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ESTATE LITIGATION BASICS—2010 UPDATE
PAPER 3.1

Challenging Inter Vivos Transfers and Beneficiary Designations

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CHALLENGING INTER VIVOS TRANSFERS AND BENEFICIARY DESIGNATIONS

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I. Introduction

You may be retained by a beneficiary of a will who discovers that the testator transferred most of his assets to others, directly or through a trust, or into jointures with others during his life. The testator may also have appointed others as beneficiaries of his life insurance and registered retirement income funds. There may appear to be little in the estate for the beneficiary.

Or perhaps you are retained by a disinherited spouse or child. Your client may potentially have a good claim to vary the will under the *Wills Variation Act*. But the testator has through transfers and beneficiary designations apparently diminished his estate to the point where the spoils of any victory will be of no consequence. The *Wills Variation Act* gives the Supreme Court of BC the jurisdiction to vary a will, but not a disposition outside of a will.

In either case, success will depend on finding grounds and building a case for bringing assets into the estate so that they flow under the will. This is so, whether your client is a beneficiary of the will, or wishes to vary the will under the *Wills Variation Act*.

The purpose of this paper is to set out and introduce some of the types of claims and remedies that you might pursue to challenge *inter vivos* transfers and beneficiary designations. The writer will also reference more in depth materials on many of these types of claims and remedies.

II. Incapacity

Your client will be successful in getting an *inter vivos* gift or beneficiary designation set aside if you can persuade the court that the donor did not have the capacity to make a gift.

In most cases, the presumption is that the donor had capacity to make an *inter vivos* gift, and the burden of proof is on the party alleging incapacity. The presumption of capacity is codified in s. 3 of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405:

> 3(1) Until the contrary is demonstrated, every adult is presumed to be capable of
> (a) making, changing or revoking a representation agreement, and
> (b) making decisions about personal care, health care and legal matters and about the adult's financial affairs, business and assets.
>
> (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

But s. 20 of the *Patients Property Act*, R.S.B.C. 1996, c. 349 creates a rebuttable presumption that a person who is or becomes a patient under the *Patients Property Act* (in other words, declared incapable of managing his affairs) is incompetent to make a gift. This presumption applies even if the donor had not yet been declared incapable when he or she transferred property, but is declared incapable of managing his affairs at a later time. See *Mlot v. Mesynski*, 1997 CarswellBC 1880.

In a general sense, the question is whether the donor understood the nature and effect of the transaction.

The courts have often considered the tests of capacity for making a will when considering whether the donor of an *inter vivos* transfer had the capacity to make a gift. The tests for testamentary capacity were set out in the English case *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at 565:

> ... It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

There are some *dicta* that the capacity for making a will is more stringent than that for making *inter vivos* gifts. See, for example, *Dacyshyn v. Dacyshyn Estate*, 1996 CarswellBC 629 (S.C.).

On the other hand, Mr. Justice Wilson, in *Re Rogers* (1963), 42 W.W.R. 200 (C.A.), when considering the test for capacity to designate the beneficiary of a life insurance policy, wrote:

> 29 I think that, since here the donee of the power was concerned with the interests of others rather than with his own interest, the testamentary test is the right one to apply.
>
> 30 Having concluded that the testamentary test is the right one to apply, I cannot see that, so far as degree of understanding or capacity is concerned, there is any real difference. I do not think that a man requires any higher or lower degree of capacity to consider his own interest than he needs to consider the interests of other persons. Nor do I think that the degree of capacity required differs in respect to any disposition by gift or otherwise.

If the donor is giving away a substantial portion of his or her wealth, the effect of which will be to reduce what is available to other beneficiaries of the donor's estate at death, it is difficult to see any rationale for applying a less stringent standard of capacity than that required to make a will.

The fact that a donor suffered from delusions does not necessarily vitiate capacity to make a gift. The question is whether the delusions affected the donor's decisions to transfer the assets or designate a beneficiary.

An example where the court found that the donor's decisions were affected by delusions is *Brydon v. Malamas*, 2008 BCSC 749. Stella Sirianidis had suffered from schizophrenia for decades, but functioned well until 2004, when she had hallucinations and suffered from depression.

Ms. Sirianidis had been close to a grand niece, Pam Brydon, whom she had made a substantial beneficiary of her will in 1995. She and Pam Brydon's grandmother owned a house on Vine Street, in Vancouver, which they gave to Ms. Brydon in 1995.

