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**ATTACKING *INTER VIVOS* GIFTS:  
WHY THEY MAY STAND OR FAIL**

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## **Attacking *Inter Vivos* Gifts: Why They May Stand or Fail**

### **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 gifts 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 unlawful reasons. If grounds exist, these *inter vivos* gifts or wealth transfers can be set aside. This would result 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.

### **A VALID GIFT**

Often when there is a transfer of an asset for estate planning purposes the transfer is gratuitous, as in 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.<sup>1</sup>

In the recent case of *Kavanaugh v. Lajoie*, 2014 ONCA 187 the Ontario Court of Appeal noted that:

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 than an intention to gift. The donor is free to change his mind. See *Bergen v. Bergen* [2013] BCJ No. 2552.<sup>2</sup>

In *Lubberts Estate (Re)*, 2014 ABCA 216 Justice Wakeling observed:

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.** See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (Alta. Sup. Ct. App. Div.) (“A gift of a chattel per verba de presenti united with possession in the donee makes a perfect gift, whether the possession proceeds, accompanies or follows the words”); *Cochrane v Moore*, 25 Q.B.D. 57

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<sup>1</sup> See *McNamee v. McNamee*, 2011 ONCA 533 at para.24; John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.438 (“Poyser”); and Bruce Ziff, *Principles of Property Law*, 3<sup>rd</sup> ed (Toronto, Carswell:2000), at pp. 140-141.

<sup>2</sup> *Kavanagh v. LaJoie*, 2014 ONCA 187 at para. 13.

(C.A. 1890) (there is no gift of a chattel capable of manual transfer without delivery from the donor to the donee); J. MacKenzie, Feeney's Canadian Law of Wills §1.4 ("there must be evidence of a donative intent of the donor to be unconditionally bound by the transfer coupled with the delivery of either the subject matter of the gift or some appropriate indicator of title") & W. Raushenbush, Brown on Personal Property 77-78 (3d. ed. 1975) (the donor must intend to give the property; the donor must transfer the property to the donee; and the donee must accept the property).<sup>3</sup> [emphasis added]

The British Columbia Court of Appeal reviewed the important distinction between an *inter vivos* gift and a testamentary disposition in ***Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277**. Citing *Wonnacott v. Loewen* (1990), 44 B.C.L.R. (2d) 23 at 26-27 (C.A.) 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:

[e]ven 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, 4<sup>th</sup> ed. (Markham, ON: LexisNexis Canada Inc., 2000), at para. 1.20.<sup>4</sup> [emphasis added]

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<sup>3</sup> *Lubberts Estate (Re)* 2014 ABCA 216 at para. 32.

<sup>4</sup> 2014 BCCA 277 at para. 21.

*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.

## **GROUNDINGS OF ATTACK**

Of the three elements to perfect a gift (intention, acceptance, transfer), intention is often disputed. Without intention to perform it, there can be no valid juridical act.<sup>5</sup> A gift or *inter vivos* transfer is void for want of intention, not voidable. The onus is on the person who received the gift to prove on a balance of probabilities that a gift was intended by the transferor at the time of the transfer.<sup>6</sup> This is so, as equity presumes bargains, not gifts.<sup>7</sup>

In ***Bakken Estate v. Bakken* 2014 BCSC 1540** the court examined the evidence a judge can consider when deciding a transferor's or giftor's intentions:

- A party opposing a claim of a 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.<sup>8</sup>
- 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

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<sup>5</sup> Poyser, *supra* note 1 at p.415.

<sup>6</sup> *Pecore v. Pecore*, 2007 SCC 17 at paras. 24 & 43 ("*Pecore*"). However, this general rule is subject to exceptions where a party seeks to set aside an instrument on the ground of *non est factum* or where the presumption of advancement is operative (see *Poyser* at p.416).

<sup>7</sup> *Pecore v. Pecore*, 2007 SCC 17 at para. 24.

<sup>8</sup> *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 74.

judge must assess its reliability, guarding against self-serving evidence that tends to reflect a change in intention.<sup>9</sup>

A review of the most common ways to “attack” the perfection of a gift or seek to have it set aside, are set out below, including relevant recent case law for each ground:

- lack of decisional capacity;
- undue influence;
- presumption of resulting trust;
- *non est factum*; and
- other equitable remedies such as unconscionable bargain and unconscionable procurement.

