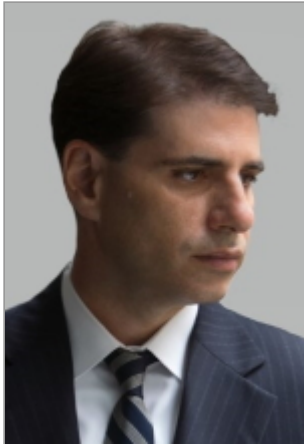


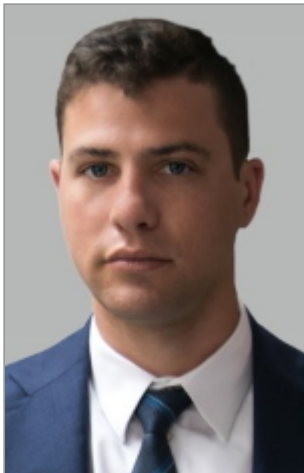
Wills, Trusts & Estates

Fraudulent conveyance and Stone v. Stone: Clarifying inter vivos transfers

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(November 11, 2019, 10:54 AM EST) -- As we concluded in our previous article, *Stone v. Stone* 2001 55 O.R. (3d) 491 has been judicially considered at least 42 times but for the most part has been followed. Where courts have come to a different result usually revolves around different facts specific to the particular case being litigated.

For example, in *Vhora v. Vhora* 2016 ONSC 2951, the Ontario Superior Court of Justice distinguished *Stone v. Stone* on its facts. As stated in paragraph 94:

"This situation is distinguishable from the facts in *Stone v. Stone* ... 55 O.R. (3d) 491 (Ont. C.A.). In that case, the deceased and his children knew that his death was near and he transferred certain assets to his children as inter vivos gifts with the intention of depleting his estate and defeating his wife's claims under either his will or the *Family Law Act*. In that case, the deceased knew his death would trigger an equalization claim by his wife; in the present case, Mr. Vhora had no idea that there was the possibility of such a claim when the note was signed in 2007."

In *Reisman v. Reisman* 2014 ONCA 109, the Court of Appeal for Ontario also distinguished *Stone v. Stone*. In that case, the husband and wife were married for 20 years. They separated in 2006. One of the issues at trial was that in 1998 the husband's father effected an estate freeze reducing the size of the husband's assets. The wife claimed that his was a fraudulent conveyance. In paragraphs 59-61 the Court of Appeal explained:

"In *Stone*, Feldman J.A. extensively canvassed the meaning of 'creditor' and of 'creditors or others' under s. 2 of the *Fraudulent Conveyances Act*. She rejected the proposition that spouses are in a 'constant debtor-creditor relationship'. Instead, she held that the debtor-creditor relationship between married spouses arises only when one spouse has the right to claim an equalization payment from the other; in other words, a debtor-creditor relationship arises when one of the events triggering an equalization claim under the *Family Law Act* occurs: for example, on death, on divorce or separation with no real prospect of the resumption of cohabitation. Unquestionably, in 1998, Linda was not a creditor of Howard. Back then she had no entitlement to an equalization payment.

"Feldman J.A. also considered the long line of decisions interpreting 'creditors or others'. She noted that 'others' includes persons who, though not judgment creditors at the time of the challenged conveyance, nonetheless have a claim for unliquidated damages. Feldman J.A. concluded, at para. 25, that in the family law context: In order for a spouse to qualify as a person who is intended to be protected from conveyances of property made with intent to defeat her interest, she must have had an existing claim against her husband at the time of the



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impugned conveyance that is a right which she could have asserted in an action.

"Linda testified that she did not know about the reorganization and the estate freeze when it took place. However, her lack of knowledge does not help her. The claim Linda asserts is a claim to an equalization payment. But she had no claim for equalization in 1998. She does not claim, for example, that she would have even contemplated separation had she known about the estate freeze. Thus, she was not an 'other' person with standing to assert a claim under s. 2 of the *Fraudulent Conveyances Act*."

In *Robins v. Robins Estate* [2003] O.J. No. 1426, a couple was in a relationship for three years and then decided to get married. Two days before the marriage, Douglas Robins implemented a share sale agreement which would provide him with an income and primarily benefit his son from a former marriage. As a result, the bulk of the wealth in the husband's estate was transferred out prior to the marriage, but during the time the couple lived together.

Wilma Robins argued that at the time the impugned transaction took place the deceased was obliged to support her pursuant to s. 30 of the *Family Law Act*. She argued that *Stone v. Stone* stood for the proposition that an inter vivos transfer intending to defeat a spouse's entitlement to support made her a creditor within the meaning of the *Fraudulent Conveyances Act* and the transfer was a fraudulent conveyance. The Ontario Superior Court of Justice disagreed and distinguished the *Stone* decision for the following reasons:

1. In *Stone v. Stone* it was an issue of equalization of property with the analysis centring in s. 5(3) and s. 7 of the *Family Law Act*. This case was for support centering on s. 30 and s. 40.
2. In *Stone* the issue was the conveyance of property accumulated during a 24-year marriage. In this case the assets in the sale of shares were owned by the husband well before the cohabitation.
3. At best Wilma Robins could argue the sale of shares, *at the time it took place*, was intended to avoid support obligations. But *Stone* dealt with the transfer of assets that impacted upon the spouse's rights to a division of net family property under the *Family Law Act*.

Conclusion

Our review of the secondary sources and case law over the last 18 years suggests that *Stone v. Stone* remains good law. What is also clear is that some courts have clarified the instances when inter vivos transfers are characterized as fraudulent. In summary:

1. An inter vivos transfer or gift is not considered to be fraudulent when: at the time the gift was made the spouse making the gift did not know of the other spouse's claim; or it takes place with the knowledge of the spouse and there is sufficient time for that spouse to exercise his/her rights under s. 5(3) of the *Family Law Act*;
2. Depending on the facts, an inter vivos transaction that takes place prior to a marriage may not be characterized as fraudulent because at that point the spouse's entitlement to a division of net family property does not yet exist;
3. It is the marriage that, pursuant to the *Family Law Act*, entitles spouses to a division of net family property. Common law spouses' statutory entitlement to support stems from the *Family Law Act* or *Succession Law Reform Act*. We have found no case that suggests that a common law spouse's efforts to thwart the other spouse's entitlement to support by making inter vivos transfers of property constitute a fraudulent conveyance. The *Robins v. Robins Estate* case suggests the opposite.

This is the second of a two-part series. Read part one: *Fraudulent conveyance and Stone v. Stone: 18 years later*.

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