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ESTATE LITIGATION BASICS—2012 UPDATE

PAPER 4.1

Fraudulent Conveyances and inter vivos Transactions

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FRAUDULENT CONVEYANCES AND INTER VIVOS TRANSACTIONS

I. Introduction 1
II. Legislation 2
III. Framework 2
IV. Creditor or Other 3
V. Wills Variation Act Claimants 3
VI. Other Types of Claims 7
VII. Married Spouses 7
VIII. Unjust Enrichment Claims 9
IX. Torts 10
X. Intent 11
XI. Conclusion 14

I. Introduction

Although the *Wills Variation Act* may be more generous to those seeking relief than comparable legislation in other jurisdictions in giving standing to apply to independent adult children, in addition to dependant children and spouses, in practice the generosity may prove illusory when the will-maker has structured her affairs using will-substitutes so that assets pass to intended beneficiaries outside of her estate. The *Wills Variation Act* gives the court jurisdiction to vary only the will, and has no anti-avoidance provision.

Those wishing to disinherit a spouse or child have employed jointures, beneficiary designations in life insurance policies, registered plans, and tax free savings accounts, *inter vivos* transfers and trusts, leaving little or nothing in their estates to pass under their wills, meaning little or nothing in the estate for the court to vary.

Without an anti-avoidance provision in the *Wills Variation Act*, those seeking to upset an estate plan that has left them disinherited, have had to seek other avenues, including applying to the court to set-aside transfers under the *Fraudulent Conveyance Act*. Those applications have usually been unsuccessful, but it is the writer's view that in some circumstances, with good evidence, an application under the *Fraudulent Conveyance Act* may succeed in getting assets into the will-maker's estate where they will be subject to a variation.

In this paper, we will look at the fraudulent conveyance jurisprudence relevant to claims made by spouses and children seeking a larger share of the assets once owned by their deceased spouses or parents.

While most of the *Fraudulent Conveyance Act* claims in estate litigation are brought by *Wills Variation Act* claimants, the *Fraudulent Conveyance Act* is relevant to other types of claims as well, including claims in tort and in unjust enrichment, and we will also look at the application of the *Fraudulent Conveyance Act* to other estate litigation claims.

II. Legislation

The *Fraudulent Conveyance Act* is remarkably short:

> **Fraudulent conveyance to avoid debt or duty of others**
>
> 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,
> (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.
>
> **Application of Act**
>
> 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.

Section 1 was amended by the Attorney General and Public Safety and Solicitor General Statutes Amendment Act, 2011, which received Royal Assent on March 29, 2012. Before this amendment, s. 1 contained the words "by collusion, guile, malice or fraud" immediately after "whose rights and obligations ..."

This amendment follows the decision in *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521, in which the Court of Appeal held that these words had no meaningful function since the penal provisions of the Act were repealed in 1987. Chief Justice Finch wrote at para. 73: "The only intent now necessary to avoid a transaction under the modern version of the Act is the intent to 'put one's assets out of the reach of one's creditors' (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required."

Although the cases we will look at were decided before the statute was amended, the more recent *Mawdsley v. Meshen*, 2012 BCCA 91, and *Easingwood v. Cockroft*, 2011 BCSC 1154, were decided since the decision in *Abakhan*.

III. Framework

Most of the cases applying the *Fraudulent Conveyance Act* are not estate litigation cases. The principles have been developed largely in commercial and matrimonial cases. The interplay between s. 1 and s. 2 has not, to the writer's knowledge, been considered in a *Wills Variation Act* or other estate litigation case, but may arise in the future.

To challenge a disposition where the transferee has not provided any consideration to the transferor, the creditor "or other" need only show that the transferor made the transfer to delay, hinder or defraud creditors. Even if the transferee had no knowledge of the transferor's intent, the disposition made for no consideration is liable to be set aside.

But if the transferee has provided good consideration for the disposition, then the creditor seeking to set aside the transaction must show that the transferee also actively participated in the plan to delay, hinder or defraud creditors.

As set out by Mr. Justice K. Smith in *Sutton v. Oshoway*, 2011 BCCA 245, at para. 4:

> The proper approach to the application of the Act is summarized concisely in *Chan v. Stanwood*, 2002 BCCA 474, 6 B.C.L.R. (4th) 273:

> [20] ... Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. As stated by this court in *Meeker Cedar Products Ltd. v. Edge* (1968) 68 D.L.R. (2d) 294 (aff'd at (1968) 1 D.L.R. (3d) 240 (S.C.C.)):
>
> > ... it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice or knowledge of the vendor's intent to delay, hinder or defraud creditors and others *unless it be proved that the purchaser was actually privy to the fraud*, i.e., a party to carrying out the fraudulent intention and purpose. [at 299; emphasis added.]
>
> [21] Where valuable consideration has passed, then, the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction. ...
>
> [emphasis in original]

An estate litigation case will usually involve *inter vivos* gifts, often involving a transfer into a jointure, or to an *inter vivos* trust as part of the transferor's estate plan. No consideration is given by the beneficiary, and the focus is on s. 1.

But in the right case, you should not overlook s. 2. Consider whether the transferee has given good consideration. If so, then the transferee will have a defense to the claim to set aside the transfer if he or she did not participate in a plan to delay, hinder or defraud the person seeking to set aside the conveyance.