In 2004, Ms. Siriandis transferred her residence and bank accounts into jointures with a sister and a nephew, and she designated them as the beneficiaries of her Registered Retirement Income Funds. She also made a new will in which she excluded Ms. Brydon.

Mr. Justice Halfyard found that Ms. Sirgianidis changed her estate plan because she was upset that Ms. Brydon was selling the Vine Street property. He found that Ms. Sirgianidis was suffering from a delusion that Ms. Brydon had agreed that she would not sell the Vine Street house to someone outside of the family. This delusion was calculated to influence her decisions concerning her will and estate planning.

Accordingly, he set aside the transfers, and held that the beneficiary designation and the will were invalid.

Other cases in which plaintiffs have been successful in persuading the court to set aside *inter vivos* transfers on the grounds that the donee did not have capacity include *Re: Elsie Jones*, 2009 BCSC 1723; *Egger v. Dessureault*, 2010 BCSC 880; and *Miller v. Turney*, 2010 BCSC 101. The plaintiffs were not successful in *Dacyshyn v. Dacyshyn Estate*, 1996 CarswellBC 629; *Quallie v. Vandervelde*, 2009 BCSC 5; and *Calbick v. Warne*, 2009 BCSC 1222.

III. Undue Influence

You can have a benefit set aside if you can establish that it was procured by undue influence, even if the donor had the mental capacity to make a gift.

Madam Justice Southin in *Longmuir v. Holland*, 2000 BCCA 538, defined undue influence at para. 71 as "influence which overbears the will of the person influenced so that in truth what she does is not his or her own act."

In *Dacyshyn*, Mr. Justice K.C. Mackenzie wrote at para. 26 "[a]n oft quoted statement of undue influence in testamentary cases is that contained in *Freeman v. Freeman* (1889), 19 O.R. 141 at 155, as follows:

> 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:'"

In practice, it is often difficult to prove actual undue influence by the donee.

But if, because of the nature of their relationship, the donee has the potential to dominate the donor, there is a presumption that the donee obtained an *inter vivos* benefit by undue influence. Madam Justice Wilson, in *Goodman Estate v. Geffin*, [1991] 2 S.C.R. 353, wrote at para. 43:

> 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.

Once the plaintiff establishes the potential for domination, the onus is on the donee to rebut the presumption. According to Madam Justice Wilson at para. 46:

> Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v. Hyman*, *supra*, at 938, the plaintiff must be shown to have entered into the transaction as a result of his own 'full, free and informed thought.' Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.

In *Stewart v. McLean*, 2010 BCSC 64, Mr. Justice Punnett summarized at para. 97 the factors the courts have considered in determining whether the presumption of undue influence has been rebutted:

> To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own 'full, free and informed thought': *Geffen* at 379. A defendant could establish this by showing:
>
> a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
>
> b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
>
> c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
>
> d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
>
> e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

When reading cases dealing with allegations that a beneficiary of a will procured the benefit by the exercise of undue influence, it should be noted that the presumption of undue influence does not apply to wills (but s. 52 of the *Wills, Estates and Succession Act* will, when brought into force, make the presumption of undue influence applicable to wills).

Does the presumption of undue influence apply to life insurance declarations, pension and Registered Retirement Savings Plan beneficiaries? In *Fontana v. Fontana*, 1987 CarswellBC 642 (S.C.), Mr. Justice Callaghan held that the life insurance beneficiary designations are more like wills, and the presumption does not apply. Mr. Justice Parrett applied *Fontana* to the designation of a beneficiary of a pension plan in *Flack v. Rossi*, 2008 BCSC 670, holding that the presumption of undue influence does not apply.

Nietsche v. Nietsche, 2007 BCSC 172 provides an illustration of a case in which the plaintiffs successfully sued the donee of *inter vivos* transfers by relying on the presumption of undue influence.

The donor, Christine Katzensteiner never married, and had no children. She was very close to her niece Maria Nietsche's four children, one of whom was the defendant Roy Neitsche. In 1988, she made a will leaving most of her estate to be divided into five equal shares among Maria's four children and another great nephew.

