

Challenging Inter Vivos Wealth Transfers

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CHALLENGING INTER VIVOS WEALTH TRANSFERS

1. INTRODUCTION

In a family setting, inter vivos transfers of assets take place for a variety of reasons ranging from legitimate wealth transfers to achieve an estate planning objective to transactions motivated by less noble objectives.

Ownership can be voluntarily transferred through testamentary gifts, gifts donation mortis causa, and inter vivos gifts.¹ Inter vivos gifts include:

1. Ordinary gifts in their traditional form, whether given verbally or in writing;
2. Transfers of property into joint tenancy;
3. Gifts or settlements into trusts where the settlor gives up legal title or perhaps an equitable interest, by making it subject to a trust relationship under which a trustee holds the property for the benefit of a beneficiary or beneficiaries;
4. Non-revocable beneficiary designations;
5. Inter vivos transfers of rights of survivorship.²

These methods of inter vivos asset transfers are commonly used by individuals in the exercise of prudent estate planning to achieve their financial objectives.

Included in these estate planning tools is the implementation of an estate freeze, which is a reorganization of assets which effectively freezes the value of property to shield assets from creditors and provide greater certainty of capital gains taxes.

The purpose of some of these estate planning tools was summarized in the 2011 British Columbia Court of Appeal decision of *Mawdsley v Meshen*,³ as follows:

Corporations and trusts also serve “protective functions” in the realm of estate planning. For example, individuals wishing to “freeze” the value of their estates may “roll over” their existing shares to new corporations, or exchange their appreciating

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¹ John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada Limited, 2014) at page 436 [*Poyser*].

² *Ibid* at page 436.

³ *Mawdsley v Meshen*, 2012 BCCA 91 [*Meshen*].

shares for fixed-value shares, on a tax-deferred basis. The future appreciation of the corporation may then accrue to the benefit of the next generation, either directly or through trusts.

In recent years, the “*alter ego trust*” has also been recognized in the *Income Tax Act* as an estate planning tool. Provided the settlor is age 65 or older, he or she may “roll” assets to a trust that is for his or her sole benefit during his or her lifetime and then for the benefit of his or her chosen beneficiaries. Such trusts have several advantages: they are used to minimize or eliminate probate fees; they permit the control and management of assets located in various jurisdictions to be centralized and to ‘carry on’ after the settlor’s death without the need for court approvals or probate’ they obviate the risk of asset diminution due to incapacity or diminished capacity on the part of the settlor; and where beneficial interests are subject to the exercise of the trustee’s discretion, they offer some protection from spendthrift family members, their spouses and other claiming through them.⁴

The use of these estate planning tools usually involves a reduction of the assets of the estate of the party deploying them, sometimes leaving disappointed spouses, adult interdependent partners or other family members who were expecting to receive something in the event of a breakdown of the relationship or upon death, as the case may be. In these circumstances, the aggrieved party or parties may bring an action seeking what they feel is rightfully theirs against the transferor, the estate thereof, or the transferee, be it a trust, a corporation or the individual.⁵

This paper will outline some of the challenges available to spouses and other parties that take issue with these voluntary asset transfers.

2. REQUIREMENTS OF AN INTER VIVOS GIFT

The requirements of an inter vivos gift include:

- a. an intention to donate;
- b. a sufficient act of delivery; and
- c. Acceptance of the gift.⁶

⁴ *Ibid* at page 3 citing M. Elena Hoffstein, *Alter Ego Trusts/Joint Partner Trusts, Tips, Traps & Planning* (2004) Ont Tax Conf, Cdn Tax Foundation, 12A: 1-47 at 3-4; **Donovan Waters, Mark Gillen & Lionel Smith, *Waters’ Law of Trusts in Canada***, 3rd ed (Toronto: Thomson Carswell, 2005) at pages 367, 368 and 372 [Waters’]

⁵ It is beyond the scope of this paper to deal with the particulars of these estate planning tools. There are many papers and publications on this topic, including “Estate Freezes, What, Why, When and How”, prepared for the Legal Education Society of Alberta; Robert C. Dunseith, Duncan & Craig LLP, “Advising a Private Family Business November 2012” Edmonton, Alberta; and David Louis, “Implementing Estate Freezes” (2nd ed) CCH Canada Limited, 2006 at page 2

⁶ Professor Bruce Ziff, *Principles of Property Law*, 3rd ed (Scarborough: Thomson Publishing Ltd, 2000) at page 140 [Ziff]; *Re GJV (Estate of)*, 2005 ABQB 160 at para 62; *Scott Estate v Scott*, [2002] AJ No 459 (Alta QB) at para 50-52; *Poyser*, *supra* note 1 at page 438.

Courts have strictly enforced these requirements and will not perfect an imperfect gift.⁷ While delivery and acceptance of the gift may not be difficult to establish, establishing intent often proves to be more difficult.

An inter vivos gift cannot be saved by dressing it up as a contract. Where there is insufficient consideration, or it can be established that the transferor did not intend to be paid, courts are willing to treat the purported 'contract' as a gift.⁸ Poyser explained this concept in his treatise, which provides that:

“a wide range of inter vivos wealth transfers are gift-like in the sense that the maker gratuitously surrenders ownership rights [to] some other person, at least in part, but comes with some reservation of the rights or ownership that is retained. That might be the case when a person settles a trust, but is one of the beneficiaries during his or her lifetime. ... These types of transfers are subject to the same basic capacity test as An Inter Vivos Gift.”⁹

3. THE REQUISITE INTENTION FOR AN INTER VIVOS TRANSFER

Intention is relevant to two different aspects of an inter vivos transfer and is considered at two different stages in a determination of whether such transfer was valid.

First, a court will evaluate whether the inter vivos transferor possessed the requisite intent to perform the transfer. This level of intent speaks to the essential validity of the transfer, that is, whether the transfer is valid or void and is similar to the determination of whether a testator had knowledge and approval in the execution of his or her will.

Second, a court will evaluate intention from the perspective of construction. At this stage, the validity of the document is assumed and the meaning of it is being assessed.

The key distinction at the first level, when dealing with basic intention, is whether intention was absent or whether intention was present but was flawed or secured by inappropriate means. Where intention is absent at the first stage the action is void at law, but where intention is present but flawed at the first stage then the action is voidable at equity.¹⁰

⁷ *Re GJV (Estate of)*, 2005 ABQB 160 at para 62 citing *Ziff*, *supra* note 6 at page 140.

⁸ *Poyser*, *supra* note 1 at page 356.

⁹ *Ibid* at pages 356-357.

¹⁰ *Poyser*, *supra* note 1 at page 357.