ESTATES LITIGATION: A Trial Lawyers Primer

Putting Things Right: How to Attack Financial Transactions

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PUTTING THINGS RIGHT: HOW TO ATTACK FINANCIAL TRANSACTIONS

I. Introduction

Every estate litigator is certainly familiar with the following scenario: a disinherited spouse or child of a testator arrives at the firm complaining that they have been cut out of the testator's will. The experienced and diligent barrister determines that this particular client has an excellent case for varying the will under the *Wills Variation Act*[1]. Unfortunately, a thorough investigation reveals that the testator transferred most or all of his or her assets to others during his or her lifetime – whether by way of direct transfers, the creation of joint tenancies, or by designating specific beneficiaries to his or her various investment accounts and insurance policies – meaning that there is nothing left to be distributed to any estate beneficiary under the terms of the will. As a result, even the most successful possible result in a wills variation action would be a worthless pursuit.

In this scenario, and in any case where the testator has disposed of most or all of his or her assets prior to death, the only recourse for disappointed or disinherited beneficiaries is to determine whether there are any grounds for setting aside the financial transactions by which the testator disposed of the assets before death. If such grounds exist, and the transactions are set aside, the assets will be returned to the estate, and will be distributed according to the terms of the will, as written by testator or as amended by the Court pursuant to the *Wills Variation Act*.

In estate litigation, the transactions open to attack are almost always gratuitous or made for nominal consideration. As such, the principles differ from those that apply when setting aside a contract. The most common ways for setting aside gratuitous transfers include:

- Resulting trusts;
- Undue influence;
- Lack of capacity;
- Lack of formal validity;
- Fraudulent conveyances; and
- Remedial constructive trusts[2].

Because the transactions are generally gratuitous, the question in most cases is whether the transfers are valid gifts. In *Singh Estate v. Shandil*[3] the court summarized the requirements for an *inter vivos* transfer. Two elements must be present to establish a gift:

(1) The donor must have intended to make a gift; and

[1] R.S.B.C. 1996, c. 490
[2] Constructive trusts as a remedy for unjust enrichment will be dealt with by Amy Mortimore in "Unjust Enrichment: Fairness and the Law"
[3] 2005 BCSC 1448, aff'd 2007 BCCA 303

(2) The donor must deliver the subject matter of the gift to the donee.

In large part, the grounds for setting aside transactions discussed this in this paper are concerned with the first requirement; that is, determining whether the testator intended to gift the asset at issue to the recipient when he or she effected the transfer.

II. Resulting Trust

The presumption of resulting trust is the general rule for gratuitous transfers, and is arguably the easiest and most utilized avenue for setting aside gratuitous transactions. This rule dictates that where an asset is transferred for no consideration, equity will presume that the transferee holds the asset in trust for the transferor, unless the transferee can demonstrate that a gift was intended.

The presumption of resulting trust can arise in two situations: when one person purchases property in the name of another, or in the names of himself and another; and when one person voluntarily transfers property *inter vivos* to another, or into the name of himself and another. Professor Waters describes the first situation as follows[4]:

> The principle has been established since the early eighteenth century that if one person buys property, but has it conveyed into another's name, or into the joint names of himself and another, that other becomes a resulting trustee for the purchaser of all the interest taken by that other. The best known statement of the principle, cited and quoted in many Canadian cases, is that of Chief Baron Eyre in *Dyer v. Dyer*:
>
> > The clear result of all the cases, without a single exception is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money.
>
> *Dyer v. Dyer* concerned land, but the principle is clearly applicable to all forms of property, and there has never been any question of its general application[5].

With respect to the second situation, Waters' states:

[4] *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) at 367 and 372

[5] Until recently, there was a debate as to whether the presumption of resulting trust applied to transfers of real property in B.C., given the presumption of indefeasibility in s. 23(1) of the *Land Title Act*. However, it now appears settled that the presumption does apply to real property. In this regard, see *Fleming v. Kwakseestahla*, 2010 BCSC 1006 and *Fuller v. Harper*, 2010 BCCA 421

> Where a person transfers his property into another's name, or into the names of himself and another, and does so gratuitously, the principle underlying *Dyer v. Dyer* would seem logically to apply to this situation also. Since Equity assumes bargains, and not gifts, he who has title gratuitously put into his name must prove that a gift was intended.

The court has also held that the presumption of resulting trust can apply to beneficiary designations[6].

The presumption of resulting trust will not arise if the presumption of advancement applies. The presumption of advancement, which presumes a gift rather than a trust, applies to gratuitous transfers where the relationship between transferor and transferee is parent and minor child. It does not apply to gratuitous transfers to adult children[7], and it seems to be an open question as to whether it applies between spouses[8].

