also Poyser, *supra*, footnote 1, at p. 509. What amount will be considered "large or immoderate" will depend on the contact, including such factors as the overall wealth of the donor, the nature of the relationship between donor and done, and whether there has been a history of similar gifts.
79. From *Zeligs Estate v. Janes*, 2015 BCSC 7 (B.C. S.C.), citing Punnet J. in *Stewart v. McLean*, *supra*, footnote 75, at para. 97.
80. *Goodman Estate v. Geffen*, *supra*, footnote 73, at p. 379; *Longmuir v. Holland*, *supra*, footnote 61, at para. 121.
81. *Goodman Estate v. Geffen*, *supra*, footnote 73, at p. 370; *Longmuir v. Holland*, *supra*, footnote 61, at para. 121.
82. *Calbick v. Wolgram Estate*, 2009 BCSC 1222 (B.C. S.C.), at para. 64.
83. *Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.), at para. 29.
84. *Longmuir v. Holland*, *supra*, footnote 61, at para. 76.
85. *Zeligs Estate v. Janes*, *supra*, footnote 79.

valuable property and house into joint tenancy with her daughter. The mother was 94, the daughter was living with the mother at the time, the transfer was gratuitous, and the daughter was the mother's attorney under a Power of Attorney.[86] The daughter however, rebutted this presumption by showing that there was no evidence of actual influence, the mother obtained independent legal advice, and, despite her physical frailties, the mother was "lucid", "capable of doing things like getting her driver's licence while in her 90s", "was assertive about her interests" and had the ability to resist undue influence.[87]

Presumed undue influence was found (but not rebutted) in the recent case of *Servello v. Servello*,[88] described above, in the context of an *inter vivos* transfer of a mother's property to her son. In this case, shortly after the death of his father, a son attended a registry office with his mother, and with the assistance of a conveyancer, the title to the mother's house was transferred to himself as sole owner. The mother successfully made a defence of *non est factum* at trial.[89] However, the court also found that the mother's signature on the document was obtained as a result of undue influence. At the time of the transfer, the son was living in his mother's house, the mother was recently widowed, English was not her first language and the family had always used the same lawyer for all of their legal dealings. The son chose however to take his mother directly to the registrar's office, did not use the family lawyer, and used a conveyancer who was a stranger to the mother and who did not speak Italian. The son, who received the benefit of the transaction, was by her side throughout.[90] The court held that the transfer of the property into joint tenancy

86. *Zeligs Estate v. Janes*, *supra*, footnote 79, at para. 114.
87. *Zeligs Estate v. Janes*, *supra*, footnote 79, at para. 157. This is an interesting case as, while the court found that the daughter rebutted the presumptions of resulting trust and undue influence, the court found that the daughter severed the joint tenancy while the mother was still alive when she used the sale proceeds of the property to pay off mortgages on the property (used for her benefit) and transferred the balance into an investment for the sole benefit of her and her husband. This transfer destroyed the unity of possession. The court found that "the right of survivorship in favour of [the daughter] that would have followed on the death of Dorothy ended with the severance of the joint tenancy" and the sale proceeds were ordered to be distributed under the mother's will. At paras. 191-192.
88. *Servello v. Servello*, *supra*, footnote 28.
89. *Servello v. Servello* (Ont. S.C.J.), *supra*, footnote 28, at paras. 1-4.
90. *Servello v. Servello* (Ont. S.C.J.), *supra*, footnote 28, at para. 47.

should be set aside and that the mother should be restored as sole owner. The court said:[91]

> The law is clear that in the case of gifts or other transactions *inter vivos*, the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence.
>
> This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina did not receive independent legal advice, and accordingly the two deeds which gave Antonio an interest in the land should be set aside on this basis as well.

The Court of Appeal dismissed the son's appeal, noting that the trial judge's finding of undue influence was "supported by the evidence."[92] The son "lived in the [mother's] home; the [mother] was recently widowed; her first language was Italian and she had limited comprehension and reading ability in English; and she did not receive independent legal advice."[93]

In *Lorintt v. Boda*,[94] however, the court did not find that the presumption of undue influence existed in a relationship between a father and son in the context of a transfer of the father's property into joint tenancy with his son. The trial judge found that "the relationship between the parties was not one which gave rise to the potential domination of one party by another."[95] At the time of the transfer the father and son did not live together, their relationship was amicable, but they only saw each other periodically because of the distance between their respective homes. There also was no evidence that the father was dependent upon the son at the time of the transfer.[96]

Also in *Kavanagh v. Lajoie*,[97] the court concluded that there was no presumed undue influence in the context of an *inter vivos* transfer of property from a father to a daughter. In its assessment, the court asked the following questions:

(1) Did the daughter's relationship with the father contain tools or capacity capable of exerting undue influence on him?