IV. Creditor or Other

To succeed in setting aside a disposition as a fraudulent conveyance, your client must be a "creditor or other."

It is not necessary that the person challenging the transaction was a creditor or had a cause of action against the transferor when the transaction was made. The phrase "creditor or other" has been held to encompass creditors who were secured at the time of the disposition, and future creditors. See *Canadian Imperial Bank of Commerce v. Boukalis* (1987), 34 D.L.R. (4th) 481, 11 B.C.L.R. (2d) 190 (C.A.) and *Abakhan*.

Although the courts have given the words "creditors or others" an expansive meaning in the commercial context, we will see that they have limited the scope in the estate litigation context.

V. Wills Variation Act Claimants

As at the date of this article, BC courts have consistently held that a person whose only claim is a claim to vary a will under the *Wills Variation Act* is not a "creditor or other," with standing to set aside a transfer under the *Fraudulent Conveyance Act*.

The first case is *Hossay v. Newman*, 1998 CanLII 15139 (B.C.S.C.), in which the plaintiff son in a *Wills Variation Act* claim unsuccessfully tried to set aside his deceased father's transfer of property into a joint tenancy with one of the defendants.

Mr. Justice Mackenzie wrote at paras. 9 through 11:

> 9 In the circumstances of this case, the plaintiff would have no claim against the testator during the testator's lifetime and the claim arises against the estate solely on death. In my view, s. 1 of the *Fraudulent Conveyance Act* in using the term "creditors and others" contemplates a situation where the person claiming, if not a creditor, at least has some legal or equitable claim against the debtor during the debtor's lifetime. I cannot interpret s. 1 as extending to claims that arise solely on the death of the debtor/testator.
>
> 10 In my view, therefore, the answer to the question posed must be qualified. If the claim under the *Wills Variation Act* can be supported by a legal or equitable claim of the plaintiff against the testator prior to the testator's death, that claim may be capable of being transformed into a claim under the *Wills Variation Act* after death. On one interpretation at least, *Jack* [*v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (C.A.)] supports that proposition and it is not necessary for me today to answer that question definitively. However, if there is no legal or equitable claim which pre-exists the death of the testator, then the claim is solely one arising on death under the *Wills Variation Act*. Without any prior foundation, the claimant does not have the status of creditor or others within the meaning of s. 1 of the *Fraudulent Conveyance Act*.
>
> 11 For a person within that category, which includes the plaintiff, the question must be answered in the negative.

Hossay was applied in *Mordo v. Nitting*, 2006 BCSC 1761, a case in which the Court dismissed the plaintiff's claim that his mother's transfer of property into an alter-ego trust was a fraudulent conveyance, and in *Easingwood v. Cockroft*, 2011 BCSC 1154, a claim by a spouse, which will be discussed below.

Until this year, there were no BC Court of Appeal cases considering the question of whether a *Wills Variation Act* claimant who had no claim during the deceased's lifetime is a "creditor or other." Now we have one.

In *Mawdsley v. Meshen*, 2010 BCSC 1009, appeal dismissed 2012 BCCA 91, Dennis Mawdsley claimed that his late common-law spouse of 18 years, Joan Meshen, fraudulently conveyed her assets to her children and her late husband's brother to avoid her legal obligations to him. He relied on the *Fraudulent Conveyance Act*. He also asked the court to vary her will under the *Wills Variation Act*.

Joan Meshen had considerable wealth, much of which she accumulated together with, or received from, her late second husband, who died in 1983. Her assets at one time included her family home in Burnaby, two lots on East 11th Avenue in Vancouver, a half-interest in 10 acres in Surrey, and shares of three companies. The other half-interest in the Surrey property was owned by Joan Meshen's late second husband's brother, Bill Meshen, who worked in the family business and who had built his house on the Surrey property. She operated the family business through one company, another owned land used for the business and the third owned equipment in the business. She also had investment accounts, and cash which totaled over $180,000 at her death, which she kept in a jointly held safety deposit box with her daughter.

She had three children, Shirley Meshen and Harry Meshen from her first marriage and Michael Meshen from her second marriage.

In February 2006, Joan Meshen was diagnosed with cancer. Her assets were then worth at least $10.5 million.

After her diagnosis, she transferred her bank accounts into joint accounts with her daughter, Shirley Meshen. The accounts held about $138,000 at the time of the transfer into joint accounts. She transferred title to her residence into the names of herself and her youngest son, Michael Meshen, as joint tenants. She transferred her interests in one of the lots on East 11th Avenue, and the Surrey property, as well as her interest in a contract to buy a condominium to her three children.

Joan Meshen made a new will on May 12, 2006, in which she left the contents of her house to her son Michael Meshen and divided the residue of her estate equally among her three children. On the same date, she established an *inter vivos* trust, and transferred a $3,250,000 investment account, and her interest in the three companies into the trust. The beneficiaries of the trust on her death were her three children and Bill Meshen.

Joan Meshen made no provision for her common-law spouse, either in her will, or by a transfer of property before her death. The transfers of assets into the trust, and into the names of Joan Meshen's children, or into joint tenancies with the children, if upheld, substantially depleted her estate leaving little for Mr. Mawdsley to pursue in his *Wills Variation Act* claim.

Mr. Mawdsley argued that he had a claim in unjust enrichment arising during Joan Meshen's lifetime, but Madam Justice Ballance in the Supreme Court of BC held that he did not have a valid claim in unjust enrichment.

