

The Reach of an Estate Trustee's Duty to Identify & Collect Estate Assets: Investigating Gratuitous *Inter Vivos* Transfers

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If a deceased person, prior to their death, transfers property to a third party, that property may still belong to the deceased's estate. For example, if an asset is transferred for no consideration, a rebuttable presumption that the donee holds the property in trust for the donor may apply. Assets gifted by the deceased while still alive may also belong to the estate if those gifts were invalid. Recognizing that estate assets may be in the hands of third parties, an estate trustee's duty to identify and collect estate assets may extend to investigating gratuitous *inter vivos* transfers made by the deceased, and may even include taking steps to recover such property.

When an Estate Will Include Failed Gratuitous *Inter Vivos* Transfers

Estate trustees have a duty to identify and collect estate assets.¹ This task is more complex than simply identifying all assets in the deceased's possession at the time of death. Estate assets may also include assets to which the deceased was entitled, as per subsection 49(2) of the *Estates Act*.² This provision specifically relates to passing estate accounts, empowering the court to make full inquiry of property to which the deceased is entitled, but also indirectly confirms that an estate can include property held by third parties.³

One kind of property to which the deceased may be entitled is property that they transferred gratuitously prior to their death. There are at least three types of gratuitous *inter vivos* transfers that could revert back to an estate:

- **A gifted right of survivorship via joint ownership:** As part of an estate plan, a right of survivorship in a valuable asset may be gifted while the donor is still alive by transferring title so that the asset is held jointly by the donor and donee.⁴ For example, the donor may transfer title of land so that it is held by the donor and donee as joint tenants,⁵ or the donor may make their bank account or other financial assets joint with the donee.⁶ So long as the donor is alive, the donor can continue to use the property; then, once the donor passes away, the donee will inherit the asset outside of probate.⁷

¹ Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed (Toronto: LexisNexis, 2000) (loose-leaf) [*Feeney's*] at § 8.13. In Ontario, see the *Estates Act*, RSO 1990, c E.21, s 32 (application to be appointed estate trustee must include a statement of the deceased's property).

² *Ibid*, s 49(2). See also *Schutz Estate (Re)*, 2023 ONSC 3959 [*Schutz*] at para 12.

³ See *Re The Estate of Taerk: Turk v Turk*, 1957 CanLII 137 (ON CA) (courts have the jurisdiction to inquire into and account for property transferred by a deceased person *inter vivos*).

⁴ See Suzana Popovic-Montag, "Tips for Gifting a Right of Survivorship" *Solicitor's Tips* (4 February 2025), online (blog): *Hull & Hull LLP* <<https://hullandhull.com/2025/02/tips-for-gifting-a-right-of-survivorship/>>.

⁵ See, for example, *Jackson v Rosenberg*, 2024 ONCA 875.

⁶ See, for example, *Morden v Niwranski*, 2025 ONSC 3105.

⁷ The advantage to this arrangement is that the estate will not be required to pay estate administration tax on the asset.

- ***Inter vivos* gifts:** An *inter vivos* gift, being a gift between living persons, has three essential elements:
 - a. An intention to make a gift on the part of the donor, without consideration or expectation of remuneration;
 - b. An acceptance of the gift by the donee; and
 - c. A sufficient act of delivery or transfer of the property to complete the transaction.⁸

- ***Donationes mortis causa*:** Death bed gifts are legally distinct from *inter vivos* gifts. To be recognized as valid, three conditions must be satisfied:
 - a. The gift or donation must have been made in contemplation, though not necessarily in expectation, of death;
 - b. The gift must be made under such circumstances as show that the property is to revert to the donor in the case that the death does not occur; and
 - c. There must have been delivery to the donee of the subject matter of the gift.⁹

The delivery requirements for a *donatio mortis causa* may be relaxed because such gifts remain revocable until the testator's death.¹⁰ For example, symbolic delivery of a *donatio mortis causa* may be permitted.¹¹

After the donor of a gratuitous *inter vivos* transfer has passed away, it may come to light that the transfer was ineffective or invalid. Under those circumstances, the property may be considered an estate asset, so long as the property reverts back to the donor's estate.

The Reach of an Estate Trustee's Duty to Identify and Collect Estate Assets

Accordingly, as part of their duty to identify and collect estate assets, an estate trustee ought to be cognizant of gratuitous *inter vivos* transfers made by the deceased before they passed away, including both outright transfers and transfers placing property into joint ownership. In fact, it may even be advisable to conduct a cursory investigation of whether transferred property may be an estate asset or whether a gratuitous *inter vivos* transfer made by the deceased was untoward.¹² Such an investigation ought to consider at least two issues:

1. Whether there is evidence confirming that the deceased intended the transferred property to be a gift; and
2. Whether there is evidence indicating that the gift is invalid.