### ***Decisional Capacity***

If the gift-maker lacked the requisite capacity to make the gratuitous transfer then the gift is open to attack. If the transferor lacked capacity to gift then he/she could not properly form the intention to gift and the gift is not perfected. A gift or other *inter vivos* wealth transfer is void, not voidable, for want of capacity.<sup>10</sup> 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 be easily rebutted by evidence or circumstances that put capacity in doubt.<sup>11</sup>

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<sup>9</sup> *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 74, citing *Pecore v. Pecore* 2007 SCC at para. 59.

<sup>10</sup> Poyser at p.356.

<sup>11</sup> Poyser at p.356.

In England and Canada the widely accepted seminal case on determining capacity to gift is *Ball v. Mannin*<sup>12</sup> which found 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.”<sup>13</sup>

This standard to determine requisite capacity to gift 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 requires the following:

- 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.<sup>14</sup>

Also, note that these requirements are also applied when the title in a house is transferred to joint tenancy, with the transferor retaining dominant possession with intent to pass to the giftee upon death.<sup>15</sup>

When determining the requisite capacity to gift, 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 standard or criteria for *testamentary* capacity arguably may apply.<sup>16</sup> This means that the giftor has

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<sup>12</sup> *Ball v. Mannin* (1829), 1 Dow & Cl. 380, 6 E.R. 568 (H.L.).

<sup>13</sup> *Ball v. Mannin* (1829), 1 Dow & Cl. 380, 6 E.R. 568 (H.L.);

<sup>14</sup> *Royal Trust Company v. Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

<sup>15</sup> Poyser at p. 357.

<sup>16</sup> *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel* [1956] S.C.R. 477 at 487. See also the case of *Verwood v. Goss* 2014 BCSC 2122 where the court held that the “requisite capacity to make *inter vivos* gifts is the same as testamentary capacity” relying on *Rogers Re* [1963] B.C.J. No. 133 (BCCA) at para. 204.



to meet the same standard or criteria as a testator (as evolved from *Banks v. Goodfellow*<sup>17</sup>) and must be able to:

- 1) Understand the nature of the act and its effects;
- 2) Shall understand the extent of the property of which he or she is disposing;
- 3) Shall be able to comprehend and appreciate the claims to which he or she sought to give effect; and,
- 4) With a view to the latter object, that no disorder of the mind shall poison the testator's affections, pervert the testator's sense of right, or present the exercise of the testator's natural faculties – that no insane delusion shall 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.<sup>18</sup>

This means that a higher threshold could apply if a person is gifting the majority of his or her assets and a lower threshold if there is a smaller size of gift.<sup>19</sup> For example, in *Re Beaney*,<sup>20</sup> 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 expressed as being equivalent to that under *Banks v. Goodfellow*<sup>21</sup> or in other words, testamentary capacity.

In the recent case of ***Foley v. McIntyre*, 2014 ONSC 194** the court was asked to determine (among other things) whether a father had capacity to gift 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

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<sup>17</sup> (1870), L.R. Q.B. 549, 39 L.J.Q.B. 237.

<sup>18</sup> Poyser at p.44.

<sup>19</sup> Poyser at p.356. See also *Foley v. McIntyre*, 2014 ONSC 194 at para. 143.

<sup>20</sup> *Beaney (Deceased) Re* [1978] 2 All E.R. 595.

<sup>21</sup> (1870), L.R. Q.B. 549, 39 L.J.Q.B. 237.

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.<sup>22</sup> 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 on his own behalf to the advance directive of a do-not-resuscitate order.<sup>23</sup>

The court was assisted by two expert witnesses who conducted retrospective capacity assessments, however, Justice Mullins preferred the daughter's expert: "In particular, I prefer and accept the opinion evidence of [the daughter's expert]. I accept his evidence that capacity is task specific. I consider that his approach in assessing the father's capacity was more nuanced and appropriately premised on a review of all of the available evidence, rather than the approach of the plaintiff's expert, which was premised much more so on inferences drawn from what he described as the burden of the father's physical illness".<sup>24</sup> The court found that the father was capable to gift 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".<sup>25</sup>

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<sup>22</sup> *Foley v. McIntyre*, 2014 ONSC 194 at paras. 92-93.

<sup>23</sup> *Foley v. McIntyre*, 2014 ONSC 194 at para. 130.

<sup>24</sup> *Foley v. McIntyre*, 2104 ONSC 194 at para. 171.

<sup>25</sup> *Foley v. McIntyre*, 2014 ONSC 194 at para. 178.