Accordingly, Mr. Mawdsley's only good claim was his *Wills Variation Act* claim, and in fact Madam Justice Ballance did vary the will to award him the whole of the residue of her estate, which included some joint accounts that she found were held on a resulting trust for the estate. She found that Ms. Meshen did not in her will meet her moral obligations to Mr. Mawdsley. The value of the award turned out to be about $280,000.

Madam Justice Ballance dismissed Mr. Mawdsley's fraudulent conveyance claim. She referred to *Hossay* and *Mordo* as cases holding that someone who had no claim during the lifetime of the deceased was not a creditor or other, but based her decision largely on her finding that Ms. Meshen did not intend to delay, hinder or defraud Mr. Mawdsley, a point to which we will return.

Mr. Mawdsley appealed to the BC Court of Appeal. In dismissing the appeal, Madam Justice Newbury affirmed that a person who had no claim during the deceased's lifetime, and whose only claim was under the *Wills Variation Act* is not a "creditor or other" on whose behalf the court may set aside a transaction as a fraudulent conveyance.

In the Court of Appeal, Madam Justice Newbury expressly approved *Hossay* and held that a claimant whose only claim was under the *Wills Variation Act* claim was not a 'creditor or other."

She considered the meaning ascribed to this phrase in the authorities:

> 75 The word "creditor" normally refers to a person to whom a debt or obligation is owed, or to someone entitled to the fulfilment of an obligation: see *Black's Law Dictionary* (9th ed.) and *Dictionary of Canadian Law* (3rd ed.). The courts have historically regarded "and others" in the *FCA* [*Fraudulent Conveyance Act*] as referring to persons who do not have debts owing to them by the transferor, but who do have 'just claims' not yet brought to fruition in terms of legal process. Thus in *Penny v. Fulljames* (1920), 50 D.L.R. 553 (Man. K.B.), it was said the statute protects "the person who, at the time of the conveyance ... had a claim for unliquidated damages in respect of which judgment had not then been recovered." (At 554.) In *Murdoch v. Murdoch* (1976), [1977] 1 W.W.R. 16 (Alta. T.D.), it was said "creditors and others" is wide enough to include "any person who has a legal or equitable right of claim" and that the claim could arise "out of a contract, express or implied, or other legal obligation." (At 20; see also *Krumm v. McKay*, 2003 ABQB 437 (Alta. Q.B.) at paras. 29-30.) On the other hand, the Law Reform Commission, supra, notes:
>
> > The key element is *legal obligation*. A claim based on the possible exercise of the court's discretion, such as a claim under dependent's relief legislation, does not constitute the disappointed survivor a creditor or other. [At 29, citing *Dower and Dower v. The Public Trustee,* [1962] 35 D.L.R. (2d) 29 (Alta. S.C.); emphasis added.]

> Professor Dunlop (at 618 of his text) also writes that "moral claims" do not give rise to an action under the *FCA*, citing inter alia, *Sunlife Assurance Co. v. Elliott* and *Gauthier v. Woollatt*, *supra*.
>
> 76 There is a large body of complex case law which considers the standing of so-called "subsequent" and "future" creditors who came within 'or others'. As Dunlop explains, *supra*, at 617*ff*., this law developed out of the rule that a person who had a debt that had not yet accrued due at the time of the impugned settlement nevertheless had standing under the FCA as long as any debt was due at the date of the transfer and remained unpaid when the action was commenced. Various exceptions developed to this rule, and various sub-rules developed to the exceptions. Professor Tamara Buckwold, in *Reform of Fraudulent Conveyances and Preferences Law*, Uniform Law Conference of Canada (Civil Law Section, 2007), summarized the groups whom Canadian courts have included in "others" under the *FCA* as follows:
>
> > Those "others" who have been found to qualify under the rather complex rules established by the judges include, most notably, (a) subsequent creditors who are allowed to piggy-back their claim on the continued existence of a debt that was extant at the time of the transaction, (b) creditors who can establish that the conveyance was intended to defeat an anticipated but not yet extant debt or an unliquidated claim (e.g., a judgment debt arising from a yet-to-be litigated claim) and (c) creditors whose claims arise from a speculative venture embarked upon by the debtor immediately before or after having executed the transfer under challenge. [At para. 28.]
>
> (The third "hazardous business" category relates to *MacKay v. Douglas*, *supra*, which may be of doubtful authority: see para. 68 above.)
>
> [emphasis in original]

Madam Justice Newbury rejected the argument that the ambit of those qualifying as a "creditor or other," should include those to whom the deceased had (following the analysis of the Supreme Court of Canada in *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807) "uncyrstallized" legal and moral obligations during the deceased's lifetime, obligations that crystallized at death. Madam Justice Newbury wrote:

> 89 The Court in *Tataryn* went on to observe that the testator's legal obligations towards his wife had existed at the time of his death, even though they had not "crystallized" during his lifetime. (At 824.) The parties were still living together—as were Mr. Mawdsley and Ms. Meshen in the case at bar. Counsel for Mr. Mawdsley thus submits that where there is an ("uncrystalllized") obligation, there must be a right that can be "enforced after death" (see para. 30 of *Tataryn* quoted above) and that this right should qualify the appellant as a 'creditor or other' under the FCA.
>
> 90 This argument may conform to one's moral sense in a particular case, but as has been seen, no case has gone so far as to suggest that "creditors and others" in the FCA includes a person who has no claim at the time of the transfer in question—or for that matter, during the transferor's lifetime. The implications of so interpreting the phrase would be enormous. Persons qualifying as spouses or children under the WVA would be entitled, at least *prima facie*, to challenge every disposition of property, whether for valuable consideration or not, made by their spouse or parent during his or her lifetime, and even to seek to prevent such dispositions by court action. The courts would find themselves assessing the consequences of various forms of transfers, including dispositions in the course of business, dispositions carried out years earlier and dispositions proposed to be carried out in the future, all in the name of protecting "moral" obligations that cannot truly be judged until the parent or spouse has lived his or her life and died leaving an estate and a will. I cannot imagine that courts should take on this role of arbiter of personal and business decisions throughout a parent or spouse's lifetime without the Legislature's clearly directing us to do so.
>
> [emphasis in original]

The Court of Appeal decision in *Mawdsley* will likely be settled law on this point in BC for some time. The Supreme Court of Canada dismissed Mr. Mawdsley's application for leave to appeal.

VI. Other Types of Claims

Mawdsley and *Hossay* say that a *Wills Variation Act* claimant who had no legal or equitable claim during the deceased's lifetime is not a "creditor or other," in whose favour a disposition will be set aside under the *Fraudulent Conveyance Act*. But these decisions do not preclude someone to whom the deceased had other legal or equitable obligations during the deceased's lifetime from applying to set aside a disposition under the *Fraudulent Conveyance Act*. That person could then either pursue his or her other legal or equitable claim, or perhaps anchor his or her claim to set aside a disposition as a fraudulent conveyance on the other legal or equitable claim, thereby bringing assets back into the deceased's estate, and then pursuing a *Wills Variation Act* claim.

Although the writer is not aware of any cases where a *Wills Variation Act* claimant has been successful in BC in setting aside a disposition as a fraudulent conveyance on the basis that the claimant had some other legal or equitable claim during the deceased's lifetime, there is no principled reason why a *Wills Variation Act* claimant may not do so. Indeed, Mr. Justice Mackenzie's *dicta* in para. 10 of his reasons in *Hossay* quoted above lends support to the view that the courts would be receptive to an argument that a *Wills Variation Act* claimant to whom the deceased had legal or equitable obligations during the deceased's lifetime could apply to set aside a disposition on the basis of those obligations, and then pursue the *Wills Variation Act* claim—with the right facts.

VII. Married Spouses

Of the potential *Wills Variation Act* claimants, the deceased's married spouse is most likely to have a legal or equitable claim during the deceased's lifetime. A spouse may have a claim to an interest in the other spouse's assets if there is a breakdown of the marriage under the *Family Relations Ac*t when a triggering event occurs. Common-law spouses meeting the criteria set out in the new legislation will be similarly situated once new *Family Law Act* comes into effect on March 18, 2013. The spouse may also have a claim for spousal support.

In *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (C.A.), a decision to which Mr. Justice Mackenze referred in *Hossay*, the Court of Appeal recognized that a married spouse has standing to apply after the death of her separated spouse to set aside a disposition as a fraudulent conveyance, albeit in *obiter*. In *Jack*, the plaintiff's separated husband severed the joint tenancy of their matrimonial home, and transferred a half interest in the home to his common law spouse shortly before his death. Mr. Justice Goldie said at page 98, "There is no doubt in my mind that Mrs. Jack [the Plaintiff] falls within the words in the statute, 'creditors and others.'" On the facts, the court held that there was no fraudulent intent, and upheld the trial judge's decision dismissing the claim by the plaintiff to set aside the transfer.

In an Ontario case, *Stone v. Stone* (2001), 18 R.F.L. (5th) 365 (Ont. C.A.), the Ontario Court of Appeal upheld a decision setting aside the plaintiff's husband's transfer of property to his children when he found out he was dying. The plaintiff's husband had done so without the plaintiff's knowledge. Although she did not commence any claim during her husband's lifetime, the Court held that, because the wife could have made claim under the *Family Law Act*, R.S.O. 1990, c. F-3, she came within the ambit of Ontario's fraudulent conveyance legislation.

But anchoring a fraudulent conveyance claim on the rights a spouse had under the *Family Relations Act*, or the new *Family Law Act*, may not be so straightforward. In BC we have what may be described as a deferred community property regime, as opposed to a community property regime. Under the *Family Relations Act*, a spouse is entitled to an interest in the "family assets" held in the other's name on a triggering event, such as a separation agreement, a declaration by the court that there is no

reasonable prospect of reconciliation or a divorce. Under the new *Family Law Act*, a spouse will be entitled to an interest in "family property" owned by the other on separation. But what if there was no triggering event before the deceased's spouse's death? Did the surviving spouse have any legal or equitable claim under the *Family Relations Act* without a triggering event? What claim would she have under the new *Family Law Act* if the spouses were not separated at the death of the spouse whose disposition of assets is being challenged as a fraudulent conveyance?

In *Easingwood v. Cockroft*, 2011 BCSC 1154, Madam Justice Dillon considered a claim by a spouse to set aside the transfer of her late husband's interest in two holding companies that held real estate into an alter ego trust. The plaintiff, Kathleen Easingwood, and her husband, Reginald Henry Easingwood, were together up until his death. There was no separation, let alone a triggering event. This case has an interesting twist in that two of Reginald Easingwood's children created the alter ego trust, and transferred their father's assets into it, at a time when he was not capable of managing his own affairs, using an enduring power of attorney he had granted to them. Let's look at the facts.