As the name implies, the presumption of resulting trust is only a presumption. It is capable of being rebutted by evidence showing, on a balance of probabilities, that the transferor intended a gift. In *Pecore v. Pecore*, the leading case on resulting trusts, the Supreme Court of Canada described the presumption as follows:

> [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

In fact, as the following additional passage from *Pecore* illustrates, the real question in any resulting trust case is the transferor's actual intention. It is only in those cases where there is insufficient evidence to establish on a balance of probabilities that the transferor intended a gift that the presumption will determine the result:

> [44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an

[6] *Neufeld v. Neufeld*, 2004 BCSC 25
[7] *Pecore v. Pecore*, [2007] 1 SCR 795 at ¶40
[8] *Anderson v. Anderson*, 2010 BCSC 911 at ¶152-158

> attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

As such, intention is the key to any resulting trust case. It is important to note that it is the transferor's intention at the time of the transfer that is relevant[9].

Joint Ownership

Perhaps the most common situation in which a presumption of resulting trust arises in estate litigation is when a parent transfers assets into joint names with an adult child. Putting assets into joint title has become a popular estate planning tool. It is often employed to avoid probate or legal fees, or to allow the adult child help manage the accounts as the parent ages. It is also often employed because the parent wants to gift the asset to the particular child outside the will. It is when the parent's intentions are unclear that problems arise, and in the absence of proof of intention to gift, equity will presume a resulting trust.

When an asset is transferred into joint names, a two-fold resulting trust may arise: one over the use of the asset during the transferor's lifetime, and one over the right of survivorship. Many cases miss this point and assume these are both part of the same right. But these are, in fact, two separate interests.

This principle is best exemplified by joint bank accounts. A bank account is a chose in action against the bank. The banker is a debtor of the account holder. At common law, when an account is in joint names, both account holders are entitled to demand the entire balance in the account from the bank, and both have a right of survivorship. In other words, each account holder owns the whole account, in the same way that joint tenants of real property each own the entire property. In equity, however, the presumption of resulting trust can dictate the true ownership of both the current funds in the account, and the right of survivorship.

Where an individual gratuitously adds an adult child or other individual as a joint account holder to an account, the presumption of resulting trust will apply at both levels. Professor Waters explains this concept as follows[10]:

> What rights to the moneys in the [joint] account has the volunteer *vis-à-vis* the person who opened and funded the joint account?
>
> These rights can be divided into two: first, the right of drawing moneys and signing on behalf of the account holders during their joint lives and, second, the right of

[9] *Pecore v. Pecore*, *supra* note 7 at ¶59
[10] *Waters' Law of Trusts* at 403

> survivorship. *Prima facie*, as we have seen, the volunteer holds his share of the rights on resulting trust for the actual depositor, unless a presumption of advancement arises in the volunteer's favour. Any moneys drawn from the account by the volunteer during the joint lives, and the right of the volunteer as the survivor to take the balance, are subject to resulting trusts.

Pecore confirms the separate nature of these rights. In that case, an elderly father placed the majority of his assets, consisting of mutual funds, bank accounts, and income trusts, into joint accounts with one of his three children, Paula. Paula made no deposits into the accounts. During his lifetime, the father continued to use and control the accounts. He declared and paid all the taxes on the income from the assets, and in this regard even wrote a letter to the financial institutions stating that he was the 100% owner of the assets and that they were not being gifted to Paula. Paula did make some withdrawals, but was required to notify the father before doing so. Consistent with the above principle, the court noted that it was open to the father to gift the right of survivorship to the transferee when the joint accounts were opened, but to retain control over the use of the funds in the accounts during his or her lifetime[11].

Pecore dealt with a gratuitous transfer. But what if the child makes contributions to the joint account? Does that mean the transfer is not gratuitous and that the presumption of resulting trust does not apply? Is the contribution consideration for the right of survivorship?

Again, the answer to these questions lies in the two-fold nature of joint accounts. For the joint account holders who have each contributed to the account, equity will presume that they hold their interests as tenants in common, so that the presumption of resulting trust will still apply to the right of survivorship. Waters succinctly describes this principle in his text[12]:

> When two persons open a joint account, and each pays in an ascertainable share, there is no difficulty in determining how much each is entitled to while the parties are alive. Their respective contributions imply that each is entitled, in equity, to a proportionate share on the winding up of the account. But should one party die, the other will take the whole fund by right of survivorship, and then the question will arise as to whether it was the intention of the deceased to make a gift of his interest to the other. In other words, is the survivor a resulting trustee of one half of the fund for the deceased's estate. […]
>
> The *prima facie* resulting trust… compels the survivor who has contributed equally to the moneys in the account to hold the deceased's half share in the balance on trust for the deceased's estate. In equity, that is, the survivor is a tenant in common, unless the presumption of resulting trust be rebutted.