### *Undue Influence*

Undue influence is also a common ground to attack 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.<sup>26</sup> 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.<sup>27</sup>

In his book, *Capacity and Undue Influence*, John Poyser states that testamentary undue influence is different than *inter vivos* undue influence.<sup>28</sup> Specifically that, “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.”<sup>29</sup> For testamentary undue influence to exist the conduct must amount to coercion and there is no presumption of undue influence.<sup>30</sup> 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.<sup>31</sup>

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<sup>26</sup> *Longmuir v. Holland*, 2000 BCCA 538.

<sup>27</sup> Poyser at p.529.

<sup>28</sup> Poyser at p.529.

<sup>29</sup> Poyser at p.489.

<sup>30</sup> Poyser at pp.306, 325, and 529.

<sup>31</sup> Poyser at p. 529; *Keljanovic Estate v. Sanservino* 2000 CarswellOnt 1312 (C.A.).

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.<sup>32</sup>

***Actual Undue Influence:***

This is 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. . .”<sup>33</sup> Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.<sup>34</sup> 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.<sup>35</sup>

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<sup>32</sup> *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171. Poyser 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.

<sup>33</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.

<sup>34</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.

<sup>35</sup> Poyser at p.492.

***Undue Influence by Relationship or Presumed Undue Influence:***

This second class does not depend on proof of reprehensible conduct. Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.<sup>36</sup>

Relationships that qualify as a ‘special relationship’ are often determined by a ‘smell test’.<sup>37</sup> Does the “potential for domination inhere in the relationship itself”?<sup>38</sup> Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization.”<sup>39</sup> 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 through age, illness, cognitive decline or heavy reliance on the adult child.<sup>40</sup>

Once a relationship is established, the onus moves to the person alleging a valid gift to rebut it. The giftor must be shown to have entered into the transaction as a result of his or her own “full, free and informed thought”.<sup>41</sup> It is often difficult to defend a gift made in the context of a special relationship. The gift must be from a spontaneous act of a donor able to exercise free and independent will. In order to be successful in attacking a

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<sup>36</sup> *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.

<sup>37</sup> Poyser at p.499.

<sup>38</sup> *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 (“Geffen”).

<sup>39</sup> *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

<sup>40</sup> *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

<sup>41</sup> *Geffen v. Goodman Estate* at para. 45.

gift based on presumed undue influence the transaction or gift must be a substantial one, not a gift of a trifle or small amount.<sup>42</sup>

The presumption of undue influence can be rebutted by showing<sup>43</sup>:

- a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;<sup>44</sup>
- b) the donor had independent legal advice or the opportunity to obtain independent legal advice;<sup>45</sup>
- c) the donor had the ability to resist any such influence;<sup>46</sup>
- d) the donor knew and appreciated what she was doing;<sup>47</sup> or
- e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.<sup>48</sup>

In ***Zeligs v. Janes* 2015 BCSC 7** 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 valuable property and house into joint tenancy with her daughter. The mother was ninety-four, 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.<sup>49</sup> The daughter however, rebutted this presumption by showing that there was no evidence of actual influence, the mother obtained independent legal

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<sup>42</sup> Poyser at p.509.

<sup>43</sup> From *Zeligs v. Janes* 2015 BCSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97.

<sup>44</sup> *Geffen* at p.379; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121

<sup>45</sup> *Geffen* at p. 370; *Longmuir* at para. 121.

<sup>46</sup> *Calbick v. Warne*, 2009 BCSC 1222 at para. 64.

<sup>47</sup> *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29.

<sup>48</sup> *Longmuir* at para. 76.

<sup>49</sup> *Zeligs v. Janes*, 2015 BCSC 7 at para. 114.

advice, and that despite her physical frailties the mother was “lucid”, “capable of doing things like getting her driver’s licence while in her 90s”, “she was assertive about her interests” and had the ability to resist undue influence.<sup>50</sup>

Also, presumed undue influence was found (but not rebutted) in the recent case of ***Servello v. Servello* 2014 ONSC 5035** 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’s first language was Italian and her comprehension and reading in English was limited. Her understanding at the time was that she was attending a court house so that her son could sign a document which would give him “the power to look after her” as she grew older. Thirteen days later the son returned to the office and he transferred the property to himself and his mother as joint tenants.<sup>51</sup>

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that he son had acquired a right of

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<sup>50</sup> *Zeligs v. Janes*, 2015 BCSC 7 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.

<sup>51</sup> 2014 ONSC 5035 at paras. 1-4.

survivorship in her home. The son refused to restore title to the property to his mother. She sought an order from the court restoring her as the property's sole owner.