Reginald Henry Easingwood and Kathleen Easingwood were married in 1983. He had four children with his first wife, who died in 1976. Two of his children died before him.

Before their marriage, Reginald Easingwood and Kathleen Easingwood had signed a marriage agreement, in which each gave up any claim to the other's assets other than in accordance with the agreement or with their wills.

On April 18, 2001, Reginald Easingwood signed an enduring power of attorney, appointing two of his children, Lauren Cockroft and Hank Easingwood as his attorneys. The power of attorney provided that they must act together.

On March 4, 2004, Reginald Easingwood signed his will naming the same two children as his executors. In the will he provided that his wife would receive the income from a fund. The capital of the fund would be $525,000 plus an adjustment for each year between the date of his will and his death, or 15% of his estate (whichever is greater). On his wife's death the capital of the fund would be divided among his then living children, the children of his deceased children, and his wife's children. In the will, he also gave his wife a life interest in his house, and set aside $100,000 to pay for expenses for his house. He provided that the residue of his estate would go to his children and to two of his grandchildren (with gifts over to the issue *per stirpes* of any beneficiary who predeceased him).

In 2007, Reginald Easingwood was suffering from dementia, and Lauren Cockroft and Hank Easingwood were managing their father's financial affairs. Hank Easingwood was diagnosed with cancer, and he and Lauren Cockroft were concerned that if Hank Easingwood died before their father, Lauren Cockroft would not be able to act on her own under the terms of the power of attorney. Accordingly, she or someone else would have to apply to court to be appointed his committee. They were concerned that there could be a dispute over who would become their father's committee.

Lauren Cockroft and Hank Easingwood used the power of attorney to settle an alter ego trust on his behalf in 2008 to allow for the continued management of their father's finances without having to make an application under the *Patients Property Act*. They transferred his interest in the two holding companies into the trust. His house remained in his name, and was subject to a life estate in favour of his wife. The two children were appointed as the first trustees, but the trust provided for the appointment of a successor trustee on Hank Easingwood's death. The assets of the trust could only be used for Reginald Easingwood's benefit during his lifetime. On his death, the terms of the trust mirrored his will. The trust provided for a fund for his wife, and for the house, and the residue of the trust funds would be divided in the same way as set out in his will.

Reginald Easingwood died September 12, 2009, after his son Hank Easingwood's death.

Madam Justice Dillon held that the enduring power of attorney gave Lauren Cockroft and Hank Easingwood authority to settle the alter ego trust on their father's behalf, and in the circumstances they had not misused it in doing so.

Kathleen Easingwood argued that because she and Reginald Easingwood were married, she had a potential claim under the *Family Relations Act* during her husband's lifetime. Accordingly, she maintained, she came within the ambit of the *Fraudulent Conveyance Act* as a "creditor or other."

Madam Justice Dillon did not accede to this argument. She found that they were happily married until Reginald Easingwood's death. They had a marriage agreement and the transfer of assets into the trust was consistent with the agreement. There was not a sufficient reality to a potential *Family Relations Act* claim for Kathleen Easingwood to have been a "creditor or other" during her husband's lifetime. Madam Justice Dillon wrote:

> [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.

Does *Easingwood* imply that a surviving spouse must show that there either was a marriage breakdown or a reasonable likelihood of a marriage breakdown at the time the now deceased spouse transferred assets in order for the surviving spouse to have standing as a "creditor or other" under the *Fraudulent Conveyance Act*? Or is Madam Justice Dillon's finding that Kathleen Easingwood was not a "creditor or other" based on a combination of factors including that there was little evidence to support a *Family Relations Act* claim by Kathleen Easingwood to her husband's assets, particularly in light of the marriage agreement, even if there had been a breakdown of the marriage? Might the outcome be different for a happily-married spouse if the court found that if there had been a breakdown of the marriage she would have had a strong claim under the *Family Relations Act* to an interest in the assets transferred to a trust?

At the time of writing this article, this case is under appeal.

VIII. Unjust Enrichment Claims

A child or spouse (or indeed others such as step-children who may not make *Wills Variation Act* claims), may have claims during the lifetime of the deceased in unjust enrichment. To prove unjust enrichment, the claimant must show:

1. An enrichment;
2. A corresponding deprivation;

3. The absence of a juristic reason for the enrichment.

(*Petkus v. Becker*, [1980] 2 S.C.R. 834)

If successful, the claimant will be entitled to either a monetary award or an interest in specific assets through a remedial constructive trust.

In *Antrobus v. Antrobus*, 2009 BCSC 1341, appeal allowed in part, 2010 BCCA 356, the plaintiff successfully sued her parents in unjust enrichment for services she had provided to them. She was also successful in having her parents' transfer of their real estate into a joint tenancy with her siblings set aside as a fraudulent conveyance. Madam Justice Lynn Smith found that the plaintiff's parents had transferred the real estate into joint tenancies with their other children to protect the real estate from the plaintiff, who had told them she believed she was entitled to their entire estates upon their deaths. The Court of Appeal reduced the quantum of the plaintiff's award from $190,000 to $100,000, but did not interfere with the order setting aside the transfer of property into a joint tenancy.