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91. *Servello v. Servello* (Ont. S.C.J.), *supra*, footnote 28, paras. 48-49.
92. *Servello v. Servello* (Ont. S.C.J.), *supra*, footnote 28, at para. 3.
93. *Servello v. Servello* (Ont. S.C.J.), *supra*, footnote 28, at para. 3.
94. *Lorintt v. Boda; Boda Estate v. Boda*, 2014 BCCA 354 (B.C. C.A.), leave to appeal refused 2015 CarswellBC 564 (S.C.C.).
95. *Lorintt v. Boda*, *supra*, footnote 94, at para. 91.
96. *Lorintt v. Boda*, *supra*, footnote 94, at para. 92.
97. 2013 ONSC 7 (Ont. S.C.J.), affirmed 2014 ONCA 187 (Ont. C.A.).

(2) Did a potential exist for domination or persuasive influence by the daughter over her father?

(3) Did the daughter within that relationship have a persuasive or dominating influence over the will of her father?

(4) If the answer to the above questions is affirmative, had the daughter rebutted the resulting presumption?[98]

The court answered the questions in the negative, based on the evidence presented. The court concluded that the daughter "did not have a persuasive or dominating influence over the will of [her father] as to her receipt of an interest in [the property]. She had influence with her father and attempted on occasion to influence him. She did not however dominate or control his will. As such the presumption of undue influence has not been established."[99] The court also determined that if it were incorrect and there was a presumption of undue influence on the facts, the presumption had been rebutted. This decision was upheld on appeal.

Undue influence was alleged, but not found, in a transfer of a 50% interest in a property as a wedding gift in *Abdollahpour v. Banifatemi*.[100] This interesting case deals with the gift by a groom's family of a 50% interest in a house to the bride for her wedding. After a year-and-a-half, the parties separated. The husband and his parents sought the return of the 50% interest in the house (along with repayment of wedding expenses and the return of other wedding gifts). Among other arguments, the husband and his parents argued that the wife acted fraudulently by tricking the husband's parents into giving her a 50% interest in the property and that she unduly influenced them to sign the deed of gift.

The court disagreed. The parents were sophisticated business people; the lawyer who was retained was the parents' own lawyer; the lawyer was qualified; the parents accepted the lawyer's advice; and the lawyer acted upon their instructions; the deed stated that it was a "Deed of Gift"; and the document was not lengthy and was clearly written. The acknowledgement and direction signed at the lawyer's office stated: "This transfer is a

98. *Kavanagh v. Lajoie*, *supra*, footnote 97, at para. 133.

99. *Kavanagh v. Lajoie*, *supra*, footnote 97, at para. 149.

100. 2014 ONSC 7273 (Ont. S.C.J.), additional reasons 2015 CarswellOnt 171 (Ont. S.C.J.), additional reasons 2015 CarswellOnt 1897 (Ont. S.C.J.), affirmed 2015 ONCA 834 (Ont. C.A.).

gift to Shakiba Sadat Banifatemi, daughter-in-law."[101] The court found:[102]

> [T]here is no evidence of undue pressure or a coercion of the will of the applicants. [The parents] retained lawyers to transfer the gift and signed a Deed of Gift indicating that the gift was irrevocable, indicating that they release any claims whatsoever on the said lands to the extent of a 50% interest to Shakiba, and understood what they were doing by signing these documents.

On the appeal, the parents attempted to argue that the gift, though not a product of undue influence, was intended to be conditional on the couple remaining married. The Court of Appeal dismissed the appeal, pointed to the Deed of Gift, and the clear evidence of the negotiations leading up to it, in which the parties rejected the initial proposal of the property being held in trust, and opted instead for an irrevocable wedding gift.[103]

Finally, the recent case of *Elder Estate v. Bradshaw*,[104] shows that a relationship between an older adult and a younger caregiver does not automatically give rise to a presumption of undue influence. The older adult had made an *inter vivos* gift of $120,000 to his caregiver. After his death, his nephews sought to have the gift set aside arguing that the caregiver/older adult relationship was a fiduciary relationship and was sufficient to give rise to a presumption of undue influence. Justice Meiklem disagreed:

> The generic label 'caregiver' does not necessarily denote a fiduciary relationship or a potential for domination … The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship.[105]

> … It is undoubtedly true that Mr. Elder was becoming more dependent upon Ms. O'Brien as time passed and it is reasonable to infer that she became a more significant part of his life after the death of his sister Georgina … but taking into account their individual natures, and the development of the relationship, I do not find that the potential for domination of his will inhered in that relationship. …[106]

101. *Abdollahpour v. Banifatemi* (Ont. S.C.J.), *supra*, footnote 100, at para. 21.
102. *Abdollahpour v. Banifatemi* (Ont. S.C.J.), *supra*, footnote 100, at para. 92.
103. *Abdollahpour v. Banifatemi* (Ont. C.A.), *supra*, footnote 100, at paras. 17-25.
104. 2015 BCSC 1266 (B.C. S.C.), additional reasons (2015), 12 E.T.R. (4th) 109 (B.C. S.C.).
105. *Elder Estate v. Bradshaw*, *supra*, footnote 104, at para.108.
106. *Elder Estate v. Bradshaw*, *supra*, footnote 104, at para. 111.

