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Estate Planning With *Inter Vivos* Gifts

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Clients are often interested in minimizing the amount of estate administration tax (also known as probate fees) payable when an application for a certificate of appointment of estate trustee is submitted.[1] A variety of estate planning strategies can be used to ensure that assets pass outside of probate and are not subject to probate fees, including beneficiary designations, secondary wills, and *inter vivos* transfers.[2] This article focuses specifically on the last strategy — *inter vivos* gifts — and potential pitfalls that clients ought to be aware of before utilizing them.

What is an *inter vivos* gift?

Unlike testamentary dispositions, which beneficiaries do not receive until the testator has died, *inter vivos* gifts take effect while the donor is still alive. Any type of property can be the subject of such a gift, including land, money, personal property, a right of survivorship, and even the forgiveness of a debt.[3] Typically three requirements are associated with *inter vivos* gifts:[4]

1. The donor must intend to make a gift and not expect consideration or compensation in return.[5]
2. The gift must be delivered to the recipient.[6]
3. The recipient must accept the gift.

Inter vivos gifts are irrevocable

After an *inter vivos* transfer is complete, it is not unusual for the transferor to change his or her mind and want to reverse the transfer.[7] With this in mind, it is important to caution clients before making an *inter vivos* gift that such a gift will be irrevocable unless the donor preserves

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[1] See the *Estate Administration Tax Act, 1998*, S.O. 1998, c. 34, Sch. and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 74.13, 74.14, 74.1.04.
[2] See Paul Dancause, "The New Regime in Enforcement and Administration of Estate Administration Tax: The Estate Information Return", 21st *East Region Solicitors Conference*, 2015 CanLIIDocs 5143, online: <https://canlii.ca/t/ss47> at 6-8.
[3] See, for example, *Falsetto v. Falsetto*, 2023 ONCA 469 [*Falsetto*] (land and money); *Jackson v. Rosenberg*, 2023 ONSC 4403 [*Jackson*] (right of survivorship); *Singh Estate v. Shandil*, 2007 BCCA 303 [*Singh*] (forgiveness of a debt).
[4] *Doherty v. Doherty*, 2023 ONSC 1536 at para. 32; *Teixeira v. Markgraf Estate*, 2017 ONCA 819 at para. 38. The property also must actually be owned by the donor: see *Murji v. The Queen*, 2018 TCC 7 at paras. 43-44.
[5] Case law also indicates that the requisite donative intent must specifically exist at the time that the gift is made – see *Franco v. Franco Estate*, 2023 BCSC 1015 at para. 50.
[6] Manual delivery may not be required; for example, delivery may be inferred from the execution of a deed transferring title: see *Tubbs v. Tubbs*, 2006 CanLII 36965 (Ont. S.C.J.) [*Tubbs*] at para. 93. In *Falsetto*, *supra* note 3, the Court of Appeal also confirmed that transfers of title and the cashing of cheques or bank drafts serve as tangible proof of delivery.
[7] See, for example, *Sandwell v. Sayers*, 2023 BCCA 147 [*Sandwell*]; *Falsetto*, *ibid.*; *Singh*, *supra* note 3; *Jackson*, *supra* note 3.

an express power of revocation.[8] In cases where a power of revocation is not reserved, it may only be possible to reverse an *inter vivos* transfer if there is a legal basis to set it aside, such as:

- the donor lacked the requisite mental capacity to validly make the gift;[9]
- the gift was procured by undue influence;[10] or
- the donor was subject to unconscionable procurement.[11]

Inter vivos transfers may be subject to the presumption of resulting trust

Before gifting property, clients also ought to be aware that an *inter vivos* transfer could be subject to the presumption of resulting trust. In *Pecore v. Pecore*,[12] the Supreme Court of Canada confirmed that the law presumes that the recipient of a gratuitous property transfer holds that property on resulting trust for the donor.[13] To rebut the presumption, the onus is placed on the recipient to prove a gift on the balance of probabilities.[14]

While the presumption of resulting trust could be handy if a client later changes their mind about the gift and/or wants to argue that an *inter vivos* transfer was not, in fact, intended to be an absolute gift, the presumption will only apply under certain circumstances, such as where:

- there is insufficient evidence of the transferor's intent to displace the presumption;[15]
- the evidence proffered is unpersuasive;[16] or
- there is evidence indicating that the transferor did not intend a gift.[17]

Whether or not the presumption of resulting trust can be overcome in any given case will ultimately depend on the evidence available to the court.