[11] *Pecore v. Pecore*, *supra* note 7 at ¶69

[12] *Waters' Law of Trusts* at 402 and 404

This was the situation that arose in the *Frosch v. Dadd*[13]. In that case, the deceased and his brother held a joint account for the purpose of collecting rental payments from properties they owned together as a joint venture, and contributed equally to the account. A few days prior to the deceased's death, the brother withdrew all the money from the account. The administrator of the estate brought an action for the return of half the funds in the account. The court held that even though both parties contributed equally to the account, there would still need to be a finding that each intended the other to enjoy survivorship rights in order for one to take the whole fund on the other's death. Otherwise, a joint tenancy could be created by "inadvertence":

> It is contended that since the brothers were the joint owners of the monies in the joint bank account, the law would be sufficient of itself to carry the property to the survivor. The fallacy of this argument lies in the fact that there is no acceptable evidence to substantiate the defendant's claim that the money deposited in the joint bank account was a gift to the two of them, and to give effect to this contention would be to hold that a joint tenancy could be created by inadvertence, a proposition which I find wholly untenable. No doubt when the joint account was opened, half the monies deposited therein belonged to the deceased. The fact that only a portion of the moneys placed in the joint account belonged to him does not in any way alter or modify the operation of the well settled principle, and it follows that the deposit of the deceased's share in the joint account raised the presumption of a resulting trust in his favour as to that portion which the defendant was unable to rebut.

<u>Evidence to Rebut the Presumption</u>

As discussed above, the transferor's intention is the fundamental question in any resulting trust action. In ascertaining intent, the court will look at a multitude of evidence, certain types of which will carry more weight than others. A good deed of gift, for example, is excellent evidence of intention, and would likely rebut any presumption of resulting trust.

In *Pecore*, the Supreme Court of Canada listed other types of evidence that may be used in determining whether a transferor intended a gift, including:

- Evidence subsequent to the transfer – Contrary to the traditional rule that excluded subsequent acts and declarations as evidence of the transferor's intent[14], the court held that such evidence should not be automatically excluded, as long as it is relevant to the intention of the transferor at the time of the transfer, and as long as the trial judge guards against evidence that is self-serving or that tends to reflect a change in intention.

[13] [1960] O.R. 435 (Ont. C.A.)
[14] *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.)

- Bank documents – Again, contrary to the traditional rule that bank documents setting up an account as joint are not evidence of an agreement between the account holders as to beneficial title[15], the court held that such documents may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death. The clearer the evidence in the bank documents in question, the more weight the evidence should carry.

- Control and use of funds in the account – The court held that control and use of the funds, like the wording of the bank documents, should not be ruled out in the ascertainment of the transferor's intention. But the court stated that it may be of marginal assistance only and, without more, will not be determinative.

- Granting power of attorney – The court held that a power of attorney granted to the transferee can be used to ascertain the transferor's intention, especially when other evidence suggests that the transferor appreciated the distinction between granting that power and gifting the right of survivorship. But this evidence should not be determinative, as the granting of a power of attorney could be seen as supporting both a trust and a gift.

- Tax treatment – The court held that the tax treatment of the account during the transferor's lifetime is admissible as going to intention. But, like with a power of attorney, it should not be determinative in the absence of other evidence, as it may be that the transferor made the transfer for the sole purpose of obtaining assistance in the management of his or her finances and wished to have the assets form a part of his or her estate upon his or her death. Or, it is open to a transferor to gift the right of survivorship to the transferee when the joint accounts are opened, but to retain control over the use of the funds in the accounts, and therefore to continue to pay taxes on them, during his or her lifetime. These are equally plausible interpretations of the fact the transferor continued to pay the taxes on the account.

[15] *Niles v. Lake*, [1947] S.C.R. 291

III. Undue Influence

In the context of gifts, equity will intervene and set aside transactions that are procured by undue influence. The leading case on the equitable doctrine of undue influence in the context of *inter vivos* gifts is *Allcard v. Skinner*[16]. In that case, the court held that this equitable protection could be invoked in two ways: where there was actual undue influence and where undue influence was presumed because of the relationship between the transferor and transferee. Cotton L.J. described the principle as follows:

> These decisions may be divided into two classes -- First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.

At common law no presumption of undue influence can arise with respect to testamentary dispositions. The onus is always on the party challenging a will to show that it was procured by undue influence[17]. In this regard, beneficiary designations on insurance policies and pension benefits have been described as more closely akin to wills than *inter vivos* gifts, with the result that the presumption of undue influence is not available to those attacking such designations[18].

Note that section 52 of the *Wills, Estates and Succession Act*[19] will alter the common law. It reads as follows:

> (52) In an action, if a person claims that a will or any provision of it resulted from another person
>
> > (a) being in a position where the potential for dependence or domination of the will-maker was present, and
> >
> > (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

[16] (1887), 36 Ch. D. 145
[17] *Vout v. Hay*, [1995] 2 S.C.R. 876 at ¶28
[18] *Fontana v. Fontana* (1987), 28 C.C.L.I. 232 (B.C.S.C.); *Flack v. Rossi*, 2008 BCSC 670 at ¶87
[19] S.B.C. 2009, c. 13 (Not in force)

In other words, once it is shown that the testator was in a relationship of potential dependence on, or domination by, the person alleged to have unduly influenced the testator, s. 52 will cause the onus to shift to the defender of the will to prove that undue influence was not exerted.