Ms. Katzensteiner had vision problems, and by 1986 she was considered legally blind. She needed help writing cheques and cards. Her health deteriorated further when she developed hip problems and anaemia. At times she became confused. In 1997, she moved out of her home, and into a care facility.

After Ms. Katzensteiner sold her home in 1997 for $270,000, she wrote five cheques to her great nephew Roy totalling about $207,000 between February 5, 1998 and July 6, 2001. Roy used the funds from the largest cheque of $150,000 for a down payment on a house.

Ms. Katzensteiner died at the age of 87 on May 6, 2002.

Roy's siblings sued Roy, alleging that he had unduly influenced their great aunt to obtain the cheques from her.

Madam Justice Allan found that the relationship between Roy and his great aunt gave rise to a presumption of undue influence. She considered the following circumstances:

- Roy's secrecy with respect to those gifts and the purchase of his house;
- The size of the alleged gifts to Roy which represented 2/3 of her estate;
- The fact that he received an additional $37,000 that he did not apparently require for the down payment for his house;
- Roy's actions in assisting the Testatrix [Ms. Katzensteiner] revoke her Power of Attorney naming Maria and Rita;
- Roy's purported ability to influence her to keep Rita in the Will;
- Roy's failure to ensure that the Testatrix received any advice before giving him the cheques;
- Roy's preparation of a letter purportedly on instructions of the Testatrix asserting that the cheques were gifts;
- Roy's evidence that he talked his great aunt out of going to a lawyer or notary when she indicated that she wanted to formally document her intention to give him the cheques;
- Roy's efforts to ensure that his mother and sisters had no access to the Testatrix's bank statements before and after her death;
- Roy's steps to cancel the Testatrix's authorization for Maria to access her bank statements;
- Roy's failure to advise his sisters and mother that the Testatrix had been taken to hospital days before she died;
- The Testatrix's poor eye sight and reliance on Roy, in her later years, to fill out all of her cheques for her;
- The Testatrix's statements after 1998 that she had no money and that Roy had taken her money;
- Roy's inability to account for the items for which he says he received reimbursement of more than $20,000.

Madam Justice Allan also considered the fact that Roy had more access to Ms. Katzensteiner. He procured groceries and liquor for his great aunt, and he took her out shopping. His great aunt trusted Roy totally. Ms. Katzensteiner may have thought she would benefit from one cheque of $35,000 she gave to Roy, because he had said that he was building a basement suite in his house, which she could use.

Roy Nietsche failed to rebut the presumption of undue influence arising from his relationship with his great aunt.

Other cases in which the courts have set aside *inter vivos* transfers on the grounds that they were procured by undue influence include: *Ogilvie v. Ogilvie Estate* (1996), 26 B.C.L.R. (3d) 262 (S.C.), aff'd 49 B.C.L.R. (3d) 277 (C.A.); *Tribe v. Farrell*, 2003 BCSC 1758, aff'd 2006 BCCA 38. Undue influence was unsuccessfully plead in *Stone v. Campbell*, 2008 BCSC 1518; *Riley v. Riley*, 2010 BCSC 161; and *Stewart v. McLean*, 2010 BCSC 64.

IV. Resulting Trusts

Perhaps the most frequently employed claim for bringing assets back into an estate is the claim that the donee is holding assets on a resulting trust for an estate. The argument is that although the testator transferred title to an asset, often by transfer into a joint tenancy, the testator retained the beneficial interest.

To describe the principle, you can do no better than to quote Waters, Gillen and Smith, in *Waters' Law of Trusts in Canada*, 3rd Edition. They wrote at 367-68:

> 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.

And, further, at 372, they wrote:

> 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. In the case of purchase by one person taking title in the name of another, the resulting trust produces this effect, namely, of putting the onus of proof of a gift upon the transferee. It is not enough for the transferee to show that the transfer was 'complete and perfect', in the sense that the transferee is fully vested with title to the property; he must also show that a gift was intended.

In *Pecore v. Pecore*, 2007 SCC 17, the majority of the Supreme Court of Canada held that the presumption of resulting trust is a presumption of law and general rule applying to gratuitous transfers, and includes transfers from a parent to an adult child.

Mr. Justice Rothstein for himself and seven other judges at paras. 24 and 25 wrote as follows:

> 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 375 and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005) at 110. This is so because equity presumes bargains, not gifts.

> 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.