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.<sup>52</sup> The court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that:

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.<sup>53</sup>

In the case of ***Lorintt v. Boda*, 2014 BCCA 354** 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

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<sup>52</sup> *Servello v. Servello* 2014 ONSC 5035 at para. 47.

<sup>53</sup> *Servello v. Servello* at paras.??-??.



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”.<sup>54</sup> 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 of their respective homes. There also was no evidence that the father was dependent upon the son at the time of the transfer.<sup>55</sup>

Also in ***Kavanagh v. Lajoie* 2013 ONSC 7, upheld 2014 ONCA 187** 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?
- 2) Whether there existed a potential 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?<sup>56</sup>

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

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<sup>54</sup> *Lorintt v. Boda* 2014 BCCA 354 at para. 91.

<sup>55</sup> *Lorintt v. Boda* 2014 BCCA 354 at para. 92.

<sup>56</sup> *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 133, upheld 2014 ONCA 187.

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”.<sup>57</sup> The court also determined that “[s]hould the above conclusion be incorrect and the presumption of undue influence exists on the evidence, this Court is of the opinion that such presumption has been rebutted by the same facts and analysis set forth above. . .”<sup>58</sup> This decision was upheld on appeal.

Undue influence was alleged, but not found, in a transfer of 50% interest in a property as a wedding gift in ***Abdollahpour v. Banifatemi* 2014 ONSC 7273**. 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 gifting her 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 agreed to the lawyer’s advice, the lawyer acted upon their instructions, the Deed was clear that it was a “Deed of Gift”, the

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<sup>57</sup> *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 149.

<sup>58</sup> *Kavanagh v. Lajoie* 2013 ONSC 7 at para. 150, upheld 2014 ONCA 187.

document was not lengthy and was clearly written. The acknowledgement and direction signed at the lawyer's office states: "This transfer is a gift to Shakiba Sadat Banifatemi, daughter-in-law".<sup>59</sup> The court found that "there 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 and 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."<sup>60</sup>

### *Resulting Trust*

Another ground upon which to attack a gift is that a presumption of resulting trust exists. When a parent makes a gratuitous transfer to a minor child the presumption of advancement applies.<sup>61</sup> However, where there is a gratuitous transfer between a parent and an independent adult child the law presumes that the adult child holds the property on resulting trust for the parent.<sup>62</sup> The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient. The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.<sup>63</sup> In determining whether the presumption has been rebutted, the trial judge must begin his or her inquiry with the presumption and then weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the parent transferor's actual intention at the time of transfer.<sup>64</sup>

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<sup>59</sup> 2014 ONSC 7273 at para. 21.

<sup>60</sup> 2014 ONSC 7273 at para. 92.

<sup>61</sup> Poyser at p.434. Also, the presumption of advancement may apply to a transfer from one spouse to another however the law is currently unclear.

<sup>62</sup> *Pecore* at para. 36.

<sup>63</sup> *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 63.

<sup>64</sup> *Mroz v. Mroz* 2015 ONCA 171 at para.72.

In the context of joint bank accounts, the Supreme Court of Canada commented in *Pecore v. Pecore*<sup>65</sup>:

Where the transferor's proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime. . . courts have no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor's death.<sup>66</sup>

But where the court finds the transferor placed assets in a joint account with the intention of retaining exclusive control over it until their death, the transferor takes the balance through survivorship.<sup>67</sup>

The rights of survivorship, both legal and equitable, vest when the joint account is opened. The gift of those rights in the present case, therefore, was *inter vivos* in nature.<sup>68</sup>

Where presumption of resulting trust applies, the onus rests with the same party (the person proving the gift was a gift) but becomes the onus to rebut the presumption of resulting trust by proving intention to gift.<sup>69</sup>

In ***Bakken Estate v. Bakken 2014 BCSC 1540*** a mother's act of making a bank account joint with her adult daughter, was examined. The daughter had withdrawn approximately \$69,000.00 from the account before her mother's death. She claimed that the funds in the account were a gift and that she could withdraw them at any time. Her brother argued that the

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<sup>65</sup> 2007 SCC 17 ("*Pecore*")

<sup>66</sup> *Pecore* at para.45.

<sup>67</sup> *Pecore* at para. 46.

<sup>68</sup> *Pecore* at para. 48.