> The [nephews'] theory of Ms. O'Brien forming and carrying out a step-by-step plan is quite simply unsupported by the evidence . . . It is a theory which is based solely on the [nephews'] original suspicions arising from the overview of the circumstance of a younger housekeeper/caregiver benefitting from the will of an aged man.[107]

Justice Meiklem also concluded that had he found the relationship sufficient to raise a presumption of undue influence, he would have found the presumption to have been rebutted. There was a preponderance of evidence from other professionals, including a doctor, home care workers, the drafting lawyer, a financial advisor, and real estate agent, all of whom had looked for evidence of undue influence, to confirm that no undue influence existed.[108]

14. Unconscionable Bargain

Equity protects the vulnerable from unconscionable bargain. A gift or other voluntary wealth transfer is *prima facie* unconscionable where:

(1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests; and

(2) The transaction effects a substantial unfairness or disadvantage on the maker.[109]

There will be a presumption of an unconscionable transaction if these two elements exist. However, the court will look at all of the evidence to determine whether the transaction is fair, just and reasonable.[110]

The onus is on the person attacking the gift or other wealth transfer to prove that the transaction was unconscionable. If the transfer or gift is found to be unconscionable, the transaction is voidable and can be set aside.[111]

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107. *Elder Estate v. Bradshaw*, *supra*, footnote 104, at para. 95.
108. *Elder Estate v. Bradshaw*, *supra*, footnote 104, at para. 98.
109. Poyser, *supra*, footnote 1, at p. 559; *Morrison v. Coast Finance Ltd.*, 1965 CarswellBC 140 (B.C. C.A.).
110. Poyser, *supra*, footnote 1, at p. 559.
111. *Ibid.*

15. Unconscionable Procurement

To prove unconscionable procurement, two elements must be present:

(a) a significant benefit obtained by one person from another; and

(b) an active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.[112]

The onus is on the person attacking the wealth transfer or gift. The leading case in Canada is *Kinsella v. Pask*,[113] in which an elderly woman was left impoverished after she wrote personal cheques of significant amounts to a lawyer who cashed them and paid the proceeds to the elderly woman's daughter. The mother did not understand that she was making gifts to the daughter, but thought she was entrusting money to the lawyer for safekeeping. The daughter was the procurer.

According to John Poyser, however, the doctrine of unconscionable procurement is largely dormant and has been since the late 1800s and early 1900s.[114]

16. Statutory Attacks

(a) Fraudulent Conveyances

An estate plan designed to deplete one's assets and therefore one's estate so as to avoid providing for a dependant spouse, child, creditor or other person may amount to a fraudulent preference or conveyance. Remedies in that event may include the use of the *Fraudulent Conveyances Act*[115] (the "FCA"), and the *Succession Law Reform Act*[116] (the "SLRA") to claw back into the estate those assets that the testator/debtor may have given or transferred away. Fairly recent court decisions suggest that certain transfers of real or personal property may be set aside as void under s. 2 of the FCA, which provides as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with

112. Poyser, *supra*, footnote 1, at p. 570.
113. 1913 CarswellOnt 781 (Ont. C.A.).
114. Poyser, *supra*, footnote 1, at p. 599.
115. R.S.O. 1990, c. F.29.
116. R.S.O. 1990, c. S.26.

> intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Improvident transfers of property may attract the remedies set out in the FCA, in particular s. 2, in circumstances where estate planning ousts the statutory rights of certain beneficiaries and/or dependants, protected under the provisions of the *Family Law Act*[117] (the "FLA") and the SLRA. The relevant sections of this legislation are discussed in more detail below.

(i) The Family Law Act

The FLA treats marriage as a form of partnership, which permits married spouses "to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership."[118]

In circumstances where a spouse depletes his or her net family property, s. 5(3) of the FLA provides a spouse with the ability to seek an equalization payment in the absence of marital breakdown.