Actual Undue Influence

Actual undue influence goes to whether the transferor intended to perform a legal act, such as gifting an asset to another person. Actual undue influence has been described as being tantamount to fraud or coercion. In *Vout v. Hay*[20], Sopinka J. said:

> [21] This [allegation of undue influence] requires proof that the testator's assent to the will was obtained by influence such that instead of representing what the testator wanted, the will is a product of coercion. Although fraud is sometimes treated as a separate issue, "fraud and undue influence" are generally coupled and the burden of proof with respect to fraud also lies on those attacking the will.

In *Dacyshyn v. Dacyshyn Estate*[21] the court adopted the oft quoted statement of undue influence from *Freeman v. Freeman*[22]:

> The undue influence which will set aside a will "must amount to force and coercion, destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear:" *Williams on Executors*, 8th ed., pt. 1, Bk. 2, ch. 1, p. 48, sec. 2, cited by Lord Penzance in his judgment in *Parfitt v. Lawless*, L.R. 2 P.& D. 462, at p. 470.

Actual undue influence can be very difficult to prove. Usually the only two people who have direct knowledge of the influence are the deceased, who is no longer around to give evidence, and the influencer. Further, the court generally insists on a high degree of proof – that the circumstances are inconsistent with any other hypothesis. In *Hix v. Ewachniuk Estate*[23], Lowry J.A quoted the long-standing proposition stated in *Boyse v. Rossborough*[24]:

> But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis.

[20] *Supra*, note 17
[21] [1996] B.C.J. No. 626
[22] 19 O.R. 141
[23] 2010 BCCA 317
[24] [1843-60] All E.R. Rep. 610 at 615

Presumed Undue Influence

As mentioned, proving actual undue influence is not always necessary when challenging *inter vivos* transfers. Those attacking such transfers may be able to rely on the presumption of undue influence if the necessary relationship existed between transferor and transferee. The leading case on presumed undue influence is *Geffen v. Goodman Estate*[25]. In that case, the central issue was the nature of the relationship that must exist between the transferor and the transferee to establish a presumption of undue influence. In the following passages, the court held that in order to trigger the presumption, there needs to be the "potential for domination":

> [28] What are the factors that go to establishing a presumption of undue influence? This question has been the focus of much debate in recent years. Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence until the contrary is shown. These include the relationship between trustee and beneficiary…; doctor and patient…; parent and child…; guardian and ward…; and future husband and fiancée…. Beginning, however, with *Zamet v. Hyman*, [1961] 3 All E.R. 933, it came to be accepted that the relationships in which undue influence will be presumed are not confined to fixed categories and that each case must be considered on its own facts. Since then it has been generally agreed that the existence of some "special" relationship must be shown in order to support the presumption although what constitutes such a "special" relationship is a matter of some doubt. […]
>
> [40] What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? […] It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. […] To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. […]
>
> [42] What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

Since *Geffen*, there has not been any refinement in the case law as to what "potential for domination" means. But the cases are instructive for showing the different types of

[25] [1991] 2 S.C.R. 353

relationships that raise the presumption and qualify as “special relationships”. The following three cases provide examples of the different types of relationship that have successfully raised the presumption.

In *Ogilvie v. Ogilvie Estate*[26], the deceased was the heir to part of a large family fortune. He did not receive much education, and spent his life pursuing his hobbies of riding horses and raising livestock. He had an alcohol abuse problem. Until the 1980’s, he was totally dependent on Royal Trust to manage his financial affairs. In the 1980’s, the deceased made various gifts to his wife’s brother and his wife. The evidence disclosed that the brother-in-law essentially controlled the deceased’s finances. Satanove J. used this financial control as the basis for a finding of a special relationship, making the following findings with respect to the influence of the brother-in-law and his wife:

- They were intimately involved in advising the deceased with respect to his assets and income and, in effect, managing them.
- They advised Royal Trust that it could discuss the deceased’s business freely with them, as they had the deceased’s “complete trust and confidence”.
- They handled the deceased’s tax planning, tax returns, and insurance.
- They assisted the deceased in the sale of property and on the division and investment of the sale proceeds.
- The deceased depended on them to open his mail.
- They made statements to other individuals to the effect that they ran the deceased’s affairs.

In *Tribe v. Farrell*[27], Cohen J. relied on the physical and emotional dependence of the transferor and the transferee in finding the existence of a special relationship. In that case, the defendant, 43 years old, was the deceased’s housekeeper. The deceased was 83. Within three years, the two had formed a close relationship. Cohen J. set out the factors on which he relied in finding that the presumption arose at ¶32 and 33:

[26] (1996), 26 B.C.L.R. (3d) 262 (S.C.), aff’d 106 B.C.A.C. 55
[27] 2003 BCSC 1758

> On the whole of the evidence, I find that by August, 1999, the deceased had become physically and emotionally dependent on the defendant to the point where she was able to dominate the will of the deceased and exercise influence over his decision making.
>
> The defendant testified that she was the deceased's only caregiver, that she had the sole responsibility for taking care of his home, and that the care she provided to the deceased benefited him by giving him peace of mind, a sense of security, companionship, friendship, trust, love, protection and enjoyment of life. The defendant said that besides looking after every aspect of the deceased's life including driving him around, cooking some meals for him, doing his laundry and shopping for him, she also took him to social events, took him out on special occasions, found persons to repair his house, advised him on important matters, helped him with personal matters, and visited him while he was in the hospital. Moreover, on the defendant's own testimony, she entered the deceased's life as a housekeeper and within three years was able to form a close enough relationship with the deceased that she could tell him not to make decisions on important matters without first checking with her.