Not all resulting trust claims are successful. The presumption of resulting trust is just that: a presumption. The defendant may rebut the presumption with evidence that the testator intended to make a gift. The result in *Pecore*, for example, was that the defendant was entitled to keep the investments her father had made into joint accounts with her. He had intended to transfer the right-of-survivorship in the joint accounts to her.

The presumption of resulting trust applies to land in BC despite s. 23(1) of the *Land Title Act*. See *Fleming v. Kwakseestahla*, 2010 BCSC 1006 and *Fuller v. Fuller Estate*, 2008 BCSC 702.

There is an exception to the presumption of resulting trusts in some relationships. This is the presumption of advancement, a presumption which is also rebuttable.

The Supreme Court of Canada said in *Pecore* that when a parent gratuitously transfers assets to his or her minor child, the presumption of advancement applies. The presumption in the case of a gratuitous transfer to the minor child is the parent intended to make a gift to the child.

Historically, the presumption of advancement applied to transfers between married spouses (originally from a husband to his wife). Now, the courts appear to give the presumption of advancement between spouses less weight than they once did. See, for example, *Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240 (C.A.). In a recent decision, *Anderson v. Anderson*, 2010 BCSC 911, Madam Justice Dardi wrote:

> Based on the recent jurisprudence it appears to be an open question in this jurisdiction as to whether, in circumstances where there is no evidence of marital discord or impending separation, the presumption of advancement might apply to transfers between husbands and wives during the currency of a marriage.

The authorities are inconsistent on whether the presumption of advancement also applies to a transfer between common law spouses. *Manley v. Schiller* (1980), 22 B.C.L.R. 61 (S.C.), supports the view that it does, and *McDonald v. Eckert*, 2004 BCSC 323, that it does not.

In addition to gratuitous *inter vivos* transfers, the Supreme Court of BC has also applied the presumption of resulting trust to hold that the designated beneficiary of a Registered Retirement Income Fund. In *Neufeld v. Neufeld*, 2004 BCSC 25, the testator had provided in her will that her estate would be divided equally between her two brothers. But she designated one of her brothers as the sole beneficiary of her RRIF. Mr. Justice Cohen applied the presumption of resulting trust in holding that the designated beneficiary held the proceeds of the RRIF in trust for the testator's estate.

Although the presumptions are helpful, success in a resulting trust claim will depend on the courts assessment of the evidence of whether the donor intended a gift. In addition to direct evidence of the donor's intent, the court may consider circumstantial evidence including the nature of the donor's relationship with the donee at the time of the transfer.

For a further discussion of resulting trusts, see Rhys Davies, QC, "Joint Tenancy Update," in *Estate Litigation – 2007 Update* (CLE, 2007) and Kimberly-Anne Kuntz, "The Trouble with Joint Tenancies: A Question of Intention," in *Estate Litigation Basics for Lawyers* (CLE, 2008).

V. Secret Trusts

It may be helpful to contrast secret trusts from resulting trusts to understand the concept. If you plead a resulting trust in the sense described above, you are alleging that the donor did not intend to make a gift. (A resulting trust could also arise if the donor intended a gift, but the gift is void or cannot be given effect.) If the plea of resulting trust is successful, the assets will result back to the donor's estate.

In contrast, if you plead a secret trust you are alleging that the donor did intend to make a gift, but that the donee holds the assets on trust for the intended beneficiaries of the gift. If the plea of secret trust is successful, the assets will flow to the intended beneficiaries rather than back to the donor's estate.

What is a secret trust?

> A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation.
>
> Per Madam Justice Saunders in *Champoise v. Prost*, 2000 BCCA 426 at para. 15.

The trust is secret because the donee's obligations are not apparent on the face of the instrument under which the property is given: the donee *appears* to take the property beneficially.

A related concept is a half-secret trust: the instrument indicates that the donee has obligations, but does not name the beneficiaries or other objects of those obligations.

To prove a secret trust, the proponent must establish the following:

(a) the donor communicated the trust to the donee during the donor's lifetime;

(b) the donee accepted the trusts. The acceptance may be implied if the donee remains silent;

(c) the three certainties of a trust must be present, that is to say:

- (i) the certainty of the donor's intention to create the trust;
- (ii) the certainty of the subject matter (the property); and
- (iii) the certainty of the objects (the beneficiaries of the trust).