If a client wishes to ensure that an *inter vivos* transfer is not subject to the presumption of resulting trust, for example to reduce the risk of future litigation, a document like a solemn declaration or deed of gift can be executed at or after the time the transfer is completed, to

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[8] A power of revocation cannot be implied: see *Singh Estate v. Shandil*, 2005 BCSC 1448 at para. 19, aff'd 2007 BCCA 303.
[9] See, for example, *James v. Belanger*, 2023 ABKB 34 at paras. 10-12.
[10] See *Sandu v. Sandu*, 2023 BCSC 323.
[11] See *Gefen v. Gaertner*, 2019 ONSC 6015. But also see *Sandwell*, *supra* note 7.
[12] 2007 SCC 17 [*Pecore*].
[13] Under certain circumstances, specifically when a transfer is made to the donor's spouse or minor children, the presumption of advancement will instead apply and a gift will be assumed.
[14] *Pecore*, *supra* note 12 at paras. 23-25 and 35-36; *Sawdon Estate v. Sawdon*, 2014 ONCA 101 at paras. 56-58; *Falsetto*, *supra* note 3 at para. 27.
[15] *Newhouse v. Garland*, 2022 BCCA 276 at paras. 54-56.
[16] See *Estate of Celeste Dos Santos (Re)*, 2022 ONSC 3824 at para. 23.
[17] For example, in *Steeves Estate v. Beers*, 2019 NBQB 48, the court found that the presumption of resulting trust applied to a variety of transfers made by the testatrix to her son prior to her death. On one of the cheques, the testatrix had written "loan" and there was also evidence that when the testatrix discussed the transfers with her friends that she had described them as an advance on her son's inheritance.

expressly state that a resulting trust is not created. With such a statement of the donor's intentions, the presumption should no longer apply[18] or, if it does, will most likely be found to have been successfully rebutted.

Inter vivos gifts could negate testamentary dispositions

Before making an *inter vivos* gift, a client also ought to be warned that it could "cancel" a bequest made under the client's will, if that instrument contains a similar gift. This concept is referred to as ademption by advancement, or the presumption against double portions, and is intended to ensure that a beneficiary does not receive the same gift twice. If there is evidence that the testator gave a gift to a beneficiary after the testator made his or her will and that an advance was intended, the court may require the recipient to rebut the presumption. Like the presumption of resulting trust, however, ademption by advancement will not apply if there is evidence establishing that the will-maker intended the beneficiary to receive both benefits, or if the testator otherwise made it clear, for example, through a document, that the presumption of ademption by advancement is not applicable.[19]

Failed *inter vivos* gifts cannot be saved posthumously

Another factor that a client may want to bear in mind before making an *inter vivos* gift is that imperfect gifts generally cannot be perfected after the client has passed away. In this respect, imperfect *inter vivos* gifts are distinct from imperfect testamentary dispositions, which can often be saved by the courts. As noted by the Ontario Court of Appeal, "[f]or a gift to be valid and enforceable it must be perfected. In other words, the donor must have done everything necessary and in his power to effect the transfer of the property. An incomplete gift is nothing more than an intention to gift."[20] The court will not compel a donor to follow through and give a promised gift.[21]

To be valid, an *inter vivos* gift also may not be conditional on the death of the donor, even if the gift is a right of survivorship — the donor must be immediately and unconditionally bound by the *inter vivos* gift.[22] For example, if a donor intends to gift a piece of property but fails to register the actual transfer of ownership prior to the donor's death, the gift will fail.[23] In cases where the registration of an alleged *inter vivos* transfer is delayed until after the death of the transferor, there is no proof confirming that the transferor intended to relinquish control over the property during his or her lifetime.[24]

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[18] See, for example, *Sandwell*, *supra* note 7 at para 57.
[19] See *Johnston (Estate of) v. Gemmill*, 2007 ABQB 235 at paras. 43-47. In this case, a specific provision in the testatrix's will prevented the application of ademption by advancement.
[20] *Kavanagh v. Lajoie*, 2014 ONCA 187 at para. 13.
[21] *McKendry v. McKendry*, 2017 BCCA 48 at para. 32.
[22] *Tubbs*, *supra* note 6. The Ontario Court of Appeal has also held that *inter vivos* transfers contingent on death are ineffective as testamentary dispositions due to lack of compliance with wills legislation: see *Carson v. Wilson*, 1960 CanLII 104 (Ont. C.A.).
[23] See *Chan v. Chan*, 2022 ABQB 256.
[24] *Tubbs*, *supra* note 6 at paras.93-95.

An imperfect *inter vivos* gift also cannot be saved or treated like a testamentary disposition if the deceased references the gift in his or her will, even if it is clear that the deceased intended to gift the property.[25] As noted in *Feeney's Canadian Law of Wills*, "unless there has been compliance with the appropriate legal requirements to perfect [a] gift, the transaction will be invalidated, no matter how clear the wishes of the would-be donor might be otherwise."[26]

Conclusion

While *inter vivos* gifts are a valuable estate planning tool, particularly because they are not subject to probate fees, there are also perils associated with these gifts that clients ought to be aware of. Once made, an *inter vivos* gift cannot be taken back. An *inter vivos* gift may also fail if there is insufficient evidence to confirm that a gift was intended or that the transfer was not intended to be an advance on the recipient's inheritance. Such a gift will also fail if it is not perfected during the donor's lifetime. In light of the rules of law applicable to *inter vivos* gifts, clients ought to be cautious before choosing to make such gifts; depending on the circumstances, a testamentary bequest may make more sense, regardless of the consequences of additional estate administration tax liability.

[25] *Troop v. Troop Estate*, 2023 NSCA 83.
[26] Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2000) at § 1.2.