Riley v. Riley[28] provides an example in a family context. In that case, the deceased had two children. Prior to this death, he conveyed his house to his daughter. The deceased told the lawyer who prepared the documents that he did not want to leave anything to his son, but due to the risk of litigation he did make a will that divided the residue between the two children. After the deceased passed away, the son claimed that the daughter had a special relationship with the deceased and unduly influenced him to make the transfer. In his reasons, Greyell J. found that the facts supported the presumption:

> [65] I have proceeded on the basis there was a special relationship between Mr. Riley and the defendant arising not only from their parent-adult child relationship, but also from the very close relationship of reliance Mr. Riley placed upon the defendant. I include in this latter category her position as holder of his Power of Attorney and joint bank accounts and his reliance on her and Mr. Mason to provide day-to-day assistance and advice to him. Accordingly, the defendant has an onus to establish she has not acted improperly in such a manner as to place undue influence on Mr. Riley to convey the property to her.

<u>Rebutting the Presumption</u>

Once a plaintiff has established that the nature of the relationship between the donor and the donee was such that the potential for domination existed, the onus shifts to the defendant to rebut it. This requires the defendant to show that the donor entered into the transaction as a result of his or her own “full, free and informed thought”. Substantively, this may entail

[28] 2010 BCSC 161

establishing that no actual influence was deployed in the particular transaction and that the donor had independent advice. It may also involve an examination of the magnitude of the benefit, as this is cogent evidence going to the issue of whether influence was exercised[29].

Though not the only way to do so, the most obvious way to rebut the presumption is to establish that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing[30]. In other words, after the donor had received independent legal advice.

If independent legal advice is to be relied upon to rebut the presumption of undue influence, the advice must be given with "a knowledge of all relevant circumstances and must be such as a competent and honest advisor would give if acting solely in the interests of the donor"[31]. In *Fowler Estate v. Barnes*[32], the court listed the following factors which may affect the character of the legal advice given and its effect on rebutting the presumption:

- whether the party benefiting from the transaction is also present at the time the advice is given;
- whether, although technically acting for the donor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
- whether the lawyer was aware of and discussed the financial implications of a transfer of all or substantially all of the donor's assets;
- whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might have benefited if the transaction did not take place;
- whether the lawyer discussed with the donor other options to achieve his or her objective with less risk; and
- whether the lawyer, though acting for the donor, had any prior professional relationship with the person alleged to be exerting the influence.

[29] *Geffen*, *supra* note 25 at ¶45; and *Ogilvie*, *supra* note 26 at ¶39
[30] *Inche Noriah v. Omar*, [1929] A.C. 127 (P.C.)
[31] *Ibid.*
[32] [1996] N.J. No. 206 (Nfld. S.C. (T.D.)

When determining whether or not the legal advice obtained by a transferor meets the appropriate standard, the BC Law Institute Report, "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide"[33] is a useful source. It includes a "Reference Aid" containing comprehensive list of red flags and recommended practices for wills practitioners to use in detecting undue influence. In a case where the sufficiency of the independent legal advice is questioned, this report can be used to determine the appropriate matters on which to cross-examine the solicitor who provided the advice[34].

As mentioned, independent legal advice is not the only way to rebut the presumption. The transferee can show by other means that no actual undue influence was employed. In this context, the deceased's character is an important piece of evidence. In particular, the court often asks whether the deceased was the type of person who was easily influenced.

For example, in *Riley*, the court found that the evidence established that the deceased had not been influenced by the daughter in the transfer of the property, particularly because he was not the type of man that was easily influenced:

> [67] The evidence established that throughout his life Mr. Riley had been a very independent man with strong views. He was a stubborn and single minded person that, once having made up his mind on a matter, there was little that could change his point of view. Those who knew him, including the plaintiff, the defendant, Mr. Olinyk, and Mr. Mason testified to this characteristic.

The deceased's susceptibility to influence and persuasion appears often in wills cases. In *Vout v. Hay*[35], the Supreme Court of Canada accepted the following finding of the trial judge with respect to whether the deceased was unduly influenced in making his will:

> ... Clarence Hay, on the evidence, was not a befuddled, senile old man whose mind had been captured by Sandra Vout and who, like the testator in *Eady v. Waring* [(1974), 2 O.R. (2d) 627], was physically and emotionally controlled and isolated by those persons who stood to benefit. In fact, the reverse is true. Clarence Hay was self-reliant and independent, was not easily influenced, lived alone and visited all members of the Hay family regularly, and he was all these things both before and for three years following the execution of the Will.