<sup>69</sup> Poyser at 425; and *Pecore*.

mother only intended his sister to receive the gift of a right of survivorship and that by withdrawing the funds she severed the joint tenancy thereby defeating her right to any money left in the account at her mother's death (including the \$69,000.00 should the court order it be returned).<sup>70</sup>

In 2001, what was remaining of a \$100,000 bequest received by the mother was deposited in a joint bank account between the mother and daughter at a credit union. The terms of the bank account agreement provided that both depositors enjoyed the rights of survivorship and withdrawal, and both owed the obligation of joint and several liability to the bank.<sup>71</sup>

In January 2011, the daughter withdrew approximately \$69,000.00 from the joint account (what was left of the \$100,000.00 bequest) and deposited it into an account in her own name. Her reason for doing so was that she believed her brother was attending the bank with their mother and making withdrawals out of the joint account at the brother's request. The bank had notified the sister as they were concerned that the brother was inducing the mother to withdraw the funds. The daughter believed that the best way to protect her mother's funds was to withdraw them and put them in her own name.

Based on affidavit evidence of other siblings, the fact that the daughter declared the interest earned on the account for her taxes, as well as the bank documents, the Court found that the mother intended a specific gift of

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<sup>70</sup> *Bakken Estate v. Bakken* 2014 BCSC 1540 at paras. 4 & 88.

<sup>71</sup> *Bakken* at para. 21.

the \$100,000.00 proceeds of the bequest.<sup>72</sup> The daughter received an *inter vivos* gift of the right of survivorship to the balance of the funds and an *inter vivos* gift of the privilege of withdrawing funds from the account. The evidence (the affidavits and bank records) was found to rebut the presumption of resulting trust.<sup>73</sup>

The court concluded:

Nothing in *Pecore* precludes a transferor from intending to make two *inter vivos* gifts at the same time; or, at two different times; one, a general *inter vivos* gift of survivorship, the other a specific *inter vivos* gift. Considering the evidence as a whole, I find that in this case, the mother intended both an *inter vivos* gift of survivorship and a specific gift of \$100,000.<sup>74</sup>

In ***Belchevski v. Dziemianko* 2014 ONSC 6353** a mother and father attempted to have the gift of an interest in a property to their daughter set aside. They argued (among other things) that they did not intend the transfer to be a gift. The parents had originally transferred title to the house into joint tenancy between themselves and their adult daughter when they all lived together in the same house. However, a breakdown in their relationship led to the parents moving out and in with their other daughter. The daughter on joint title attended a lawyer's office and transferred legal title of the house to herself and simultaneously executed a declaration of trust confirming that her parents remained the beneficial owners of their interest in the home and that the daughter only held legal title.<sup>75</sup>

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<sup>72</sup> *Bakken* at para. 78.

<sup>73</sup> *Bakken* at para. 87.

<sup>74</sup> *Bakken* at para. 94.

<sup>75</sup> *Belchevski v. Dziemianko*, 2014 ONSC 6353 at para. 8.

The court concluded that there was sufficient evidence to conclude on a balance of probabilities that at the time of the transfer, the parents intended to gift the house to their daughter as a complete and unconditional gift. The court came to this conclusion based on the following facts: the lawyer involved was a senior member of the bar, he spoke Macedonian (the parents' language), he was content that the parents understood the legal advice he gave them, he took contemporaneous notes detailing the parents' intention to gift, the lawyer testified that the father was leading the meeting and was in charge of the discussions, the lawyer specifically explained the concepts of joint tenancy and resulting trust, and that at the time of the transfer, the daughter was already set to inherit the house under their wills.<sup>76</sup>

The presumption of resulting trust was rebutted on evidence.<sup>77</sup> The joint tenancy was not severed however as the beneficial ownership remained with parents. The court ordered that the house be sold and the net proceeds be divided equally between the surviving father (the mother had passed away before the trial) and daughter.

***Zeligs v. Janes* 2015 BCSC 7** also discussed the presumption of resulting trust but in the context of the transfer of a house into joint tenancy between a mother and daughter. The court found the daughter rebutted the presumption based on the testimony of a friend of the mother's, the

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<sup>76</sup> *Belchevski v. Dziemianko* 2014 ONSC 6353 at para. 21.