In many of the cases, the most contentious and difficult issue may be the certainty of intention to create a trust.

In the following cases a plea of secret trust was successful: *Glasspool v. Everett* (1998), 53 B.C.L.R. (3d) 371 (S.C.), aff'd 1999 BCCA 31; *Young v. Baker* (September 30, 2004), BCSC Victoria Registry 03-3213; and *Chinn v. Hanrieder*, 2009 BCSC 635. In the following cases the courts dismissed a secret trust claim: *Hayman v. Nicoll*, [1944] 3 D.L.R. 551 (S.C.C.); *Champoise v. Prost*, 2000 BCCA 426; *Milsom v. Holien*, 2001 BCSC 868; *Bellinger v. Nuytten Estate*, 2002 BCSC 571; and *Anderson v. Anderson*, 2010 BCSC 911.

Most secret trust cases are will cases: someone claims that the beneficiary in a will holds his or her share of the estate on a secret trust. But the principles apply to *inter vivos* transfers, insurance policies, and other beneficiary designations.

An example of a case where the court found that the donor had imposed a secret trust on the surviving joint tenant and insurance beneficiary is an unreported decision, *Young v. Baker* (September 30, 2004), BCSC Victoria Registry 03-3213. After being diagnosed with cancer, Nancy Firth transferred assets into a joint tenancy with her sister Shelley Baker to avoid probate fees. She also made Ms. Baker the sole beneficiary of her life insurance. The Court found that Ms. Firth had intended to also benefit her sister Sandra Young as well as Ms. Firth's nieces and nephews, but was concerned about Ms. Young's marriage. On finding all of the elements of a secret trust established, the Court held that Ms. Baker held one-half of the assets on a secret trust for herself and her children, and the other half for Ms. Young and Ms. Young's children.

Timing is important when considering whether there is a secret trust over *inter vivos* transfers. If the court finds that at the time the transfer was made the transferor made a gift, the transferor cannot later impose a secret trust on the beneficiary of the gift. This is one of the reasons the secret trust argument failed in *Milsom v. Holien*, the Court having found that the donor had completed a gift of GIC's when he transferred them into jointures with his common law spouse.

In contrast, in the wills cases, the testator may communicate the fully secret trust to the trustee after the will is made. This is because the testator may later revoke the will if the donee does not accept the trusts. The same reasoning should apply to revocable beneficiary designations in life insurance policies and Registered Retirement Savings Plans and Registered Retirement Income Funds. The donor should be able to communicate the trust to the trustee after the donor has signed the beneficiary designation, but the writer is not aware of any cases on point.

For a further discussion of secret trusts, see Stanley T. Rule, "Secret Trusts," in *Estate Litigation – 2009 Update* (CLE, 2009).

VI. Constructive Trusts

A. Remedial Constructive Trusts to Prevent Unjust Enrichment

A remedial constructive trust is a remedy, rather than a cause of action. It is often associated with, but is not limited to, claims in unjust enrichment. Sometimes constructive trusts and unjust enrichment are mistakenly used interchangeably. Unjust enrichment is a cause of action, and a remedial constructive trust is sometimes, but not always, granted as a remedy for unjust enrichment.

To succeed in an unjust enrichment claim, the plaintiff needs to establish three elements:

1. An enrichment;
2. A corresponding deprivation;
3. Absence of a juristic reason for the enrichment.

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

In estate litigation, unjust enrichment claims are typically brought by disappointed family or friends who claim to have provided care, labour, money or property to the deceased in the expectation of a more substantial inheritance.

If the plaintiff proves unjust enrichment the court may decide whether to make a monetary award to the plaintiff or grant a remedial constructive trust over specific property. In many cases, the courts make a monetary award. The majority of the Supreme Court of Canada in *Peter v. Beblow*, [1993] 1 S.C.R. 980, has said that the court must find a monetary award to be inadequate before imposing a constructive trust.

Madam Justice McLachlin (as she then was) wrote for the majority in *Peter v. Beblow* at para. 34:

> To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in *Lac Minerals*. The value of that trust is to be determined on the basis of the actual value of the matrimonial property—the 'value survived' approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

The choice of remedy in estate litigation will be critically important where the assets of the deceased devolve outside of the deceased's estate through jointures or beneficiary designations. If there are little or no assets falling into the deceased's estate, a monetary award against the estate will not prevent

unjust enrichment. The plaintiff will want a remedial constructive trust imposed on the assets flowing outside of the deceased's estate, such as real estate that the deceased held with another in a joint tenancy. Because a remedial constructive trust is imposed on specific property, the trust should follow the property into the hands of a gratuitous transferee or designated beneficiary.