In *Maddess v. Racz*[36], Gray J. relied partly on the independence of the testator in dismissing a claim for undue influence in a wills case:

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[33] BCLI Report No. 61, October 2011

[34] The BC Law Institute Report can be found at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

[35] *Supra*, note 17 at ¶30

> [327] Ernie probably had influence over his mother during the 27 years that he was her only child living nearby, from 1973 until 2000, although Rosalia was stubborn and not particularly susceptible to influence. Ernie's influence was probably greater after Louis died in 1991. However, that is not sufficient to establish undue influence.
>
> [328] The fact that Mr. Brister presented Rosalia with a draft will which preferred Ernie and which she refused to sign suggests that Rosalia was not particularly susceptible to influence. It is possible that Ernie encouraged Rosalia to sign such a will, but that does not establish undue influence.

Conversely, the deceased's vulnerability and dependency can militate in favour of a finding of undue influence. In *Hix v. Ewachniuk Estate*[37], the court summarized the key findings of the trial judge in coming to the conclusion that the deceased was unduly influenced by her son in making her will:

> [100] To his credit, Ted Ewachniuk was very caring of his mother by all accounts. He and his wife filled in for her caregivers on weekends. Ted Ewachniuk would sleep at his mother's home on weekends when her caregivers did not.
>
> [101] Her groceries and medications were purchased for her by her son or his wife. Any outings that she enjoyed, such as attending church, depended upon being taken by her son. Even her attendances to the Douglas Park seniors program could not reliably depend on the HandyDART system, and thus she was reliant on her son and his wife to attend the program with any regularity.
>
> [102] By January 2004, Sophia Ewachniuk was, as she told Dr. Pilar, a lonely woman, and from the evidence of the plaintiffs and Ted Ewachniuk, a woman who was beginning to experience some confusion. By this time she was very vulnerable and had become virtually dependant on her son and his wife for all aspects of her existence. She could be easily and improperly influenced by Ted Ewachniuk.
>
> [103] I have concluded that Ted Ewachniuk has an aggressive and domineering personality both in general, and in particular, in his desire for the absolute ownership of the shares in Regent Holdings. I have no doubt that by late 2003, and certainly by January of 2004, Ted Ewachniuk knew that his mother was vulnerable and considerably dependant upon him, and that he was well able to profoundly influence her decisions.

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[36] 2008 BCSC 1550

[37] *Supra*, note 23

IV. Lack of Capacity

As with resulting trusts and undue influence, the question of capacity goes to the donor's intention. In order to intend to make a gift, the donor must have the capacity to form that intention[38]. As with the onus placed on the propounder of a will, it appears the onus is on the proponent of the gift to prove capacity on a balance of probabilities[39], though there is conflicting authorities in this regard[40].

The test for establishing capacity for *inter vivos* gifts appears to be the same as the test for establishing capacity for a testamentary disposition. In *Field v. James*[41], Madam Justice Rowles, in dissent, but not on this point, quoted the following passage from *Banks v. Goodfellow*[42] as setting out the test for establishing capacity:

> ... [The testator] ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.

Some authorities[43] suggest that the test for capacity to make an *inter vivos* gift is less stringent than the test required for testamentary dispositions, particularly where the gift is entirely divorced from the donor's death and otherwise unlike a testamentary disposition. In *Dacyshyn*, MacKenzie J. dealt with the issue of capacity to effect an *inter vivos* transfer as follows:

> Many of the leading cases on undue influence and a lack of capacity involve testamentary instruments. The standards for *inter vivos* transactions on questions of undue influence and capacity are, if anything, less stringent than those for testamentary instruments, and I propose to test the August 14, 1992, transfer by the standards laid down in testamentary cases on the basis that an *inter vivos* transaction must be valid if it can meet the testamentary tests.

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[38] *Schretlen Estate v. Turney*, 2010 BCSC 101 at ¶31
[39] *Ibid.* at ¶33; and *Brydon v. Malamas*, 2008 BCSC 749 ¶230
[40] See *Archer v. St. John*, 2008 ABQB No. 25 at ¶22, where the court stated: "The onus of establishing whether an individual has the legal capacity to make an *inter vivos* gift reposes with the party alleging incapacity"
[41] 2001 BCCA 267 at ¶51
[42] (1870), L.R. 5 Q.B. 549 at 567
[43] *Dacyshyn v. Dacyshyn Estate*, *supra* note 20 at ¶25; and *Schretlen Estate v. Turney*, *supra* note 34 at ¶32

V. Lack of Formal Validity

If a gift is considered a testamentary disposition, it must comply with the formal requirements of the *Wills Act*[44]. In other words, it must be signed by the testator in the presence of two or more witnesses. Whether a gift will be considered testamentary depends on the donor's intention.

