



Winter 2020

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Elderly RELATIVES IN Trouble?

Here's what may help...

Today's rapidly aging population, combined with what feels like busier schedules, is prompting adult children to seek assistance from third parties with the care of their elderly parents or relatives.

Professional care is a necessary reality for some and, in most cases, can be just what the doctor ordered. However, in some cases, trusted caregivers manipulate, coerce, or even abuse the very people whom they are hired to protect. What can be done





when caregivers receive, unjustifiably, property from those for whom they are caring?

It is important to be aware of not only the harm – or potential for harm – that may come to your loved one, but also how you can address it. Estates are becoming increasingly valuable and complex and, therefore, litigious. With that comes increased scrutiny of those who may be blamed for an elderly person’s diminished assets. This is not a bad thing.

There are certain legal principles available to confront unlawful behaviour of caregivers, including the presumption of resulting trust, the presumption of known incapacity, the presumption of undue influence, and the doctrine of equitable fraud.

Presumption of Resulting Trust

When title of a property is in one person’s name, despite that person giving nothing in exchange for it, the recipient must prove the transfer was intended as a gift if the transfer is challenged (except in limited circumstances, such as a transfer of property from a parent to a minor child).¹ This is called a rebuttable presumption of resulting trust, where the Court presumes the recipient is holding the property for the benefit of the transferor in trust. If the recipient of the gratuitous transfer cannot rebut the presumption by proving that the transfer was intended as a gift, the recipient is required to return the property.

Presumption of Known Incapacity

The presumption of known incapacity applies when the assets of someone whose property is under guardianship gives property to another person. In that case, the Court presumes that the recipient knew of the lack of capacity of the transferor. The recipient must prove that he or she did not have reasonable grounds to believe the transferor was incapable.²

If the recipient proves that they did not have reasonable grounds to believe the transfer was unreasonable, the presumption of known incapacity will be rebutted, and the gift will stand. Otherwise – if the recipient cannot prove there was a reasonable basis to believe the transferor was capable of gifting – the property must be returned.

1. *Pecore v. Pecore*, (2007) 1 S.C.R. 795.

2. *Substitute Decisions Act, 1992*, SO 1992, c 30, subsection 2(4).

Presumption of Undue Influence

Undue influence occurs where a decision is made as a result of one party's exertion of influence over another, leading to a decision that contradicts the influenced party's actual intention. The circumstances surrounding certain *inter vivos* gifts (i.e., gifts during one's life) can give rise to either actual or presumed undue influence.

Actual undue influence exists when a gift is secured by unacceptable means (e.g., coercion).

Presumed undue influence exists when the relationship between the transferor and recipient is in some way "special," such as the relationship between an elderly person (who is vulnerable because of age, illness, or cognitive decline, etc.) and his or her caregiver. The courts will intervene as a matter of public policy to prevent abuse of the influence existing from such "special" relationships. Proof of reprehensible conduct is not necessary.

If the requisite type of dependent relationship exists, and the potential for domination is found, the court will consider the nature of the transaction itself. Once the presumption is established, the obligation shifts to the recipient to prove a lack of such influence.

Doctrine of Equitable Fraud

The doctrine of equitable fraud applies if the nature or effect of a gift itself offends the conscience of the court, even if there is no undue influence (or dishonest conduct). This doctrine also depends on a relationship based on vulnerability but does not require the recipient to dominate the transferor. Instead, it concerns conduct that, in the context of the relationship of the parties, is unconscionable. The transactions captured by this doctrine need not be deceitful. In fact, the Court has described this fraud as "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."³

The above are some of the mechanisms available to correct improper behaviour as it relates to the more vulnerable members of our society. Though at times difficult to navigate, these mechanisms are ultimately in place to ensure justice is achieved. If you believe misconduct has taken place, we recommend speaking with a legal advisor to discuss your options.

If you have any questions about the possible manipulation or coercion of a loved one in an estate matter, contact Danna Fichtenbaum at dfichtenbaum@mindengross.com.



Danna Fichtenbaum
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3. *First City Capital Ltd. v British Columbia Building Corp.*, 1989 2868 (BC SC).

Firm News

Minden Gross LLP welcomes...