Section 6(1) of the FLA permits the surviving spouse on death to make application against the deceased's estate for an equalization of net family property:

> 6.(1). When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

Essentially, the FLA election provides a surviving spouse with the right to elect in favour of an equalization of the couples' respective net family properties ("NFP") and to forego entitlement (if any) under the deceased's will and/or pursuant to the provisions of the SLRA respecting intestate succession. While a surviving spouse can pursue equalization after the death of his or her spouse, the relief prescribed under s. 5(3) of the FLA can only be pursued during the lifetime of the spouse.

(ii) The Succession Law Reform Act

The SLRA provides for the support of "dependants", in situations where a deceased, prior to death, was providing support to prescribed family members, or was under a legal obligation to do so immediately before death, but failed to make

117. R.S.O. 1990, c. F.3.
118. FLA preamble.

adequate provision for the proper support of a dependent spouse, child and/or other dependant(s) on death.

Unlike s. 5(3) of the FLA, the SLRA does not specifically provide dependants with a legal remedy in circumstances where the testator has recklessly depleted assets and hence the estate during his lifetime. However, s. 72 of the SLRA provides that the value of certain transactions effected by the deceased before death shall be clawed back in and deemed to form part of the estate for the purpose of satisfying any orders made by the court directing payments to a dependant.[119]

(iii) The Fraudulent Conveyances Act

If a court determines that a transfer was effected with the "intent to defeat, hinder, delay or defraud creditors or others ..."[120] it will declare the transfer void as against such creditors. The conveyance can, however, be saved if the transferee provides consideration for the transfer, and if it can be shown that the transferee was acting in good faith and had no notice of the transferor's intent to defeat the rightful claims of creditors.[121]

The words "creditors and others" have been judicially considered by the courts. The court has held the words to be interpreted as including not only actual "judgment creditors", "but also persons who have actions pending against the transferor in which it is clear that they are certain to recover damages."[122]

The application of the FCA when used to recapture *inter vivos* dispositions for the benefit of a spouse and/or dependants claiming under the FLA and the SLRA, respectively, has been regarded as somewhat speculative.[123] However, more recently, our courts have indicated a willingness to apply the FCA to set aside certain transactions where the evidence is clear that the intent of the transferor/testator was to prevent legitimate claimants from having access to such assets.[124]

Where it can be shown that the deceased was aware that the effect of the transfers might be to deny or frustrate the claims of

119. Section 63(2) and s. 72, SLRA.
120. FCA, s. 2.
121. FCA, ss. 3 and 4.
122. *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 (Ont. C.A.), at p. 211.
123. Berend Hovius and T.G. Youdan, *The Law of Family Property* (Toronto, Carswell, 1991).
124. See *Stone v. Stone* (2001), 203 D.L.R. (4th) 257 (Ont. C.A.).

"creditors or others" who would expect to benefit from the deceased's estate, the application of the *FCA* should be considered as a possible remedy.

Much, of course, will depend on the deceased's rationale for effecting the transfer(s).

17. Statute of Frauds

The *Statute of Frauds*[125] provides that certain contracts must be in writing. One such type of contract is for the sale or transfer of land. In *Kavanaugh v. LaJoie* (discussed above), a son argued that his father made him an *inter vivos* gift of certain lands because the father had promised the land to him and put his name on title as a joint tenant with him. The father however had subsequently severed the joint tenancy. The court held that there was no gift as the three elements (intention, acceptance and delivery) were not made out. The court also found that such a gift (an oral promise of a gift of land) would "be contrary to the *Statute of Frauds*."[126]

In *Abdollahpour v. Banifatemi*,[127] also discussed above, the groom's parents attempted in part to argue that the gift of land to their daughter-in-law, which was documented in a Deed of Gift as an unconditional wedding gift, was nevertheless conditional on the parties remaining married. The parents argued that there had been a collateral verbal agreement that the daughter-in-law would transfer the property back if the marriage fell apart. The court, upheld on appeal, found that such a promise or verbal representation, even if it had been made, "would be ineffective in any event" because of the provisions of the *Statute of Frauds* that require such agreements to be in writing when pertaining to an interest in land.[128]

18. Conclusion

In the coming years there will be a significant transfer of wealth between the "saving generation" and the baby boomers. Some may choose to transfer that wealth while they are still alive and have a right to do so. However, some may not have the requisite decisional capacity to give their savings away or

125. R.S.O. 1990, c. S.19.
126. *Kavanagh v. Lajoie*, *supra*, footnote 97, at paras. 12-15.
127. *Abdollahpour v. Banifatemi*, *supra*, footnote 100.
128. *Abdollahpour v. Banifatemi* (Ont. C.A.), *supra*, footnote 100, at para. 27.

may be unduly influenced into doing so. Large *inter vivos* transfers should be scrutinized closely. The grounds discussed, and cases reviewed, provide consideration of the available ways to set aside questionable transfers.