The general principles which govern the question of whether a document is testamentary were discussed in *Wonnacott v. Loewen*[45]. In that case, the Court of Appeal accepted the following test from *Cock v. Cooke*[46] as the correct test:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

The interpretation of this rule is well-settled. If the document creates a trust which takes immediate effect, even though it is to be performed after the death of the settlor, it is not dependent upon the settlor's death for its vigour and effect[47].

The discussion in *Wonnacott* helps to differentiate between transfers which are testamentary in nature, and those which are not. In reference to a testamentary transfer, Seaton J.A. referred to the judgment of Mackay J. in *Elliott v. Turner*[48] , which stated:

> In cases where documents are held to be testamentary, there appear to be the following facts, which facts are not present in the case at bar: 1. No consideration passes; 2. The document has no immediate effect; 3. The document is revocable; 4. The position of the deceased and the donee does not immediately change.

The case of *Anderson Estate v. Polson*[49] provides an example of a party successfully setting aside a transaction on the basis of failure to comply with the formal requirements of the *Wills Act*. In that case, the deceased made two loans – one to the defendant company in 1991 for $200,000 at an interest rate of 9%, and one no-interest loan to the individual defendant in 1998 for $55,000. Each loan was evidenced by a demand note.

Following the making of the first demand note, the Plaintiff signed a document that contained the following statement: "At the time of my death, [the] demand note shall be considered paid, and returned to Polson Investments Ltd."

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[44] R.S.B.C. 1996, c. 489, s. 4
[45] (1990), 44 B.C.L.R. (2d) 23 (C.A.)
[46] (1866), L.R. 1 P. 241
[47] J.A. *in Corlet v. Isle of Man Bank Limited et al*, [1937] 2 W.W.R. 209 (Alta. S.C. A.D.)
[48] [1944] 2 D.L.R. 313 at 319 (Ont. H.C.)
[49] 2003 BCSC 1721

Following the making of the second demand note, the Plaintiff signed a document that contained the following statement: "The above loan to Ronald J. Polson in the amount of $55,000 is to be forgiven at the time of my death and upon the same terms as the $200,000 loan to Polson Investments Ltd."

Truscott J. found that the requirements set out in *Elliott v. Turner* were present with both documents, with the result that the documents were testamentary in nature. In particular, he held that:

- the Plaintiff intended that the document would only take effect on his death, and therefore was dependent on his death for its vigour and effect;
- there was no consideration given by the Defendants for the forgiveness of the loans;
- the document had no immediate effect;
- the document was revocable, as the Plaintiff could have recovered on the notes during his lifetime;
- the position of the Plaintiff and the Defendants did not immediately change; and
- the Defendants were not bound to pay any further interest than they had already been paying on the notes.

VI. Fraudulent Conveyances

Using the *Fraudulent Conveyance Act*[50] to attack financial transactions is an intriguing idea. Undue influence or resulting trust claims are defeated by the transferor's intention to benefit the recipient, but such an intention is a standard element in a fraudulent conveyance claim. And often the true intention is to put the asset beyond the reach of Wills Variation claimants, so the "fraudulent" label seems to somewhat fit the situation. Unfortunately, the strategy has not borne much fruit thus far because of the difficulty in claimants achieving standing under the Act.

The Act is very short, just two paragraphs:

> (1) If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> > (a) a disposition of property, by writing or otherwise,

[50] R.S.B.C. 1996, c.163

(b) a bond,

(c) a proceeding, or

(d) an order

> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
>
> (2) This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

In essence, "creditors and others" can ask the court to void a disposition of property if the transferor intended to delay, hinder or defraud the claimant. "Disposition of property" is very broadly defined. In essence, a transfer by any method would be included[51].

"Delay, hinder or defraud" is the key element of the Act. Since direct evidence usually is not available, intent is often established through "badges of fraud"[52]. However, dishonest or morally blameworthy intent is not required. It is sufficient if the intent is to "put one's assets out of the reach of one's creditors"[53]. A valid estate planning purpose will not protect a transaction if the transferor also had the improper purpose of putting the asset beyond the reach of his or her creditors.

The pivotal question for application of this Act to estate litigation is who is considered a creditor within the meaning of the Act. While "creditors and others" has been very broadly defined, an important limitation is that the applicant's claim must have existed during the lifetime of the transferor and cannot arise solely on the death of the transferor. This is a challenge in estate litigation, because many claims arise from the transferor's efforts to protect against the *Wills Variation Act*. However, a *Wills Variation Act* claim does not exist until after death because a will is not effective until the will maker dies. The *Hossey v. Newman* decision expressly held that a claim under the *Wills Variation Act* is not a claim by a "creditor or others" under the *Fraudulent Conveyance Act*[54].

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[51] *Interpretation Act,* R.S.B.C. 1996, c. 238, definition of "dispose"; see *Antrobus v. Antrobus* 2009 BCSC 1341, where a transfer of real property into joint tenancy and the settlement of a trust were both set aside as fraudulent conveyances

[52] *Twyne's Case* (1601), 76 E.R. 809

[53] *Abakahn & Associates Inc. v. Braydon Investments Ltd.,* 2008 BCSC 1547, aff'd at 2009 BCCA 521

[54] *Hossey v. Newman* (1988), 22 E.T.R. (2nd) 150 (B.C.S.C.); *Mordo v. Nitting* 2006 BCSC 1761; *Easingwood v. Cockroft* 2011 BCSC 1154

Unjust enrichment is an example of a claim that could exist during the transferor's lifetime but not become apparent until after death. In *Antrobus v. Antrobus*[55], the transferors' daughter sought to set aside a joint tenancy and settlement of a trust. She had worked without compensation in the family business on the basis of a promise that she would be the sole beneficiary of her parents' estate. The court held that the *Fraudulent Conveyance Act* applied because the daughter had an unjust enrichment claim against her parents at the time of the transfer.

One avenue that shows promise is a spouse who would have had a potential right or claim under the *Family Relations Act* prior to the transferor's death. The B.C. Supreme Court examined this issue in *Mawdsley v. Meshen*[56]. The claimant was in a common law relationship with the deceased for 18 years. The deceased had children from previous marriages and had inherited significant property from a former husband. Before her death, the deceased and her common law spouse met with professional advisors to plan the deceased's estate. The deceased settled an alter ego trust, set up joint accounts, transferred properties and made a new Will. These arrangements benefited the deceased's children and brother-in-law and left nothing to her common law spouse. After her death, the spouse commenced an action attacking all of these transactions on the basis of incapacity, undue influence, resulting trust, unjust enrichment, and variation of the will – the entire tool kit. He also claimed that the transfers to the alter ego trust were void as a fraudulent conveyance.

Both the Supreme Court and the Court of Appeal found that the common law spouse did not qualify as a creditor under the *Fraudulent Conveyance Act*. He had argued that he had a claim for spousal support under the *Family Relations Act* during the deceased's lifetime, but the Court of Appeal held that was not good enough; he needed a property claim and, as a common law spouse, such a claim did not exist under the *Family Relations Act* as it then was. We now have the *Family Law Act*[57], which defines "spouse" for the purposes of property division as including those persons living in a marriage like relationship for 2 years. While that will broaden the class of potential plaintiffs, there remains a limit in that the right to claim for division of property does not arise until a triggering event has occurred. Under the new Act, the triggering event is the date of separation, meaning when one spouse has formed the intent to live separate and apart.

The case of *Easingwood v. Cockroft*[58] faced the issue of whether a spouse could use the *Fraudulent Conveyance Act* to challenge an alter ego trust when there was no triggering event prior to death. Madam Justice Dillon held that there was no claim because there was not a

[55] *Supra,* note 51
[56] 2010 BCSC 1099, aff'd 2012 BCCA 91
[57] S.B.C. 2011, c. 25
[58] 2011 BCSC 1154

sufficient reality to a potential *Family Relations Act* claim to give the plaintiff standing under the *Fraudulent Conveyance Act*:

> [51] In my view, in order to qualify as a potential claimant so to be a creditor or other within the meaning of the *FCA*, a spouse must either have begun an action under the *FRA* or there must be an evidential basis to reasonably conclude that the claimant has a potential right or claim to have asserted entitlement to family assets on marriage breakup under s. 56 of the *FRA*. The plaintiff does not qualify under any of these criteria. Kay and Reg were happily married at all material times and there was no likelihood that the marriage was about to break up in November 2008. There were no irreconcilable differences between them, no periods of separation, or indicators of strife except for the stress of Reg's illness. Kay always knew the terms of Reg's will and the Trust does not depart from those terms. Kay had never said that the provision for her under the will was inadequate or indicated that she would contest it. She was never involved in decisions about Reg's business or investments as she had recognized Reg's desire for Hank and Lauren to manage his affairs in June 2007. She could have had access to the information in Reg's accounts at the bank and she participated in discussions at the bank where it was clear that she was neither the decision-maker nor the beneficiary. There is no reality to a claim under the *FRA* when there is no evidence as to the value of any of either Reg's or Kay's assets at the time of the marriage and no description of Kay's present needs, notwithstanding the presumption in s. 60 and the provisions of s. 65 of the *FRA*. The marriage agreement which, I find, was applied by both Reg and Kay, kept Reg's business and other assets that were transferred to the Trust as separate property of Reg. Kay kept her own property to herself. It is not sufficient for Kay to now maintain that she is a creditor or other because she might have brought a claim under the *FRA* if she and Reg had separated.

The decision is under appeal. However, it must be noted that this was a happy marriage and the spouses had a marriage agreement. One wonders if a claim might have a better chance of success under the *Fraudulent Conveyance Act* if the facts included an unhappy marriage and a stronger potential claim to division of assets.

Other possible, less common, bases for *Fraudulent Conveyance Act* claims in the estate litigation context are torts (sexual assault[59]) and contract (perhaps breach of a marriage or separation agreement).

[59] *S.(G.M.) v. R. (W.W.)*, 2010 BCSC 1741