Although the plaintiff in *Antrobus* brought her claim during her parents' lifetimes, in principle a court could apply the same reasoning after the parents' deaths to set aside *inter vivos* transfers.

In *Mawdsley*, one of the arguments Mr. Mawdsley advanced in support of his position that he had standing to apply to set aside Joan Meshen's transfers of assets was that he had a claim in unjust enrichment during her lifetime, but Madam Justice Ballance found that his unjust enrichment claim did not have merit. If the court had found that he had a meritorious unjust enrichment claim, the Court of Appeal's decision on whether he was a "creditor or other" might have been different. But the outcome of the case would likely have been the same, for reasons discussed below.

Similarly, in *Easingwood*, Madam Justice Dillon found that Kathleen Easingwood did not have a meritorious claim in unjust enrichment against her husband.

IX. Torts

Though less common, a family member may be successful in setting aside a disposition if he or she had a potential tort claim at the time of the transfer.

In *S (G.M.) v. R. (W.W.)*, 2010 BCSC 1741, the plaintiff was successful in setting aside transfers by her step-father of his house and bank accounts into jointures with her half-brother as fraudulent conveyances. He had sexually assaulted her as a child. He told his solicitor that he wished to make the transfers to avoid probate fees and other expenses on his death. When he made the transfers in 1987, the plaintiff had not brought or threatened any action against him. She did not sue until after his death. But Mr. Justice Johnston found, "At the time of the transfer, the stepfather clearly knew that he had caused injury to the plaintiff for which the plaintiff had not forgiven him and I find that it was within the contemplation of the stepfather that the plaintiff could at any time sue him for damages for those injuries." He inferred that the step-father made the transfers to put the assets out of the plaintiff's reach, or at minimum to delay her from recovering any damages.

Although *S. (G.M.) v. R. (W.W.)* was not a *Wills Variation Act* claim, and indeed as a step-daughter, S. would not have had standing, in a case where a child had grounds to make a claim against her parent for assault, she could ground a fraudulent conveyance claim on the fact that she had an independent claim for assault when a transfer was made.

Recently Mr. Justice Crawford applied *S. (G.M.) v. R. (W.W.)* in *M.J.K. (Guardian ad litem of) v. W.A.M.K. Estate*, 2012 BCSC 1346 to set aside transfers of funds by the plaintiffs' grandfather after he was charged with assaulting them.

X. Intent

The wording of the legislation implies that only those dispositions "made to delay, hinder or defraud creditors and others of their just and lawful remedies" are fraudulent conveyances, and the courts have held that a disposition is not fraudulent if there is no intent to affect the rights of creditors. Even if the party seeking to set aside a disposition is found to be a "creditor or other," the court may find that the disposition does not run afoul the *Fraudulent Conveyance Act* if the person who made the disposition did so for other valid purposes without the requisite intent.

A case in point is *Jack v. Parkinson* referred to above. When George Jack severed the joint tenancy of his home that he owned with his wife, Mary Jack, he had been separated from her for seven years, during which time he was living in the home in a common-law relationship with Ellen Parkinson to whom he transferred his half-interest. In 1986, Mr. Jack made a will in which he left his estate to Ms. Parkinson. In that same year, he filed a divorce petition, and Mrs. Jack filed a counter-petition in which she sought a division of assets. Nevertheless, the Court of Appeal upheld the Supreme Court's decision that the transfer was not a fraudulent conveyance. Mr. Justice Goldie wrote:

> 14 This, however, does not dispose of the second issue, namely, the effect of the trial judge's finding that there was no intent to delay, hinder, or defraud creditors and others. I refer to Mr. Justice Holmes' judgment:
>
> > In any event, I do not find the defendant, George Jack, made the conveyance in question with the intention to delay, hinder or defraud creditors and others. He wanted the defendant, Parkinson, to have his property upon his death. It was obvious that he considered his relationship with the plaintiff at an end and that he naturally with that in mind reviewed his affairs to see that they were in order. He had earlier arranged to change life insurance beneficiaries, he made a new will and he severed the joint tenancy when he learned of his shortened lifespan because he had been told by his solicitor of the survivorship aspect of joint property. He was also advised by his solicitor of the fact that he could, and I quote from the affidavit of his then solicitor:
> >
> > > Transfer the interest in the house during his lifetime which would save his common-law wife the trouble and expense of probating his will.
> >
> > In the circumstance of his long separation, his new relationship, his desire to order his affairs and the advice of his solicitor, I can find no indication on his part of an intent to defeat any interest of the plaintiff.
>
> 15 As I have said I do not overlook the fact that this was a voluntary transfer without consideration and that in those circumstances there is a presumption of fraud but it is a rebuttable presumption. The deceased had manifested his desire to make provision for the woman with whom he had spent the last seven years of his life in his will made in 1986. The finding of the trial judge is one we must respect. It relies in part on the affidavit of Mr. Jack's former solicitor and there was no cross-examination with respect to that affidavit.

As in *Jack*, in *DeLeeuw v. DeLeeuw*, 2003 BCSC 1472, the Court upheld a disposition of assets on the basis that it was done as part of a legitimate estate plan without the intent of defeating the claims of creditors. In *DeLeeuw*, the testator's wife, who was one of the plaintiffs in a *Wills Variation Act* claim, asked the Court to set aside an *inter vivos* transfer the testator had made of some shares to one of his children. Mr. Justice Masuhara found that the testator had transferred the shares openly as part of his estate plan, with his wife's knowledge, albeit despite her objections. The testator had no fraudulent intent, and accordingly, the Court dismissed this aspect of the plaintiff wife's claim.

