

Fraud

Equitable fraud: Overlooked arrow in lawyer's quiver

By Charles Wagner and Matthew Stroh



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(September 10, 2019, 9:01 AM EDT) -- The doctrine of undue influence is frequently employed to attack gifts. However, can the doctrine of equitable fraud apply when the requirements of undue influence are not otherwise met? That is the subject of this article.

The doctrines of undue influence and equitable fraud are closely related. Both depend on a relationship predicated on vulnerability. While the circumstances in which undue influence and equitable fraud may apply frequently overlap, doctrinally they are distinct. In some ways, equitable fraud is the broader of the two doctrines.

The Supreme Court of Canada's description of equitable fraud suggests that transactions that offend the court's moral compass as being unconscionable may be set aside even in the absence of deceit or a special relationship between the parties.

Undue influence

In *Goodman Estate v. Geffen* [1991] 2 S.C.R. 353, Justice Bertha Wilson of the Supreme Court of Canada described the presumption of undue influence as arising in a situation in which "... one person [has the ability] to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power."

In order to trigger a presumption of undue influence, the first question the court is tasked to decide is whether the "potential for domination inheres in the nature of the relationship itself." Equity has traditionally recognized certain types of relationships in which a presumption of undue influence arises. One such relationship is between parent and child.



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However, the overriding concern is relationships which give rise to dependency, which are not always easy to categorize. For example, minor children are typically dependent on their parents (or those who act in a similar capacity). In contrast, elderly parents may be dependent on their adult children, effectively a role reversal caused by aging.

If the requisite type of relationship of dependency and the potential for domination is found, then the second question the court must consider is the nature of the transaction itself. In the case of gifts, the court's concern is that the donor's "beneficence not be tainted."

If circumstances giving rise to the presumption of undue influence are found, then the legal burden shifts to the recipient of the gift to demonstrate that undue influence was not employed against the donor in connection with the making of the gift. The presumption of undue influence may be rebutted by showing that no actual influence was deployed, that the donor had independent legal advice in connection with making the gift, etc.

This gives rise to an interesting question. What if the recipient of the gift is able to discharge their burden of showing that no undue influence was deployed against the donor, for example by showing that the donor obtained independent legal advice before making the gift, but that the effect of the gift is to render the donor a pauper? The doctrine of equitable fraud arguably may apply in such a situation if the nature or effect of the gift itself offends the "conscience" of the court.

Equitable fraud

While equitable fraud is also grounded in a relationship of vulnerability, unlike undue influence, it does not necessarily depend on the ability of one person to dominate the will of another. Instead, equitable fraud concerns conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other.

Equitable fraud is distinct from common law fraud because it does not depend on dishonesty. Instead, it is predicated on the breach of a duty imposed by equity. As explained by the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* 2002 SCC 19:

"What amounts to 'fraud or the equivalent of fraud' is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989) 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that 'in this context fraud or the equivalent of fraud refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. ... Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained' (p. 37). Fraud in the 'wider sense' of a ground for equitable relief 'is so infinite in its varieties that the Courts have not attempted to define it', but 'all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken'".

This is part one of a two-part series.

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