Finally, in respect of unjust enrichment claims, it will be helpful to review Madam Justice Huddart's extensive analysis of unjust enrichment, including a discussion of equitable set-off where there are mutual enrichments, in a recent decision, *Wilson v. Fotsch*, 2010 BCCA 226. The case was a dispute between living common-law spouses, but the principles are applicable to estate litigation cases.

For a further discussion of unjust enrichment and constructive trusts, see Stanley T. Rule, "Unjust Enrichment and Constructive Trusts," in *Estate Litigation – 2007 Update* (CLE, 2007).

B. Other Remedial Constructive Trusts

While remedial constructive trusts are often associated with unjust enrichment cases, "a constructive trust may be imposed where good conscience so requires" per Madam Justice McLachlin, as she then was, in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34.

In *Soulo*s, Madam Justice McLachlin expressly rejected the view that remedial constructive trusts were only available to remedy unjust enrichment. She wrote at para. 17:

> The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or 'institutional' trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

With the right facts, constructive trusts can be used to pursue assets that pass outside of the estate, even where there is no unjust enrichment.

In *Martindale Estate v. Martindale* (1998), 55 B.C.L.R. (3d) 63 (C.A.), Madam Justice Southin held that it was against good conscience for the beneficiary of his deceased former wife's life insurance to keep the insurance proceeds. The wife designated her husband as the beneficiary of a group life insurance policy in 1979. The wife and the husband entered into a separation agreement and then divorced in 1981. The wife never changed the designated beneficiary of the group life insurance policy, although there was evidence that she thought she had.

On the wife's death, the husband claimed the proceeds of the group life insurance policy, and the insurer paid him as it was required to do pursuant to the *Insurance Act*.

The separation agreement contained clauses indicating it was a final agreement on property, and each of the husband and wife gave up any claims to the other's property or estate.

Madam Justice Southin held that, because the husband had given up his rights to all of his wife's property in the separation agreement, it was against good conscience for him to keep the proceeds. She upheld the trial judge's order imposing a remedial constructive trust on the proceeds (but for different reasons than those of the trial judge). Madam Justice Southin wrote at paras. 26 and 27:

> [26] But I am comfortable in this case in saying that it would be against good conscience for the appellants to keep this money because Mr. Martindale had, by the

> separation agreement, surrendered any right he might have had to the property of the deceased. A policy of life insurance is a species of property of the insured, albeit the amount payable under the contract of insurance does not fall into possession until the insured's death, and, by law, cannot be taken by the insured's creditors.
>
> [27] For the appellant, Mr. Martindale, to claim from the insurer the proceeds was a breach of the separation agreement and such a breach is sufficient, in my opinion, to call in aid the doctrine of the remedial constructive trust. To put it another way, it is not the mistaken belief of Mrs. Martindale which gives rise to a remedy; it is the bargain which Mr. Martindale made.

VII. Fraudulent Conveyances

Section 1 of the *Fraudulent Conveyance Act* says:

> 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 by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

At first glance, the *Fraudulent Conveyance Act* does not appear to be fruitful ground for a disappointed beneficiary of a will, or claimant under the *Wills Variation Act*, seeking to set aside an *inter vivos* transfer.

In two cases, the BC Supreme Court has held that a person entitled to make a claim under the *Wills Variation Act* is not a "creditor or other" within the meaning of the statute. The first case is *Hossay v. Newman* (Feb. 5, 1998), BCSC, Kelowna Registry 27559, 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. *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.

But *Hossay* left the door open to challenges of *inter vivos* transfers by those claimants who had an independent legal or equitable claim during the testator's lifetime. Mr. Justice Mackenzie wrote at paras. 9 and 10:

> 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*. For person within that category, which includes the plaintiff, the question must be answered in the negative.

In *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (C.A.), 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 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 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 ambit of Ontario's fraudulent conveyance legislation.

