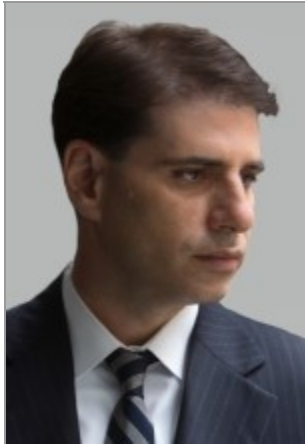


Following The Money

Fraudulent conveyance and Stone v. Stone: 18 years later

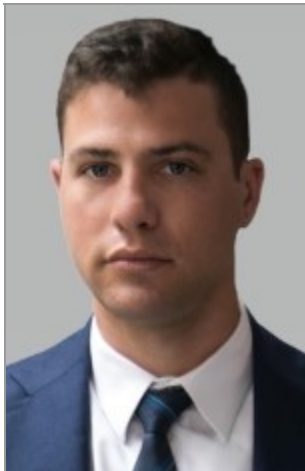
By Gregory Sidlofsky, David Wagner and Charles Wagner



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(November 4, 2019, 8:46 AM EST) -- It has been 18 years since the Court of Appeal for Ontario decided *Stone v. Stone* 2001 55 O.R. (3d) 491. In this case the court characterized *inter vivos* gifts from a father to his adult children as a fraudulent conveyance because the gifts were intended to thwart a spouse's entitlement under the *Family Law Act*. Let's see how courts have applied this seminal case.

While a foundational premise of estate law in Ontario is that each one of us has testamentary freedom to do what we want with our assets upon death, the courts rely on legal mechanisms like constructive trusts to protect disinherited spouses. Similarly, the legislature has passed laws that provide spouses with the right not to take under a will and elect to take a division of net family property. As well, the legislature has provided dependants, like children, spouses and common law spouses, with rights to receive support if the deceased failed to make proper provision for their adequate support in the will.



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Arguably, *Stone v. Stone* just applied a framework that was already in place. But let's consider the facts of that case:

Mr. Stone and his first wife had two children. He divorced his first wife and stayed married to the second Mrs. Stone until his death 24 years later. It was a second marriage for Mrs. Stone as well and she also had children from her first marriage. When Mr. Stone learned that he was terminally ill he did not want his assets to go to his then wife or her children. To achieve this, he transferred all of his property to the children of his first marriage so that upon his demise there would be nothing left in his estate. His wife commenced a claim for equalization under s. 7 of the *Family Law Act* and argued that the *inter vivos* gifts to his children were void because they were fraudulent conveyances.

At issue was whether Mrs. Stone was a "creditor or other," which would provide her with the status to challenge the *inter vivos* transfers as fraudulent conveyances.



The Court of Appeal analysis started with s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, which provides:

"Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns."

The evidence was clear that Mr. Stone wanted to thwart his wife's



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rights under the *Family Law Act* because he wanted his money to go to his children. But, for those gifts to be set aside the court had to find that the wife was a "creditor or other." As the court notes in para. 25 of its decision, for the wife to fall under the definition of creditor or other she had to have had:

"... an existing claim against her husband *at the time of the impugned conveyances*, that is a right which she could have asserted in an action (emphasis added)."

The Court of Appeal acknowledged that the spouses each owned their separate property throughout the marriage. For the impugned conveyance to be fraudulent it had to take place on the occurrence of a "triggering event" under s. 5 of the *Family Law Act*. Trigger events occur if there is a permanent separation, if a spouse dies, or if there is a danger that one spouse would improvidently deplete his/her net family property.

Until Mr. Stone died, the couple was still cohabiting. As such, in order for Mrs. Stone to be a creditor, Mr. Stone would have to be guilty of improvidently depleting his estate and Mrs. Stone would have had to exercise her rights under s. 5(3) to stop her husband if she had known what he was doing. In the decision, the Court of Appeal explained:

"Because Mr. Stone's death was known by all to be imminent, Mrs. Stone's claim to a right to equalization was also imminent and would have been triggered by his death."

The court spent a lot of time dealing with s. 5(3) which provides:

"When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation."

In the annotation found in the reported case, they share the following observation:

"...under s. 2 of the Fraudulent Conveyances Act and concluded that "others" included anyone who had a claim for unliquidated damages against the transferor at the time of the impugned transactions. The simple question was whether the wife had a claim against the husband at the time of the transfers that was compromised by the transfers. At the time of the transfers, the husband knew that the wife would survive him, that the value of her assets was less than the value of his, and that she would not accept her legacy under his will. However, until the occurrence of a "triggering event" under s. 5 of the Family Law Act, the wife had no right to claim an equalization entitlement.Since the parties were cohabiting at the time of the transfers, the wife's only hope was to establish a case under s. 5(3) *Family Law Act* (improvident depletion)....since he kept everything a secret, he deprived her of this opportunity... the wife could have applied under s. 5(3) of the *Family Law Act* to stop the husband if she had known what he was doing."

At para. 30, Justice Kathryn Feldman stated: "One of the effects of s. 5(3) of the Act is to provide a remedy to a spouse in those circumstances where the other spouse seeks to divest himself or herself of his or her property in anticipation of death in order to defeat the spouse's claim to equalization." The Court of Appeal appears to be saying that by concealing his plan, Mr. Stone disintitiled Mrs. Stone from exercising her rights under s. 5(3) and in these circumstances the conveyance was fraudulent.

In an article in the *National Creditor/Debtor Review*, lawyer Robert Klotz suggested: "The issue of standing is somewhat of a red herring, because a well-accepted line of authority establishes that even a transaction that is made at a time when the transferor has no creditors at all, may be set aside if the intention was to defeat foreseeable future creditors. This line of cases has not yet been considered in connection with a challenge to a prenuptial transaction intended to protect the future husband from the future wife's equalization claims."

In the past 18 years since *Stone v. Stone*, it has been judicially considered at least 42 times. For

the most part, *Stone v. Stone* has been followed. Where courts have come to a different result it usually revolves around different facts specific to the particular case being litigated.

This is the first of a two-part series.

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