⁸ *Deziel v Deziel*, 2024 ONSC 5279 [*Deziel*] at para 87.

⁹ *Gerberg v Gerberg*, 2025 BCSC 1359 [*Gerberg*] at para 155.

¹⁰ *Feeney's*, *supra* note 1 at § 1.6, footnote 1.

¹¹ See *Leblanc v Robertson-Schultz*, 2024 SKKB 174 at paras 16, 19.

¹² See *Armstrong v Kotanko*, 2019 BCSC 1519 [*Armstrong*] at para 8 (duty as executor to estate beneficiaries includes duty to investigate whether *inter vivos* transactions are untoward). See also *Booth Estate v Connor Estate*, 1998 CarswellOnt 4872, [1998] OJ No 5261 (Gen Div) [*Booth*] at para 10.

With respect to the first issue, if the estate trustee is unable to find evidence affirming that the deceased intended to give the transferred property to the donee, the presumption of resulting trust may apply, in which case the donee may be holding the property in trust for the estate.¹³

With the second issue, factors relevant to the validity of a gift may depend on whether the deceased made an *inter vivos* gift or a *donatio mortis causa*. Salient considerations for both types of gifts include:¹⁴

- Whether the gifted property was actually delivered prior to the testator's death;¹⁵
- Whether there is any evidence indicating that the donor lacked capacity, recognizing that the capacity required for such gifts may not be the same as testamentary capacity, depending on the nature of the gift;¹⁶ and
- Whether there is any evidence indicating that the donee exerted undue influence on the deceased. During the investigation, the estate trustee may want to bear in mind that undue influence may be presumed for *inter vivos* gifts if the relationship between the donor and donee had a "potential for dominance."¹⁷ For a *donatio mortis causa*, however, the onus of proof will be on the party challenging the gift to prove that the donee actually unduly influenced the deceased.¹⁸

When investigating the validity of a *donatio mortis causa* specifically, an estate trustee may also want to consider whether there is evidence confirming that the gift was given in contemplation of death. While it is not necessary for the donor to be at the point of death when the gift is made, this requirement "will not be satisfied by a vague and general impression that death may occur from one of those ordinary risks that attend all human affairs."¹⁹

Proceeding When It Appears That a Third Party Is Holding an Estate Asset

There appear to be three circumstances in which an estate trustee ought to consider seeking direction from the court as to whether property gratuitously transferred by the deceased to a third party is an estate asset:

1. If the estate trustee's investigation indicates that the presumption of resulting trust has not been rebutted.

¹³ The concept of resulting trust is discussed at length in *Pecore v Pecore*, 2007 SCC 17.

¹⁴ Please note that this list is intended to be illustrative, and is not intended to be an exhaustive list of bases upon which an *inter vivos* gift or *donatio mortis causa* may be deemed invalid.

¹⁵ See, for example, *Deziel*, *supra* note 8; *Hugginson v Hugginson*, 2025 ONSC 1797.

¹⁶ For the capacity necessary to effect an *inter vivos* gift, see *Palichuk v Palichuk*, 2021 ONSC 7393, *aff'd* 2023 ONCA 116; *Slover v Rellinger*, 2019 ONSC 6497 [*Slover*] at para 284.

For the capacity necessary to effect a *donatio mortis causa*, see *Rahman v Hassan*, [2024] EWHC 1290 (Ch.) at paras. 74, 142(6) and the Law Commission, *Modernising Wills Law, Volume 1: Report*, Law Com No 419 (May 2025), online: <<https://lawcom.gov.uk/publication/modernising-wills-final-report/>> at 15.7.

¹⁷ *Slover*, *ibid* at para 376.

¹⁸ See *Slovchenko v Toronto-Dominion Bank and Mereshko*, 1963 CanLII 120 (ON SC).

¹⁹ See *Gerberg*, *supra* note 9 at paras 156-157, quoting *Saulnier v Anderson*, 1987 CanLII 5283 (NB KB) at para 48.

