

Slide 1

**WILLS & ESTATE DISPUTES**

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Slide 2

**Attacking Gifts**

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□ **2 general classes of transfers of property:**

- **Inter vivos transfers – take effect while transferor is living; and**
- **Testamentary transfers – take effect on death of the testator.**

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Slide 3

**Inter Vivos v. Testamentary Transfers**

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□ **Distinction between inter vivos and testamentary transfers:**

- **Requirements to validly transfer (Wills Act) differ;**
- **Probate fees payable only on estate assets;**
- **Different presumptions of law arise; and**
- **Some different legal considerations may arise.**

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Slide 4

**Right of Survivorship**

- **Transfers that provide for the right of survivorship:**
  - **Joint bank accounts; and**
  - **Joint tenancy ownership of land****are inter vivos transfers.**

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Slide 5

**Beneficiaries/Annuitants**

- **Designated beneficiaries / annuitants:**
  - **Employee benefit plans;**
  - **RRSPs / RRIFs; and**
  - **Life Insurance (?)****are effectively inter vivos transfers.**

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Slide 6

**Presumptions of Law**

- **Testamentary transfer:**
  - **If Wills Act requirements met, and Will is read by or to the testator, presumption is testator knew and approved of contents of Will.**

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Slide 7

**Presumptions of Law**

- Inter vivos transfer:**
  - transfers to spouses and infant children presumed to be gifts (presumption of advancement);
  - Transfers to others presumed to create a resulting trust (presumption of resulting trust);

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**Presumptions of Law**

- Are just that-presumptions.**
- Can be rebutted by the evidence.**

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**Presumption of Advancement**

- Places the burden of proof on the person(s) challenging the transfer to demonstrate that a gift was not intended.**
- Civil standard of proof is applicable (balance of probabilities).**

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**Pecore v. Pecore**

- He declares and paid all taxes on income made from the accounts;
- He had a history of financially helping P. and her family;
- Other adult children, P.'s siblings, were financially secure; P. was not;

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Slide 14

**Pecore v. Pecore**

- Father's Will left specific gifts to P., her spouse M. and their children, but no mention of the accounts;
- Residue of the estate to be divided equally between P. and M.;

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**Pecore v. Pecore**

- Upon father's death, P. redeemed the balance in the joint accounts on the basis of the right of survivorship;
- In later divorce proceedings, M. claimed P. held the balance in the accounts in trust for the benefit of her father's estate;

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**Pecore v. Pecore**

- ❑ Thus, M. claimed the balance formed part of the residue and should be distributed according to the Will;

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**Pecore v. Pecore**

- ❑ The lower courts held that the father intended to make a gift of the beneficial interest in the accounts upon his death to P. alone;
- ❑ Outcome?

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**Pecore v. Pecore**

- ❑ Held:
- ❑ The presumption of resulting trust applies, but is rebutted;
- ❑ The evidence clearly demonstrated that father's intention was to gift the balance left in the joint accounts to P. alone on his death through survivorship;

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**Pecore v. Pecore**

- **Relevant evidence / considerations may include:**
  - **The wording used in bank documents may carry significant weight as to intention;**
  - **Control and use of the funds;**
  - **The granting of a Power of Attorney;**

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Slide 20

**Pecore v. Pecore**

- **Tax treatment of the joint accounts;**
- **Evidence subsequent to the transfer, if relevant to the transferor's intention at time of transfer;**
- **Relationships and dependency are important;**

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Slide 21

**A Companion Case**

- **Madsen Estate v. Saylor (2007) Supreme Court of Canada**

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Slide 22

**Madsen Estate v. Saylor**

- ❑ **Parents had longstanding Wills treating 3 children equally;**
- ❑ **After death of mother, father made daughter P. joint account holder on his bank accounts;**

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Slide 23

**Madsen Estate v. Saylor**

- ❑ **The accounts had a right of survivorship;**
- ❑ **Father also executed a POA in P.'s favour;**
- ❑ **Father did not change Will after his spouse died;**

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Slide 24

**Madsen Estate v. Saylor**

- ❑ **Father retained control of the joint accounts and funds used solely for his benefit;**
- ❑ **He declared and paid all taxes on income from accounts;**

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Slide 25

**Madsen Estate v. Saylor**

- ❑ **Conflicting evidence on the children's relationships with their father;**
- ❑ **Outcome?**

