CITATION: Henry v. Henry, 2019 ONSC 740
COURT FILE NO.: CV-15-124799
DATE: 20190130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Lisa Anne Henry and Jacqueline Marie Henry	)	Lisa Anne Henry and Jacqueline Marie Henry, Self-Represented
Applicants	)	
	)	
– and –	)	
	)	
Richard Mark Henry And Colleen Diane Henry	)	Richard Mark Henry, Self-Represented
	)	
Respondents	)	Eli Smolarcik, Counsel for the Respondent, Colleen Diane Henry
	)	
	)	
	)	
	)	
	)	**HEARD:** November 22, 2018

REASONS FOR DECISION

MULLINS J.:

Introduction

[1] This trial concerns a dispute between four of the six children of Paula Lisa Henry regarding the distribution of her assets upon her passing.

[2] Paula Henry died on March 13, 2013. She is survived by her six children, the parties; Jaqueline, Lisa, Colleen and Richard Henry; and James Henry and Tom Henry, who are not parties to any of the litigation that ensued after their mother's death.

[3] Shortly following her death, a holograph will of Paula Henry was found. It does not appear that any of her children anticipated this. The will is dated August 21, 2003. By its terms, Paula Henry named her son Richard as her executor. The will provided that "the Money" in "Presidents Choice Financial", the Bank of Canada and, also, the 'moneys' at CIBC account No 0641537 were left to James, Richard, Jackie and Colleen Henry and that Tom Henry's share be paid after the death of his wife Ida and not before. Under this will, Paula

Henry's daughter, Lisa, receives no benefit. The will did not provide for the payment of any debts, nor does it contain a clause governing any residue.

[4] Also, amongst her personal possessions upon death, Paula Henry's children found a Gold Certificate issued by the Bank of Nova Scotia in respect of 25 ounces troy of gold to be delivered to 'Lisa Henry' upon surrender of the certificate. The certificate is dated February 18, 1991. As well, a ruby ring, considered by the children to have intrinsic and sentimental value, was found.

[5] As of her mother's death, Colleen Henry held a bank account in joint name with her mother at President's Choice Financial wherein there was $51,002.22 on deposit. Other accounts of the deceased were identified at the National Bank of Canada and the CIBC, in the sums of $16,000 and $6,200, approximately.

[6] Disputes flared between Jacqueline and Richard over his conduct in administering what he believed to be his mother's wishes and, ultimately the directions under her will. Jacqueline and Lisa filed objections to his application for appointment as Estate Trustee. Jacqueline and Lisa brought an action against Colleen Henry in the Small Claims Court, alleging that Lisa held the President's Choice account as a trustee and was obliged to distribute it equally amongst her siblings including Lisa, rather than as called for under the will, amongst the five named therein and excluding Lisa. Lisa Henry claimed that the Gold Certificate in the name of Lisa Henry belongs to her, not her mother. Richard Henry disagreed, believing that the gold is an asset belonging to the estate. Colleen claimed that her mother gifted the ruby ring to her by words spoken before her death. Jacqueline refuses to deliver up possession of the ring.

[7] There is no dispute that all the funds in all the accounts and those used to purchase the Gold Certificate, originated solely from the deceased during her lifetime.

[8] The trial record is constituted with all kinds of material. I have considered that which was actually addressed in the testimony as evidence, without strict adherence to the formality of proof, given the provenance of this litigation, the modest amounts in dispute, the time it has taken to get to trial, the mystery as to why there was no pretrial, and the fact most of the parties are not represented by counsel. I have ignored the rest. I have also, without much analysis, allowed the testimony to include what was allegedly said by the deceased, on grounds it has been necessary to understand the narrative. In considering the ultimate value of the evidence however, I am mindful that it must be both necessary and reliable to be received as proof of its contents.

[9] The machinations of the parties as to their various claims have been the subject of a number of court orders.

[10] On February 2, 2016, it was ordered, among other things, that:

a. The Small Claims Court files be transferred to the Superior Court of Justice and joined with the proceedings therein;

b. Colleen was to be added as a defendant in the application before the Superior Court for directions;

c. The parties to the proceeding and the issues to be determined were:

i. whether the gold certificate in the name of Lisa Henry is Lisa Henry's property or the estate's property;

ii. whether the President's Choice bank account was subject to an express trust wherein Colleen Henry was to divide the proceeds between the five children excepting herself;

iii. whether Richard and Colleen had breached the express trust involving the PC funds and are personally liable to the Applicants for a share.

l. The costs are reserved to the trial judge.

[11] On March 29, 2018, Richard Henry was appointed Estate Trustee on terms. In the endorsement, Bird J. noted that the validity of the will was not questioned.

[12] A trial was ordered by Di Luca J., to determine two issues. These were: whether Lisa Anne Henry owned the Gold Certificate found in her mother's apartment upon death or whether it belongs to the intestate estate; and whether the President's Choice account falls within the estate or was the subject of an *inter vivos* trust and is to be distributed in accordance with the terms of an *inter vivos* trust.