Samita Smith to our Commercial Real Estate Group. Her practice focuses on the purchase, sale, and financing of mixed-use, commercial, and industrial properties and to **Marc Senderowitz** in our Commercial Real Estate Group. Marc is a senior advisor for clients undertaking complex real estate transactions.



**Samita
Smith**



**Marc
Senderowitz**

Congratulations:

Minden Gross LLP is pleased to announce the admission to partnership of **Benjamin (Ben) Bloom** (Business Law), **Eli Kutner** (Real Estate), **Benjamin Radcliffe** (Leasing), and **Enzo Sallese** (Real Estate).

Matthew Getzler (Tax and Wills and Estates) on being named as a 2019 Lexpert Rising Star: Leading Lawyers Under 40. The Lexpert Rising Stars is a prestigious award that honours lawyers who demonstrate leadership in the Canadian legal community.



**Benjamin
Bloom**



**Eli
Kutner**



**Benjamin
Radcliffe**



**Enzo
Sallese**



**Matthew
Getzler**

Professional Notes

Irvin Schein wrote two blog posts, including “Can Amazon be liable for the sale of defective goods by third parties?” on Jan 13.

In Nov, the Wills and Estates Group was active for Make A Will Month, publishing **Danna Fichtenbaum’s** “Are you ready to be an estate trustee?” on Nov 13 and **Matthew Getzler’s** “Probate Planning 101” on Nov 25. **Danna** presented “Wills and why we need them” for TNO - The Neighbourhood Organization on Nov 27. **Sheila Morris** published four articles, including “So, You Want to Make A Will...” on Nov 20. *Wealth Professional Canada* quoted her in “Don’t discount digital assets in estate planning” on Nov 26. Young Women in Law posted her article “Planning Your Future Part I: Banked Genetic Material” on Dec 6. She published “Consent and the use of Human Reproductive Material after Death” on Dec 11. On Dec 20, *Lawyer’s Daily* posted “Death, consent and human reproductive material.”

Stephen Posen was ranked as a Most Frequently Recommended lawyer in Property Leasing in the 2020 *Lexpert/ALM 500 Directory*, where he, **Christina Kobi**, **Michael Horowitz**, and **Melodie Eng** published “Recent Developments in Property Leasing.” The group also hosted the seminar “Hot Topics in Commercial Leasing” on Nov 27 with speakers **Catherine Francis** (Litigation), **Benjamin Radcliffe**, **Leonidas (Lenny) Mylonopoulos**, **Christina, Michael** (Leasing), **Steven Birken**, **Boris Zayachkowski**, **Marta Lewycky** (Leasing), **Melissa Muskat** (Property Taxation and Assessment Law), **Timothy Dunn** (Financial Services), **Stephen Posen**, and **Melodie** (Leasing). **Michael**, **Christina**, **Benjamin**, and **Boris** attended the 2020 ICSC Whistler Conference on January 26-28.

Robert Beattie, **Yosef Adler**, **Andrian Lozinski**, **Alexandra (Sasha) Toten**, and **Nusrat Ali** (Business Law) acted as lead and Canadian counsel for the vendor in the sale of McNairn Packaging to AmercareRoyal, LLC on Nov 25.

Andrew Elbaz and Student-at-Law, **Josh Hersh**, published “IIROC Mandatory Cybersecurity Breach Reporting” on Nov 18, “It’s About Time: Ontario Government to Conduct Long Overdue Review of Securities Regulations” on Nov 14, and “IIAC in Support of the OSC Having Blanket Order Powers” on Dec 11. **Andrew** also published “Securities Regulators Provide Guidance to Cannabis Issuers on Disclosure of Potential Conflicts of Interest” with **Alexander Katznelson** on Nov 13.

Steven Pearlstein was recognized in an Ontario Superior Court decision (*567 College Street Inc. v. 2329005 Ontario Inc.*, 2019 ONSC) as an eminent and experienced expert in real estate law.

Samantha Prasad published four articles on *The Fund Library*, including “Year-end tax tips” on Nov 19, and three articles in *The TaxLetter*, including Dec’s “Giving a Gift - It’s Not Easy.” She attended the prestigious invitation-only Senior Estates & Trusts Practitioners’ Forum hosted by Cambridge Forums on Nov 3-5 where she co-led a session on “Cultural Awareness in Practice.”