The question of intent was considered in depth by both the Supreme Court of BC and the Court of Appeal in *Mawdsley*.

At trial, Madam Justice Ballance reached her decision that Joan Meshen's transfer of assets to the alter ego trust was not a fraudulent conveyance largely on the basis that Ms. Meshen was not motivated by an intention to defeat any claim by Mr. Mawdsley. Rather, Madam Justice Ballance found that Ms. Meshen did so for other legitimate tax and estate planning objectives.

Madam Justice Ballance summarized the jurisprudence on the requisite intent for a disposition to be a fraudulent conveyance, and the indicia of a fraudulent intent as follows:

> [209] The appellate court in *Abakhan* endorsed the principle that for the purposes of the FCA, it is no longer necessary to show a dishonest or morally blameworthy intent on the part of the transferor. With regard to the element of intent, all that is required to avoid a transaction under the FCA is an intention to place the assets out of the reach of a creditor or other: *Abakhan*, para. 73.
>
> [210] An individual may transfer a single piece of property or undertake a series of dispositive transactions for several reasons. A conveyance that is made with the intent of insulating assets from a creditor's grasp will not be excused where there also exists a lawful or *bona fide* concurrent intention. The latter intent does not serve to untaint the former. This is so even where the impermissible intention is subordinate to the *bona fide* rationale underlying the transfer: *Abakhan*, paras. 85-86.
>
> [211] Intention is a state of mind and is a question of fact to be ascertained based on the whole of the evidence of each particular case. Accordingly, whether a conveyance has been made with the required fraudulent intent will turn on the facts unique to each case. The precedential value of the large volume of case law is therefore limited. Authorities can be as readily found upholding transfers between a parent and children as they can setting them aside. The Court will examine the circumstances existing at the time the disposition was made as well as subsequent events that have a bearing on the question of intention at that time. At the same time, however, the law has long recognized that there may not be direct evidence of intention, and that fraud and concealment often march hand-in-hand. The courts have therefore identified certain circumstantial hallmarks, deemed suspicious, which may support an inference of fraudulent intent. In *Dexia Credit Local v. Rogan,* 2008 BCSC 1406 [*Dexia*], at paras. 23-24, Walker J. recites these so-called badges of fraud which the courts have traditionally resorted to in determining whether a transfer is fraudulent. The list is not closed:
>
> > [23] It is a question of fact, for the court to determine, whether the disposition was made with an intention to defeat, hinder, delay, or prejudice creditors. In *Banton v. Westcoast Landfill Diversion Corp*., 2004 BCCA 293 Braidwood J.A., writing for the court, cited at para. 5 a number of factual indicia of fraudulent intention or "badges of fraud" from *Frimer v. Lurcher*, [1984] B.C.J. No. 728 (S.C.):
> >
> > > (1) The state of the debtor's financial affairs at the time of the transaction, including his income, assets and debts;
> > >
> > > (2) The relationship between the parties to the transfer;
> > >
> > > (3) The effect of the disposition on the assets of the debtor, i.e. whether the transfer effectively divests the debtor of a substantial portion or all of his assets;
> > >
> > > (4) Evidence of haste in making the disposition;
> > >
> > > (5) The timing of the transfer relative to notice of the debts or claims against the debtor;
> > >
> > > (6) Whether the transferee gave valuable consideration for the transfer.

> [24] There are other indicia or badges of fraud that include continuing to remain in possession following a conveyance and secrecy respecting the transactions.

> [212] There is authority for the proposition that where the condemned transaction was made for no consideration, there is a legal presumption of fraudulent intent. Early authorities evidently went so far as to hold that in those circumstances, the presumption was not rebuttable. The better and modern view of the Canadian jurisprudence is that the presumption is rebuttable and therefore will yield to credible evidence that demonstrates the transferor did not dispose of the asset in furtherance of an improper purpose: see, for example, *Jack*. The authorities further hold that where a disposition is made between near relatives, especially spouses, in suspicious circumstances, the burden shifts to the transferor to show that the transaction was bona fide: *Koop v. Smith* (1915), 51 S.C.R. 554; *Jennings v. Chow*, 2008 BCSC 110; *CIBC Mortgage Corp. v. Pender*, [1999] B.C.J. No. 2162 (S.C.); *Dexia; Antrobus v. Antrobus*, 2009 BCSC 1341 [*Antrobus*].

In reaching the conclusion that Ms. Meshen did not intend to defeat any claim Mr. Mawdsley may have, Madam Justice Ballance considered the evidence that Joan Meshen did not dispose of her assets secretively. Rather, Mr. Mawdsley had been in on meetings with Joan Meshen's estate planning advisers as far back as 2000 in which she had discussions about transferring assets into a trust to benefit her children and her brother-in-law. Mr. Mawdsley knew that she did not intend to leave him anything, and he did not object during her lifetime.

Although her lawyer had told her about Mr. Mawdsley's potential *Wills Variation Act* claim, Joan Meshen dismissed the idea that her common law husband would make a claim. She said that she and Mr. Mawdsley had an agreement that each would keep her or his property. Madam Justice Ballance found that they did have an agreement that apart from sharing some expenses, and the occasional joint investment, they would keep their property separate, and each was free to deal with her or his own property as they liked.