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Slide 26

**Madsen Estate v. Saylor**

- ❑ **Held:**
- ❑ **P. held the balance of the joint accounts in trust for father's estate;**
- ❑ **There was some evidence to suggest an intention to gift- (bank documents, P.'s evidence on her father's understanding of right of survivorship)**

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Slide 27

**Madsen Estate v. Saylor**

- ❑ **However, bank documents lacked clarity and trial judge found P.'s testimony evasive and conflicting;**
- ❑ **Presumption of resulting trust was not rebutted.**

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**Patient Under Patients Property Act**

- **Every gift, grant, alienation, conveyance, or transfer of property made by a person who is or becomes a patient is deemed to be fraudulent and void as against the committee if:**

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Slide 32

**Patient under Patients Property Act**

- a) **It is not made for full and valuable consideration actually paid or sufficiently secured; or**
  - b) **The person to whom the property was alienated etc. had notice at the time of alienation etc. of the mental condition of the person.**
- (s. 20, Patients Property Act)**

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Slide 33

**Patient under Patients Property Act**

- **There is a rebuttable presumption of incompetency for transfers prior to the transferor becoming a patient under the Act.**

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**Disposition of Land**

- ❑ **Is not enforceable unless there is in writing signed by the transferor:**
  - An indication that the disposition has been made; and
  - A reasonable indication of the subject matter.

(s. 59, Law and Equity Act)

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**Attacks Relevant to Both Inter Vivos Transfers and Wills**

- ❑ **Capacity**
- ❑ **Undue influence in suspicious circumstances**
- ❑ **Trusts**

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**Capacity**

- ❑ **A legal test;**
- ❑ **A testator must have an understanding of :**
  - the nature of making a Will and its effect;
  - the extent of the property he is disposing;

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**Capacity**

- the persons who are or should be the objects of his bounty; and
- the manner in which the property is to be distributed between them.

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**Capacity**

- Further, no disorder of the mind shall poison his affections, prevent his sense of right or prevent the exercise of his natural faculties;

i.e. No insane delusion shall influence his Will in disposing of his property in a way which, if his mind had been sound, would not have been made.  
**(Banks v. Goodfellow (1870)) (English Q.B.)**

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**Capacity**

- Capacity necessary to make an inter vivos gift:
  - May be the same as that required to make a Will, or may be less stringent;
  - Depends on the type and extent of the inter vivos gift.

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**Capacity**

- **Evidence**
  - The evidence of capacity from the person who took instructions on and prepared the Will (or deed of gift) is highly relevant.
  - Evidence of lay persons who routinely interacted with the testator/transferor is also important.

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**Capacity**

- **Medical records and expert opinions can also be very important.**

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**Undue Influence in Suspicious Circumstances**

- **A person may have capacity to make a Will or inter vivos gift, but same may be invalid if she was unduly influenced to the extent that, through coercion, her free and disposing mind was overwhelmed;**

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**Undue Influence in Suspicious Circumstances**

- The party who alleges undue influence bears the burden of proof;
- A difficult claim to prove – the influence must go beyond the influence of affection or attachment.

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**Undue Influence in Suspicious Circumstances**

- Suspicious circumstances may include:
  - Age and infirmity of donor;
  - Is the alleged wrongdoer’s relationship to the donor relatively new?

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**Undue Influence in Suspicious Circumstances**

- Do the impugned transaction(s) upset long held estate plans?
- Is the alleged wrongdoer controlling others’ access to the donor?

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**Undue Influence in Suspicious Circumstances**

- Has the alleged wrongdoer poisoned the donor’s mind to his relatives and others he might otherwise benefit?
- Has the alleged wrongdoer played a prominent role in the choice of the donor’s legal, medical and financial advisors?

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**Undue Influence in Suspicious Circumstances**

- Is the donor reliant upon the alleged wrongdoer for care and living needs?

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**Trusts**

- The donee / beneficiary may have been given property on an express or a secret trust that she will hold the beneficial interest in it for another person;

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**Trusts**

- e.g. Land put in joint tenancy for the sole purpose of avoiding probate fees may be held in trust for a larger group of beneficiaries.

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Slide 50

**Trusts**

- **Constructive Trust**
  - Is there a claim for constructive trust on the “gifted” property on the basis of an unjust enrichment claim?

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**Other Possibilities**

- **Wills Variation Act claims:**
  - A topic onto itself;
  - Only spouses and children may claim;
  - Seeks a variation of the bequests made under the Will to the benefit of the claimant(s).

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**Questions?**

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**We would be pleased to answer any (further) questions you may have.**

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