

## CHECKLIST: GROUNDS TO ATTACK AN *INTER VIVOS* GIFT

GROUND	CRITERIA
Decisional Capacity	<p>In order to be found to have the requisite decisional capacity to make a gift, a donor requires the following:</p> <p>(a) The ability to understand the nature of the gift; and</p> <p>(b) The ability to understand the specific effect of the gift in the circumstances.</p> <p>The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the factors for determining requisite testamentary capacity arguably apply.</p>
Undue Influence	<p>1) <b>Direct or Actual undue influence:</b></p> <ul style="list-style-type: none"> <li>• Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . .”<sup>1</sup></li> <li>• Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.<sup>2</sup></li> </ul> <p>2) <b>Presumed undue influence</b> or undue influence by relationship:</p> <ul style="list-style-type: none"> <li>• Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.<sup>3</sup></li> </ul>

<sup>1</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.

<sup>2</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.

<sup>3</sup> *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.

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	<ul style="list-style-type: none"> <li>• Does the “potential for domination inhere in the relationship itself”?<sup>4</sup></li> <li>• Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization.”<sup>5</sup></li> <li>• A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.<sup>6</sup></li> </ul>
Resulting Trust	<ul style="list-style-type: none"> <li>• Where there is a gratuitous transfer between a parent and an independent adult child there is a presumption of resulting trust.<sup>7</sup></li> <li>• The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient.</li> <li>• The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.<sup>8</sup></li> </ul>
<i>Non Est Factum</i>	<ul style="list-style-type: none"> <li>• <i>Non est factum</i> is the plea that a deed or other formal document is declared void for want of intention:  “[W]here a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of <i>non est factum</i> on the basis that his mind at the</li> </ul>

<sup>4</sup> *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

<sup>5</sup> *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

<sup>6</sup> *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

<sup>7</sup> *Pecore v. Pecore* 2007 SCC 17.

<sup>8</sup> *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 63.

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	<p>time of the execution of the document did not follow his hand.”<sup>9</sup></p> <ul style="list-style-type: none"> <li>• <i>Non est factum</i> places the legal onus on the person attacking the transfer or gift to prove “no intention”.</li> </ul>
Unconscionable Bargain	<p>A gift or other voluntary wealth transfer is prima facie unconscionable where:</p> <ol style="list-style-type: none"> <li>1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker’s own interests; and</li> <li>2) The transaction affects a substantial unfairness or disadvantage on the maker.<sup>10</sup></li> </ol>
Unconscionable Procurement	<ol style="list-style-type: none"> <li>1) A significant benefit obtained by one person from another;</li> <li>2) An active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.<sup>11</sup></li> </ol>

*This checklist is intended for the purposes of providing information and guidance only. This memorandum/checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

Kimberly A. Whaley, Whaley Estate Litigation Partners

<sup>9</sup> *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.

<sup>10</sup> *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).

<sup>11</sup> John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.580.