In the Court of Appeal, Madam Justice Newbury held that Madam Justice Ballance correctly applied the law to the facts she found.

Mr. Mawdsley argued in the Court of Appeal that if the effect of the dispositions was to deplete Ms. Meshen's estate, the Court must find as a matter of law that Joan Meshen intended to defeat or delay Mr. Mawdsley's claim. He argued that the Court of Appeal had adopted this position in *Abakhan*, an argument which Madam Justice Newbury rejected:

> 71 I do not agree with Mr. Mawdsley's submission, then, that *Braydon* did away with the requirement of intention on the part of the transferor for the FCA to apply. In some cases, of course, that intention may be inferred from the effect of the transaction, and indeed a presumption may arise in some circumstances from that effect. If there is no credible evidence to the contrary, the FCA may be satisfied; but there is no rule of law that in every case, an intention to defeat creditors must be inferred from the effect of the impugned transaction. As Freedman J.A. stated in *Mandryk* [*v. Merko* (1971) 19 D.L.R. (3d) 238 (Man C.A.)] evidence that the effect of the impugned transfer was to defeat or delay creditors "is not conclusive." In the result, I cannot accede to Mr. Manson's argument in the case at bar that Ms. Meshen must be taken as a matter of law to have intended to delay or hinder Mr. Mawdsley (assuming for these purposes that he qualifies as a 'creditor or other' under the FCA) in advancing a WVA claim.
>
> [emphasis in original]

Likewise, in *Easingwood*, Madam Justice Dillon found that when Reginald Easingwood's attorneys used the power of attorney to transfer their father's assets to an alter ego trust, they did not do so with any intent of putting those assets out of reach of his wife. She found that they did so in order to allow for the continued management of his assets in contemplation of the death of one of them. Their main

reason was to avoid the necessity of a committeeship application. The other reasons for the trust were also legitimate estate and tax planning objectives, including avoiding probate fees. The ultimate distribution of his assets was identical to what it would have been under his will if the trust had not been settled, and it was consistent with the marriage agreement between Mr. Easingwood and his wife. Furthermore, the attorneys had no indication at the time they settled the trust that Mrs. Easingwood intended to challenge the will or marriage agreement.

XI. Conclusion

BC courts have interpreted and applied the *Fraudulent Conveyance Act* in a manner that permits a fair amount of latitude for estate planning. The legislation will generally not be an impediment to using will substitutes for choosing who to benefit on death or in contemplation of death. The circumstances in which plaintiffs will be able to use the *Fraudulent Conveyance Act* to successfully attack an estate plan are limited by the jurisprudence—but not eliminated.

The most significant development in the intersection of estate litigation and fraudulent conveyance jurisprudence in recent years is the confirmation by the Court of Appeal in *Mawdsley* that a person who has no claim at the time of the disposition apart from a potential future *Wills Variation Ac*t claim is not a "creditor or other" on whose behalf the court may find a disposition to be void. In many cases, people are able to plan around the *Wills Variation Act* by disposing of their assets before death, including the transferring assets into *inter vivos* trusts, without running afoul of the *Fraudulent Conveyance Act*.

On the other hand, if the person seeking to set aside a disposition did have a legal or equitable claim at the time of the disposition, such as a claim in unjust enrichment, a claim for a division of assets under the *Family Relations Act* or *Family Law Act*, or a claim in tort, then the court may set aside the disposition. In principle, a *Wills Variation Act* claimant could rely on a different legal or equitable claim as grounds to set aside a disposition of assets as a fraudulent conveyance, and then successfully apply under the *Wills Variation Act* for a share of the estate that includes those assets. Mr. Justice Mackenzie contemplated this possibility in *Hossay*, but the writer is not aware of any BC case in which a *Wills Variation Act* claimant has successfully relied on the *Fraudulent Conveyance Act* to transform another legal or equitable claim that the claimant had at the time of the disposition of assets into a *Wills Variation Act* claim to a share of those assets.

Certainly, if your client is relying on another claim to establish her standing as a "creditor or other," there must be an air of reality to the claim. The Supreme Court of BC's decision in *Easingwood* implies that a theoretical claim on the basis that the claimant was a spouse at the time of the disposition is not enough. At minimum, the claimant must have had a reasonable prospect of making a successful legal or equitable claim. Whether it is necessary for a spouse who might have had a successful claim under family law legislation to a share of the assets that were disposed of by the now deceased spouse to also prove that either there was a triggering event or that it was likely that there would be a triggering event at the time of the disposition is not yet settled. Perhaps the Court of Appeal in *Easingwood* will clarify this issue, or it may remain an issue for future cases.

It is important for those seeking to set aside dispositions as fraudulent conveyances to demonstrate that there is an air of reality to their claims for another reason, namely to prove an intent to delay, hinder or defraud them. *Mawdsley* confirms that a disposition without the requisite intent is not a fraudulent conveyance. There may be a presumption of intent where the effect of a gratuitous disposition is to put an asset out of reach of the claimant. But if the person who made the disposition did not believe, and had no reasonable basis for believing, that the claimant had any intention of making a claim, then it is unlikely that a court will find that there was any intent to delay, hinder or defraud.