On Dec 2, **Joan Jung** spoke on a panel on “Inter-generational Transfers of Business/Surplus Stripping” at the Canadian Tax Foundation Annual Tax Conference in Montreal with Bruce Harris and Ken Griffin (PwC Canada). She attended the Minden Gross LLP-sponsored Ontario Tax Conference on Oct 28-29 and on Sept 19

she published “Tax Issues for Estate Administration Lawyers.”

Whitney Abrams was quoted in “Global Cannabis Industry: The Essential Primer” published by Meritas and the Oct 29 Canadian Press story “Rejected pot shop applicants seek leave to appeal.” She published three posts on *Canada Cannabis Legal*, including “The market is open! Private cannabis retail store cap to be revoked as of March 2, 2020” on Dec 13.

Victoria Craib, Student-at-Law, published two articles on *Canada Cannabis Legal* – “2019 Update: Cannabis Laws – The Global Status of Legalization” on Oct 17 and “New Year brings new Modules to CannSell Program in Ontario” on Jan 2. She also wrote “Claims Limit for Small Claims Court to increase to \$35,000 in Ontario” on Oct 24.

Samantha Bogoroch published “Government Increases Small Claims Court Limit to \$35,000: What does this mean for businesses?” on Oct 28 and “Recent Changes to the Bankruptcy and Insolvency Act and Companies’ Creditors Arrangement Act: Effective November 1, 2019” on Nov 28.

On Nov 19, **Reuben Rosenblatt**, LLD, QC, LSM, co-chaired Safeguarding Real Estate Transactions 2019 with Francy Kussner (Goodmans LLP) and presented “Scary Lawyer Cases: Old and New.” He was allocated 20 minutes for his presentation on “What Happened This Year” at the Law Society of Ontario’s Six-Minute Real Estate Lawyer.

Sepideh Nassabi published two articles in *Lawyer’s Daily* including “Kardashians cashing in catchphrases in trademark law” on Nov 22. She also published “USE IT OR

LOSE IT: Beware of non-use trademark cancellation” and “What Beyoncé wants, Beyoncé gets, or does she?”

Michael Goldberg hosted the second session of Tax Talk: Season 7 on Nov 14.

Timothy Dunn was profiled by *AdvocateDaily* in “Creative problem-solving core to Dunn’s financial practice” on Nov 5.

Howard Black was quoted in “Mediation of estate disputes can preserve money, privacy” in *AdvocateDaily* on Oct 31.

Marta Lewycky published “So You Want to be an Adjudicator?: Update on Ontario’s Construction Act Adjudication Process” on Sept 26.

In Nov., *Lexpert Magazine’s* “Big Deals” recognized our team, led by **Yosef Adler** (Business Law), with **Andrew Elbaz** (Securities and Capital Markets), **Jessica Thrower** (Business Law/Securities and Capital Markets), and **Alexander Katznelson** (Securities and Capital Markets), in acting for Enthusiast Gaming Holdings Inc. (TSXV: EGLX) on the completion of its arrangement with J55 Capital Corp. and Aquilini GameCo Inc. to form the leading publicly-traded esports and gaming media organization in North America.

Minden Gross LLP acted for First Gulf in the sale of the East Harbour Project to Cadillac Fairview on Sept 25 with a team led by **Leonard Baranek** (Real Estate), with **Leah Silber** (Real Estate), **Yosef Adler** (Business Law), **Samantha Prasad** (Tax), **Tracy Kay** (Employment and Labour), **Ethan Eisen** (Real Estate), and **Leonidas (Lenny) Mylonopoulos** (Commercial Leasing).



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Brian Temins, Whitney Abrams (Business Law), and **Samantha Prasad** (Tax) advised Southern Cliff Brands Inc. (Pommies Cider Co.) on its acquisition on Nov 8 by Valens GroWorks Corp. (TSXV: VGW) (OTCQX: VGWCF), a multi-licensed cannabis company, in a cash and stock deal. Pommies is a manufacturer and distributor of hard cider.

Brian Temins and **Jessica Thrower** (Business Law) acted on behalf of Lynx Equity Limited on its acquisition of US-based Prime Flooring LLC.

Brian Temins, Jessica Thrower, and Nusrat Ali (Business Law) acted for FirePower Equity in completing its majority investment in The Installation Group (TIG) in Nov.

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