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**Teixeira v. Estate of Markgraf [2017] ONCA 819**

The recent decision of the ONCA in *Teixeira v. Estate of Markgraf* provides a nice analysis of the law relating to gifts as it pertains to *The Bills of Exchange Act (“the Act”)*. There is a principle in law that a gift is irrevocable; once completed, a gift cannot be revoked since the original donor no longer has title to the gift in question. But when is the gift of a cheque complete so that a donor can no longer revoke? Is it when the cheque is physically given to the recipient? Is it when the cheque is cashed? This question arose in the recent case of *Teixeira* in which the donor provided a large cheque to her neighbour for which there were insufficient funds in her account. She died shortly thereafter so the issue arose as to whether the cheque could be enforced as against the Estate.

In *Teixeira*, Arlindo was Mary’s neighbour. He helped with Mary’s household maintenance, drove her about and assisted with chores like groceries and banking. He did this out of the goodness of his heart. Shortly before her death, Mary made a will. She made a bequest to Arlindo in the amount of \$100,000. She also wrote out a cheque to him for \$100,000. She gave the cheque to her stepson and asked him to give it to Arlindo with instructions that he should take it to the bank the next day. Arlindo did in fact attend at Mary’s bank the next day but the bank refused to negotiate the cheque on the basis that the balance in Mary’s account was only roughly \$80,000. While she had over \$200,000 in other funds on deposit, without Mary’s specific instructions, the bank was not authorized to transfer money to her chequing account to make up the shortfall. Mary died six days later and the bank then froze her accounts. Arlindo attempted to deposit the cheque at his own bank but it was returned, marked “funds frozen”. Mary’s stepson, her Estate Trustee, told Arlindo that he would be receiving \$100,000 from the Estate and that he would also be receiving the further sum of \$100,000 in respect of the cheque. However, after receiving legal advice, the Estate Trustee took the position that the cheque was an imperfect gift which was not legally enforceable.

Arlindo sued the Estate but his claim failed. The application judge made several important findings of fact. First, he found that Arlindo carried out his acts of kindness toward Mary on a purely voluntary basis: he received no pay, and he had no expectation otherwise. Further, he held that there was no evidence that the parties had any contract. Finally, he found that Arlindo had not acted to his detriment in anticipation of receiving the proceeds of Mary’s cheque. The application judge found that there were three requirements for a valid *inter vivos* gift (i.e., a gift given by a person during her lifetime, as opposed to a bequest in a will): (i) an intention to donate; (ii) an acceptance and (iii) a sufficient act of “delivery”. The application judge held that a gift by cheque is not complete until the cheque has been cashed or has been cleared by the relevant banks. The judge found that the mere fact that the cheque was delivered into the hands of Arlindo was not enough for delivery.

Arlindo appealed, relying on several grounds. He argued that there was an implicit contract between the two: that he provided services in exchange for the \$100,000. He also argued that the cheque was enforceable by virtue of the terms of the *Act*; that once the cheque was dishonoured, this gave rise

to a viable claim against the Estate for the value of the cheque. He also argued that his receipt of the cheque equalled “delivery”. Finally, he argued that this case cried out for Equitable relief.

The ONCA rejected the contractual argument. The application judge found as a fact that there was no contract and that Arlindo performed his services on a gratuitous basis. Without consideration, there could be no contract. This lack of consideration was also fatal to the Bills of Exchange argument. A cheque is simply a direction by one party to another party (the bank), requesting that the second party pay a certain sum to the payee of the cheque. The case law is clear that until the cheque has been cashed, and the money debited from the drawer’s account, this direction to pay is incomplete and it can be revoked at any time, as with a stop payment order, for example. This is so whether the cheque was provided in exchange for consideration, or provided as a gift. If the cheque was provided to a payee in exchange for the provision of some goods or services, however, then the cheque was given for consideration and in such a case, the payee could successfully sue to recover the value of the cheque. The payment by cheque would be *evidence* of the debt owing, but the debt itself would arise by reason of the underlying provision of the goods or services (consideration). The case of a gift is different: by definition, a gift is gratuitous; there is no consideration provided in exchange for the cheque. The provision of the cheque then is evidence of nothing more than an incomplete gift that was revoked. The CA held that an absence of consideration is a complete defence to an action to enforce the payment on a cheque.

Finally, the CA considered the issue as to whether or not the Estate should be estopped from denying the validity of the gift, or whether the Court should intervene to “help out” Arlindo, in the interests of justice. The CA found that since Arlindo had not changed his position in anticipation of receiving the cheque, estoppel could not apply. The CA also held that the case law was clear that Equity is not to intervene to assist a “volunteer” (someone who has not given value for the cheque) in circumstances such as these.