While a married spouse of the testator might be able to set aside a transfer on the basis of his or her rights during the testator's lifetime under the *Family Relations Act*, a common law spouse, child, or indeed any other person, could seek to set aside such a transfer if he or she had a claim in unjust enrichment.

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.

Not every transfer that has the effect of defeating a claim is a fraudulent conveyance. A party seeking to set aside a transfer as a fraudulent conveyance must prove an intent to delay, hinder or defraud creditors or others.

For example, in *DeLeeuw v. DeLeeuw*, 2003 BCSC 1472, 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.

More recently, Madam Justice Ballance dismissed the plaintiff's claim that his common law spouse of 18 years had fraudulently conveyed assets after she was diagnosed with cancer in *Mawdsley v. Meshen*, 2010 BCSC 1099. Dennis Mawdsley's common law spouse, Joan Meshen, transferred her interests in three privately held companies, as well as $3,250,000 in investments into an alter ego trust, the remainder beneficiaries of which were her children, and her late second husband's brother. She also transferred her residence into a joint tenancy with her youngest son, her other real estate properties to her children, and made her bank accounts joint with her daughter.

Madam Justice Ballance found that Ms. Meshen was not motivated by an intention to defeat any claim by Mr. Mawdsley, including his potential claim under the *Wills Variation Act*, when she entered the transactions. She entered these transactions for other legitimate tax and estate planning objectives.

Ms. Meshen did not enter these transactions secretively. Mr. Mawdsley had been in on meetings with Ms. Meshen's estate planning advisers as far back as 2000 in which she had discussions about transferring assets into a trust. He knew that she did not intend to leave him anything, and he did not object during her lifetime. Madam Justice Ballance also found that the couple had an agreement that, apart from sharing some expenses, they would keep their property separate, and each was free to deal with her or his own property.

Mr. Mawdsley was successful to a limited extent in persuading the court that cash held in a joint safety deposit box and some joint bank accounts were held on a resulting trust for Joan Meshen's estate, and he was successful in his application to vary the will. But Ms. Meshen had effectively disposed of most of her assets outside of the estate.

Although there are few estate-litigation cases in which BC courts have considered fraudulent conveyance arguments, the legislation ought not to be overlooked. If your client had a legal or equitable claim against the testator during the testator's lifetime, and the testator gratuitously transferred assets with the intent of delaying, hindering or defrauding your client, you will have a reasonable basis for attacking the transfer as a fraudulent conveyance.

For a further discussion of fraudulent conveyances, see Duncan J. Manson, "Fraudulent Conveyances," in *Blended Families Practical Estate Planning Considerations* (CLE, 2010).

VIII. Conclusion

Incapacity, undue influence, resulting trusts, constructive trusts, secret trusts, and fraudulent conveyance each offer a legal framework for challenging *inter vivos* transfers and beneficiary designations. There are no doubt others, such as unconscionable transactions.

A set of facts will often give rise to more than one type of claim. For example, it is common to see incapacity and undue influence plead in the same case. If the evidence indicates that the donor suffered from diminished capacity, he or she may have been vulnerable to undue influence, as well as incapacitated. The same facts will often give rise to resulting thrusts. Evidence that the donor was incapacitated will undermine statements by the donor that he or she intended to make a gift.

This is not to say that certain claims should always be plead with others. You should always exercise care when pleading undue influence that there is some basis for the allegation, or your client may penalized in costs given that undue influence carries a stigma of moral turpitude.

Other types of claims do not go well together, even though the rules permit alternative pleadings. Evidence that the donor did not have capacity to make a gift is likely to undermine the allegation that the donor transferred assets with the intent to defeat a claim (a pointed noted by Madam Justice Ballance in *Mawdsley* at para. 184). Similarly, allegations of incapacity and secret trust are not likely to fit well with one another. If the donor did not understand the nature and effect of a transfer or beneficiary designation, it is hard to conceive of how he or she could create a secret trust.

This is not to say that certain claims should never be plead together. At the outset of a case, you might not have enough evidence to assess the strength of a number of potential claims. For example, it may be necessary to plead incapacity in order to get medical records and legal files to assess the strength of a claim that the donor did not have capacity. There may also be evidence of a fraudulent conveyance. It may make sense to initially plead both. But once you have gathered sufficient evidence to assess the strength of various potential claims, it is important to develop a coherent theory, and a good idea to drop any inconsistent allegations.