<sup>77</sup> *Belchevski v. Dziemianko*, 2014 ONSC 6353 at para. 24.

testimony of the solicitor who executed the transfer, and a note signed by the mother stating that: “I wish to stay in my home . . . as long as I live & to make sure I can I asked [my daughter] to move in and stay with me as long as I live, and to be fair to [my daughter] I made her joint owner as long as I live & full owner when I die.”<sup>78</sup> While the note was hearsay, the court admitted it on the basis of necessity. The court concluded it was significant evidence as to the intention of the mother. However, in the end, the court concluded that the joint tenancy was severed when the daughter took the proceeds of the sale of the property (while the mother was still alive) and deposited them into an investment account for the sole benefit of her and her husband. The court found that the right of survivorship ended with the severance of the joint tenancy and the sale proceeds were ordered to be distributed according to the mother’s will.<sup>79</sup>

### ***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.<sup>80</sup> *Non est factum* is a defence, developed in the court of common law not equity:

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<sup>78</sup> *Zeligs v. Janes* 2015 BCSC 7 at para. 48.

<sup>79</sup> *Zeligs v. Janes* 2015 BCSC 7 at paras. 191-192.

<sup>80</sup> Poyser at p.455.



[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.”<sup>81</sup>

*Non est factum* is a defence whose application is restricted to those circumstances where the person relying on it must show: 1) they were not careless, and 2) the document signed was different from the one they thought they were signing.<sup>82</sup>

*Non est factum* was proven in the case of ***Servello v. Servello***,<sup>83</sup> discussed above, 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:

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.<sup>84</sup>

Another recent case where *non est factum* was plead was in the decision in ***Belchevski v. Dziemianko***:

*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

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<sup>81</sup> *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.

<sup>82</sup> *Beer v. Beer* (1997), 43 O.T.C. 115, 13 R.P.R. (3d) 33 (Ont. Ct. (Gen. Div.)) at para. 26.

<sup>83</sup> 2014 ONSC 5035.

<sup>84</sup> 2014 ONSC 5035 at para. 44.

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.<sup>85</sup>

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 (transferring title in their home to joint tenancy with their daughter) at the time of transacting.<sup>86</sup> Also there was sufficient evidence to show that the parents intended to gift 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, he always made sure his clients understood what he was doing and the documents they were executing, he took contemporaneous notes that confirmed a gift during their lifetime and clearly explained what joint tenancy meant.<sup>87</sup>

### ***Other Equitable Challenges to Gifts***<sup>88</sup>

There are other equitable challenges that can be utilized to challenge *inter vivos* gifts. These include unconscionable bargains (exploitation of special disadvantage) and unconscionable procurement.

#### ***Unconscionable bargain:***

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

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<sup>85</sup> 2014 ONSC 6353 at para. 18.

<sup>86</sup> 2014 ONSC 6353 at para. 20.

<sup>87</sup> 2014 ONSC 6353 at para. 21.

<sup>88</sup> Poyser at Chapter 9, starting at p.541.

- 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 affects a substantial unfairness or disadvantage on the maker.<sup>89</sup>

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.<sup>90</sup>

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.<sup>91</sup>

#### ***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.<sup>92</sup>

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<sup>89</sup> Poyser at p. 559; *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).

<sup>90</sup> Poyser at p. 559.

<sup>91</sup> Poyser at p. 559.

<sup>92</sup> Poyser at p.570.

The onus is on the person attacking the wealth transfer or gift. The leading case in Canada is *Kinsella v. Pask* 1913 CarswellOnt 781 (ONCA), in which an elderly woman was left impoverished after she made personal cheques of significant amounts payable to a lawyer and cashed in favour of 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 is largely dormant and has been since the late 1800's and early 1900s.<sup>93</sup>

## **CONCLUSION AND RESOURCES**

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 gift their savings away or may be unduly influenced to do so. Large *inter vivos* transfers should be scrutinized closely. The grounds discussed and cases reviewed provide consideration of the available routes to set aside questionable transfers.

### **Schedule "A"**

Attached as Schedule "A" is a chart of the relevant grounds of attack and what is needed to prove each ground.

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<sup>93</sup> Poyser at p.599.

**Schedule “B”**

Attached as Schedule “B” is a chart of Undue Influence Checklist:

[http://whaleyestatelitigation.com/resources/WEL\\_Undue\\_Influence\\_Checklist.pdf](http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist.pdf)

**Schedule “C”**

Attached as Schedule “C” is a Capacity Checklist: The Estate Planning Context, and a Summary of Capacity Criteria:

[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_Estate\\_PlanningContext.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_Estate_PlanningContext.pdf)

**Schedule “D”**

Attached as Schedule “D” is a Summary of Capacity Criteria Chart:

[http://www.whaleyestatelitigation.com/resources/WEL\\_SummaryofCapacityCriteria.pdf](http://www.whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf)