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Invalidating Transfers of Property

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Elder law is an emerging area of the law and presents unique challenges for legal practitioners and the courts. The term “elder law” encompasses a broad range of legal and aging issues, focusing specifically on aging considerations of both the “hale and hearty” as well as those with serious deficiencies in various contexts, including estate planning, health law, real estate and family law, among many others¹. A particular concern that arises in respect of the elderly is the issue of vulnerability, and the potential for this vulnerability to be exploited by family members, friends and/or caregivers. While courts and legal practitioners have begun to grapple with this issue, it does not appear that vulnerability alone is sufficient to override suspicious transactions. The focus of this paper will be on how *inter vivos* transfers of property made by elderly persons can be set aside. Whether a transfer of property by an elder person should be invalidated requires a consideration of issues regarding vulnerability, mental capacity, power imbalances and undue influence. However, despite the unique considerations that arise with respect to the elderly, it appears that the approach adopted by the courts to date has not deterred caregivers, family members and others from exploiting the vulnerable and aging members of our population.

REQUIREMENTS FOR A VALID TRANSFER OF PROPERTY

A gift of property by an elder person while he or she is still living is considered an *inter vivos* gift, as it takes effect during the lifetime of the donor, not upon the donor’s death². In order for an *inter vivos* gift to be considered valid, it must satisfy the following three criteria:

1. an intention to donate;
2. a sufficient act of delivery; and
3. acceptance of the gift.³

¹ Ann Soden, *Advising the Older Client*, Butterworths: at pgs. 3, 4 [“Soden”].

² Note that this paper will be using the term “donor” and “transferor” interchangeably.

³ *Robertson v. Hayton*, [2003] O.J. No. 4538 (SCJ) at para. 30 [“Robertson”]; *Scott Estate v. Scott*, [2002] A.J. No. 459 (Alta QB) at para. 50.

If all three criteria are met, the transfer of property will constitute a valid gift. While establishing the second and third criteria, delivery and acceptance, are not overly cumbersome, it is the first criterion that may cause difficulty, particularly when the transferor is an elderly person.

In order to establish that the donor had the requisite intention to donate, it must be shown that the donor intended to part with the property; the evidence must demonstrate that the donor intended to divest himself or herself of ownership of the property⁴. Determining whether the donor had an intention to gift can be inferred from his or her actions as well as other extrinsic factors including: the nature of the relationship between the parties, the size of the gift as measured against the total of the donor's property and the importance of the gifted item in relation to the donor's overall property⁵. Additionally, in order for a gift of property made to a stranger to be valid, there must be evidence inconsistent with any other purpose before the donor can be said to have parted with ownership of the property⁶. The term "stranger" may encompass a broad range of people, including new friends, caregivers, neighbours and/or charities.

In certain circumstances, the presumption of advancement will apply to *inter vivos* gifts, thereby dispensing with the need to prove an intention to donate. If the presumption of advancement applies to a transfer of property, the donor will be presumed to have intended to make a gift to the recipient. Of particular significance is how this presumption applies to transfers from parent to child. In *Pecore v. Pecore*⁷, the Supreme Court of Canada narrowed the application of the presumption of advancement, limiting its operation in the parent/child context to transfers by a parent(s) to minor children. The presumption, however, is not limited to natural children, and may extend to children to whom the donor stands in *loco parentis*⁸. The Supreme Court further established that the presumption does not apply to adult children, including dependant adult children. Accordingly, if property is transferred by a parent to an adult child, it will not automatically be presumed that the parent had an intention to gift the property. To the contrary, the law now presumes that the donee holds the property on a resulting trust for the donor.

⁴ *Kibsey Estate v. Stutsky*, [1990] M.J. No. 112 (CA) at para. 10 [*"Kibsey"*].

⁵ *Lacasse v. Kober*, 2004 SKQB 250 (Sask. QB) at para. 7.

⁶ *Hardy v. Atkinson* (1908), 1908 CarswellMan 142 (CA) at para. 19.

⁷ *Pecore v. Pecore*, [2007] 1 S.C.R. 795.

⁸ See, for example, *Evong Estate v. Lawton*, 1990 CarswellNS 167 (SC); *Romaine v. Romain*, 2001 CarswellBC 2039 (CA).

SETTING ASIDE A TRANSFER OF PROPERTY

A complete *inter vivos* gift that satisfies the three requirements is irrevocable, but can be declared void on several grounds; most notable for the purposes of elderly transferors of property is undue influence and mental incapacity. Based on a review of the relevant case-law, it appears that while courts recognize the unique position of older adults, the test for establishing undue influence or mental incapacity is not necessarily adjusted or altered to take these considerations into account.⁹ This is particularly concerning due to the often vulnerable position of the elderly. Older adults are more susceptible to emotional and/or financial abuse as well as mental health issues, which should inform the grounds on which the tests to set aside transfers of property should be applied.

Standing to Set Aside a Transfer of Property

In order to invalidate a transfer of property made by an older adult, the person challenging the transfer must have standing to do so. There are certain categories of people who may have standing to challenge the transfer. First, Attorney's for Property under a valid Power of Attorney and Guardians for Property, have standing. Second, close family members may have standing to challenge a transfer of property, although this right is not automatic¹⁰. Blood relationships alone do not give rise to an automatic claim to object to the donor's *inter vivos* gift of property. However, the familial tie along with a pecuniary interest in the transaction under challenge may be sufficient to grant standing¹¹. The reason for allowing family members to have standing in these circumstances is to provide protection to donors who may have lacked mental capacity or been unduly influenced when the property was gifted. If standing were not granted in these types of situations, vulnerable persons could be taken advantage of without the possibility for recourse before the courts. Third, following death, beneficiaries of an estate have standing to challenge *inter vivos* gifts made by the donor¹². A beneficiary may challenge a gift on the basis of undue influence if, but for the gift, the gifted property would have gone to the estate.

⁹ The court in a recent unreported decision, in *Parker v. Fockler et al.* Court File No. 03-35/09 and CV-10-00412442-000, creatively recognized that an elderly person may be a "party under disability" pursuant to Rule 7, though capable to manage property.

¹⁰ *Yoerger v. Briedenbach*, 1956, 19 W.W.R. 109 (Man. CA) at para. 18.

¹¹ *Lagoski*, *supra* note 9 at paras. 31-32; *Ewart v. Abrahams*, [1988] B.C.J. No. 68 (BCCA) at para. 14.

¹² *Lagoski v. Shano*, 2007, 63 R.P.R. (4th) 310 (On. SCJ) at paras. 47, 48 [*"Lagoski"*].

Vulnerability

Although this paper has focused considerably on the vulnerable position of older adults, vulnerability alone is insufficient to set aside a transfer of property. Vulnerability can arise from loneliness, social isolation, reliance on single relationships, failing health, lack of business or financial sophistication etc.; and while age alone does not cause vulnerability, older adults are more likely to possess these characteristics¹³. Nonetheless, a person can be vulnerable, but capable; a person can also be vulnerable without being unduly influenced by another. Accordingly, in order to set aside a transfer of property, something more than just vulnerability is required, such as evidence that the transferor was unduly influenced or lacked the requisite mental capacity to make a transfer of property.

Undue Influence

Undue influence is influence which overbears the will of the person, and can be used to invalidate a transfer of property. This doctrine was developed as a response to the need to protect people from being forced, tricked or misled by others into parting with their property. It must be noted that soliciting or begging for a gift is permissible; repeated requests for a gift do not amount to undue influence. It is when these requests amount to coercion that the validity of the transfer of property becomes questionable.

There are two types of undue influence, actual and presumed. To establish actual undue influence, it must be shown that a person has deliberately used his or her influence on another so as to prevent the exercise of free will. For instance, threats by a child to send a parent to a nursing home if certain gifts are not made would fall under this category. Older adults can often be susceptible to this type of undue influence, particularly those who, without the person exerting the influence, are without alternative social or family support structures; this includes seniors whose physical and/or mental needs make them dependent on others¹⁴. Gifts that fall under this category are set aside on the basis that a person should not retain any benefit arising from his or her own wrongful act.

Presumed undue influence, on the other hand, does not require such wrongdoing to be proved. Rather, it is the nature of the relationship between the parties that triggers the presumption that the recipient of the property unduly influenced the transferor. The onus is on the person challenging the validity of

¹³ *Soden, supra* note 1 at p. 331.

¹⁴ *Soden, supra* note 1 at p. 336.

the transfer of property to establish the circumstances that trigger the application of the presumption, and the onus then moves to the recipient of the property to rebut the presumption¹⁵. Although there are certain relationships which typically give rise to a presumption of undue influence, the test adopted by the Supreme Court of Canada, whereby the pertinent consideration is whether the relationship is such that one party had a dominating influence over the other, must be applied¹⁶. Specifically, it must be established that one person had the ability to dominate the will of another, whether through manipulation, coercion or abuse of power¹⁷. These are particularly significant considerations involving older adults, as the circumstances that create vulnerabilities in these individuals may also be a source of dependency, which in turn, could give rise to the potential for domination by another¹⁸. Gifts that fall under this category are set aside on grounds of public policy, to prevent the relationship between the parties from being abused.

A family relationship is not, in of itself, sufficient to raise a presumption of undue influence. Accordingly, a transfer from husband to wife or parent to child will not automatically invoke the presumption. Moreover, it has been held that the presumption does not automatically arise in the context of a parent-child relationship even where the parent is a potentially vulnerable person¹⁹. While transfers of property by elderly or infirm persons may attract the presumption, it is by no means automatic; instead, the particular circumstances of each case must be examined.

If the party challenging the transfer of property is able to successfully trigger the presumption of undue influence, the onus then shifts to the recipient to rebut it. In order to rebut the presumption, the recipient of the property must show that the gift was the result of the donor's own full, free and informed thought²⁰. Two ways to rebut the presumption include: (1) showing that no actual influence existed; or (2) showing that the donor received independent legal advice²¹. The size of the gifted property, whether the donor kept the gift a secret, the donor's mental capacity, age or infirmity and other evidence of the donor's wishes will be significant considerations in determining whether influence

¹⁵ *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Soden*, *supra* note 1 at p. 337.

¹⁹ *Chender v. Lewaskewicz*, 2007, 62 R.P.R. (4th) 170 (NSCA) at paras. 62, 63.

²⁰ *Krys v. Krys*, [1929] S.C.R. 153.

²¹ *Striesfield v. Goodman*, [2001] O.J. No. 3314 (SCJ) at para. 146; affirmed [2004] O.J. No. 1992 (CA).

was exercised²². If the donor is deceased by the time the matter proceeds before a court, the court will be required to examine the evidence with extra care, and in some circumstances, with suspicion²³.

Mental Incapacity

Another way a transfer of property by an elderly person may be set aside is if he or she lacked the requisite mental capacity to make a valid transfer. In order to set aside an *inter vivos* gift on this ground, the transferor's degree of mental incapacity must be such that it would interfere with his or her capacity to understand substantially the nature and effect of the transaction. However, depending on the size of the gift, the test for determining competency may shift to that used to judge testamentary capacity²⁴. For instance, if the gift constitutes substantially all of the donor's assets, this heightened test will be required. The party challenging the gift does not have to establish that the donor, in fact, failed to understand the nature and effect of the transaction; rather, what must be established is that the donor was not capable of understanding it²⁵.

The onus of proving mental incapacity is on the party seeking to set aside the *inter vivos* gift. It is not necessary, however, that the donor receive an actual medical diagnosis of mental incapacity; it is sufficient if the finding of mental incapacity is factually sustainable²⁶. If, however, there is medical evidence that the donor was senile at the time of the gift, there may be a presumption of mental incapacity, thereby shifting the burden on the recipient of the gift to prove mental capacity²⁷. The party seeking to uphold the gift, on the other hand, must establish that the donor had the capacity to understand the nature and effect of the transaction; further, that the gift was the voluntary, well-understood act of the donor²⁸.

CONCLUSION

The transfer of property by an elderly person to a family member, friend, caregiver or even stranger may be set aside on several grounds, including undue influence and mental incapacity. The law, however, has not yet fully been able to grapple with the particularly vulnerable position of older adults. While the

²² *Ibid.*

²³ *Kibsey, supra* note 4 at para. 11; *Miller v Miller Estate*, 2011 CarswellBC 45 (CA).

²⁴ *Robertson, supra* note 3 at para. 33; *Booth Estate v. Connor Estate*, 1998 CarswellOnt 3387 (Gen. Div.) at paras. 52, 53.

²⁵ *Royal Trust Co. v. Diamant*, [1953] 3 D.L.R. 102 (BCSC); *Stoppel v. Loesner*, 1974 CarswellMan 141 (QB).

²⁶ *Kapacila (Litigation Guardian of) v. Otto*, 2007 CarswellSask 682 (CA).

²⁷ *Mathieu v. Saint-Michel*, [1956] S.C.J. No. 477.

²⁸ *McMillan v. Brown*, 1957 CarswellNS 41 (SC).

area of elder law is continually evolving and gaining more recognition before the courts, in order to better serve the aging population, greater attention must be placed on protecting those who, although not considered mentally incapable and/or susceptible to undue influence, are vulnerable. Although not all older adults are in relationships of dependency, certain changes need to be implemented to better protect those who are. For instance, rather than relying on the stringent requirements of proving undue influence, certain categories of cases should automatically result in *inter vivos* gifts receiving heightened scrutiny, such as transfers from an older parent to adult child. Additionally, placing the onus of proving the validity of a transfer of property on the recipient of the gift, rather than the party challenging it, may reduce the possibility of older adults being unduly exploited.