

Equitable Fraud

Equitable fraud: Using it in court

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(September 17, 2019, 10:53 AM EDT) -- The case of *Roach v. Todd* 2018 ONSC 5289 is a good example of how the doctrine of equitable fraud may be employed. One of the issues that arose in that case was a gift made by an elderly father, Willie, to his daughter, Claudette, in the amount of \$57,000, leaving only \$2,961.31 in Willie's bank account (the impugned gift). While this case turned in large measure on undue influence and Willie's apparent lack of capacity to make the impugned gift, the doctrine of equitable fraud would also likely apply.

Claudette acted as Willie's attorney under a continuing power of attorney for property executed by Willie. The evidence established that Claudette exercised sole control over Willie's financial affairs from the time that the POA was signed until Willie's death.

At the time the impugned gift was made, Willie was in a hospital and was suffering from significant cognitive impairments. The evidence appeared to show that Claudette had prepared a document which she had Willie sign in secret in connection with the impugned gift, which was purportedly made by Willie to Claudette to compensate her for taking care of him.

However, after the gift was made, Willie only lived with Claudette for six months and was then transferred to a care home for the remainder of his life. He thus gave her effectively \$9,500 per month for any care she rendered during the short period of time that he actually lived with her.

Willie received no independent legal advice in connection with the impugned gift. The only witness to the document evidencing the gift was Claudette's fiancé. Justice Thomas Heeney found it to be incredible that no nurse or other person at the busy hospital where Willie was a patient could be found to act as an independent witness and, therefore, concluded that the impugned gift was intended by Claudette to have been made in secret and without the scrutiny of her siblings.

Although Justice Heeney's judgment turned on undue influence and Willie's lack of capacity to make the impugned gift, it could have equally been decided under the doctrine of equitable fraud. As explained by John E. S. Poyser in his case annotation:

"... The judge then found that the gift could be set aside on the grounds of equitable *inter vivos* undue influence, and more specifically equitable undue influence by presumption. Again, this ground is in common judicial use."

Justice Heeney then went on to find that the child who received the gifts was acting in a fiduciary role as the attorney for property of the gift-maker and therefore had a duty to act in his best interests. She violated her duty by encouraging and accepting gifts from him in circumstances that effectively reduced him to the state of a pauper. No authority was cited, but this is a

traditional ground that allows a court to set a gift aside as voidable under the doctrine of equitable fraud.

This raises an interesting issue. What if the facts in *Roach v. Todd* were different such that: (1) the presumption of undue influence was rebutted; and (2) Willie's capacity to make the impugned gift was not in issue. For example, what if the evidence showed that while Willie was in the hospital convalescing, that he contacted his long-time solicitor, "Mr. Law," and instructed him to prepare documents associated with the impugned gift, which were later witnessed by Mr. Law and a nurse at the hospital without Claudette or her fiancé being present. What if also, Claudette made no suggestion or representation that she would take care of Willie in exchange for the impugned gift, but Willie decided to give it to her anyway. On those hypothetical facts, arguably the presumption of undue influence may have been found to be rebutted by the court.

Yet, as Claudette was managing Willie's financial affairs under a POA, and the fact of the impugned gift rendered Willie "a pauper," it may have arguably been set aside on the basis of the doctrine of equitable fraud alone as being unconscionable for Claudette to accept in the circumstances.

A case in point where the equitable fraud argument might have made a difference is the case of *John Gironda et al. v. Vito Gironda et al.* 2013 ONSC 4133. In that case, the applicants argued that Vito Gironda exercised undue influence over his mother for her to change her will and to gift all of her money (\$175,000) to him.

They argued that she was physically and emotionally dependent on Vito; she was socially isolated because Vito alienated the rest of the family; there was a great deal of family conflict between Vito and his brothers; the mother had experienced recent bereavement in the loss of her husband of almost 60 years; she was making a will which was significantly more favourable to Vito than her prior wills; and, simultaneously, executing new powers of attorney for property and personal care removing her existing joint attorneys. Justice Michael Penny observed as follows:

"I certainly agree that there are grounds for the *suspicion* of undue influence in these circumstances and that, particularly given the signs of some cognitive decline, careful probing of the circumstances surrounding the execution of these documents is warranted. It is not sufficient, however, merely to allege the possibility or suspicion of undue influence. There must be evidence to establish the presence of undue influence on a balance of probabilities."

Query whether the transfer to Vito of all his mother's money and her house would have met the threshold of unconscionability to set these *inter vivos* transfers aside absent the finding of undue influence. In these sorts of cases, equitable fraud may have been another arrow in the quiver.

Conclusion

The elastic and open-ended definition of equitable fraud is a cause of concern for some. Its very flexibility makes it difficult to apply and defend against. Case law demonstrates that judges sometimes rely on this doctrine to deviate from an unfair strict application of legal technical rights. It is a doctrine that could very well be a useful weapon against an unconscionable result.

This is part two of a two-part series. Read part one: [Equitable fraud: Overlooked arrow in lawyer's quiver](#).

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