2. If there is evidence indicating that a gift made by the deceased prior to their death is invalid. In fact, the court has noted that an estate trustee's duties may include taking reasonable steps to recover assets gifted by the deceased while under the "coercive influence of the donee, or when the deceased donor had been in an incompetent state of mind."²⁰
3. If the estate trustee is in a conflict of interest relative to the issue because they were the recipient of the transferred property, and thereby cannot "offer an objective, unbiased view of the transaction."²¹ It also merits noting that, if another party with an interest in the estate disputes the propriety of such an *inter vivos* transfer, the estate trustee may be removed due to their conflict of interest.²²

While seeking direction from the court may be appropriate under these circumstances in light of an estate trustee's fiduciary duties and their obligation to administer an estate for the benefit of the beneficiaries,²³ there may be other factors to consider that are also salient. For example, it may only be appropriate to take action to recover an asset if the transfer substantially reduced the size of the deceased's estate.²⁴

The estate trustee should also be cognizant of potential limitations issues. Recognizing that the *Limitations Act, 2002*²⁵ applies to *inter vivos* transfers,²⁶ it may not be appropriate to seek direction on transfers made more than two years prior. For transfers of real property, however, the applicable limitation period can be 10 years, meaning the estate trustee could seek direction on older transfers.²⁷

Proceeding if a Gratuitous *Inter Vivos* Transfer Appears to Be Valid

If a cursory investigation yields evidence which indicates that the deceased intended a gratuitous *inter vivos* transfer to be a gift, and the evidence does not appear to indicate that the transfer is invalid, the estate trustee may be satisfied that the property is not an estate asset.²⁸ Even if an estate trustee reaches this conclusion, however, it is good practice to disclose the existence of such assets to the beneficiaries of the estate, or at least any assets subject to a rebuttable presumption of belonging to the estate.²⁹ A beneficiary may wish to challenge such *inter vivos* transfers, notwithstanding the estate trustee's investigation,³⁰ but will only be able to do so if they are actually aware of said transfers.³¹

²⁰ *Booth*, *supra* note 12 at para 10.

²¹ *Schutz*, *supra* note 2 at para 11. See also *Armstrong*, *supra* note 12 at para 8.

²² This issue is addressed at length in *Jury v Rogodzinski*, 2021 BCSC 2441 and *Rhodes v Myers*, 2024 BCCA 165.

²³ *Dyal v Dyal*, 2023 ONSC 4322 at para 32.

²⁴ *Booth*, *supra* note 12 at para 10.

²⁵ SO 2002, c 24, Sch B.

²⁶ The application of limitation periods to *inter vivos* transfers was addressed in *The Estate of William Robert Waters v Gillian Henry et al*, 2024 ONSC 4190 at paras 229-259. See also Ian Hull, "Estate Litigation to Recover Inter Vivos Transfers: Determining Which Limitation Periods Apply and When They Begin" (21 August 2024), online (blog): *Hull & Hull LLP* <<https://hullandhull.com/2024/08/estate-litigation-to-recover-inter-vivos-transfers-determining-which-limitation-periods-apply-and-when-they-begin/>>.

²⁷ See the *Real Property Limitations Act*, RSO 1990, c L.15.

²⁸ See, for example, *Munro v Thomas*, 2021 ONSC 3320 at para 25.

²⁹ *Syryda Estate v Rathwell*, 2025 ABKB 285 [*Syryda*] at paras 25-28.

³⁰ See, for example, *Buffa v Giacomelli*, 2025 ONSC 4024.

³¹ *Syryda*, *supra* note 27 at paras 26-28.

Potential Consequences of Failing to Identify Estate Assets Transferred *Inter Vivos*

If an estate trustee fails to collect assets that the deceased improperly transferred prior to their death or that are being held in trust on behalf of the estate, there may be a variety of consequences. If the estate trustee failed to investigate an asset, but their conduct is not the product of negligence, it appears that the court will refrain from removing the estate trustee.³² However, if an estate trustee fails to identify all estate assets or to conduct a thorough investigation, it is feasible that their compensation for acting as estate trustee may be reduced during the passing of accounts. Depending on the circumstances, the beneficiaries of the estate could also commence litigation against the estate trustee. Having said that, establishing a claim could be challenging, recognizing that an executor usually will not be held liable for accidentally losing estate assets, or losing assets due to an oversight – “[e]xecutors are only liable to do their best and if they honestly do their best, they are not liable for errors in judgment.”³³

Conclusion

It may not always be the case that an estate trustee ought to challenge improper *inter vivos* transfers or try to recover estate property held in trust by third parties – for example, seeking to recover a modest sum gratuitously transferred by the deceased while alive may be impractical. Nevertheless, when identifying and collecting estate assets, it is advisable for estate trustees to review the testator’s personal affairs for gratuitous *inter vivos* transfers, bearing in mind that third parties may hold estate assets in trust, and that improper gifts may still, in fact, belong to the estate. Whether or not it is appropriate for the estate trustee to take steps to recover such assets will depend on the circumstances.



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³² See *Garbera Estate (Re)*, 2024 ABKB 185 at paras 175-185.

³³ *Feeney's*, *supra* note 1 at § 8.57.