[13] Daughter Lisa Henry's full name is Lisa Anne Henry. Her age was not disclosed in the evidence. She recalls going downtown with her mother to the Bank of Nova Scotia head office at which time her mother made an investment in gold. The certificate in respect of the investment was issued at a local branch some time later.

[14] The certificate in issue bears the name Lisa Henry and was purchased on February 18, 1991. Her mother told her, Lisa testified, that the gold she purchased was to be her daughter's, upon her mother's death, unless her mother needed it during her own lifetime, in which case she would use it for herself. The certificate was found in Paula Henry's files, in her apartment following her death. At no time was the certificate delivered into the possession of Lisa Henry by her mother.

[15] Richard Henry testified that he was aware his mother invested in gold and kept a file containing records of transactions relating to her investments. Certain documents found in the file were given in evidence. These signify that, on the same date as the purchase of the gold in issue, the value of 10 ounces of a certificate of value for 35 ounces, had been redeemed. The certificate for the 35 ounces was in the name of Jacqueline Henry.

[16] Jaqueline and Lisa Henry both testified that the funds used to purchase any and all gold investments bearing their names originated with their mother. Lisa Anne Henry points to a document from the Bank of Nova Scotia that advises clients of the requirements to produce identification when purchasing precious metals from the bank, notably as it applies to

customers who are not clients of the bank. She testified that her mother would not have been able to produce two pieces of identification in the name of Lisa Henry required to have redeemed the certificate in issue.

[17] Lisa Anne Henry testified that her mother was known mostly by the name Paula Henry. Her sister Colleen's evidence was that no one other than her mother's family in Germany (from where her mother had emigrated), addressed her by that name, and that her mother was known to her friends and family by the name, Lisa. Tom Henry testified that his mother was called Lisa. A promissory note from Colleen to her mother is addressed to the name of Paula Lisa Henry. Documents signify that the deceased was identified, or identified herself, by a number of variants, including Paula Henry, Lisa P Henry and Paula L Henry. Of the documents, only those associated with a T1 General Income Tax 1990 return show the name of Lisa Henry as that of the deceased. On those documents bearing what appears to be her own signature, the deceased appears to have used the name of Paula, or Paula L Henry.

[18] As of the date of her mother's will in 2003, testified Jaqueline Henry, her mother held an account at President's Choice Financial and had a number of accounts at the CIBC. Jacqueline identified documents that appear to confirm her evidence that these accounts were closed well before her mother's death. New accounts were opened after the date of execution of her mother's will in the joint names of her mother and her sister Colleen Henry. Jacqueline Henry testified that her mother told her that there was no more executor, no will, and that the fresh banking arrangements were intended to allow probate to be avoided. She claims that Colleen Henry was appointed by their mother as a trustee of the CIBC and PC Financial Accounts and was obligated to distribute them equally to all six of the siblings. After receiving an advance of $25,000 in March of 2011, to assist her to purchase a home, Colleen received her entitlement of her mother's estate and the trust was varied, so as to call upon her to distribute the funds remaining on her mother's death to her five siblings.

[19] The banking documents identified by Jacqueline as part of the Trial Record, were not challenged at trial. These confirm that the deceased made new banking arrangements in or about 2006, such that her accounts were transferred to accounts held jointly with Colleen Henry. The defendants do not dispute that all deposits in joint tenancy with their mother were constituted with funds that originated with their mother.

[20] Colleen Henry understood from her mother, she testified, that she was to distribute the funds on joint deposit in the PC Financial Account to each of her siblings equally (she, having received her inheritance in advance), much the same as her sister Jacqueline had said in her testimony.

[21] Upon her mother's death when she learned of the will, Colleen Henry transferred the jointly held funds to her brother, Tom, who transferred them to Richard as the named executor of her mother's will. Colleen Henry makes no claim to any funds from her mother's estate whatsoever.

[22] Richard testified that his sister Jacqueline is correct, in that she has not yet received a share of the PC Financial Account. This is because she has refused to deliver up his mother's ruby ring and cannot be trusted to do so. Only by withholding funds could he position the estate to recover the ring without further costs being incurred in circumstances where the disputes have already cost dearly.

The Law

[23] A gift *inter vivos* may be found where there is an irrevocable transfer of property from one person to another while the donor is alive and not in expectation of death: see Thomas G. Feeney & James MacKenzie, *Canadian Law of Wills,* 4th ed. (London: Butterworth, 2000) at 1.3 and 1.4. To constitute a gift there must be an intention to donate, acceptance of the gift, and a sufficient act of delivery: see Bruce Ziff, *The Principles of Property Law*, 2nd ed. (Scarborough: Carswell, 1996); *Bayoff Estate (Re)* (2000), 190 Sask. R. 82 (Q.B.).

[24] The gift must be a present gift, and not one that is intended to take effect upon the death of the donor, as the latter will be presumed to be a testamentary disposition and will fail unless it is duly executed as a will. Nor may the gift be one that is intended to take effect at some other time in the future; it must be an immediate, present gift. Where a gift rests merely in promise whether written or verbal or unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him or her, to complete and perfect it. An incomplete, or inchoate gift occurs when the donor has not done everything within his or her power to transfer the property. The donor must have done everything which, according to the nature of the property, was required to be done in order to transfer the property and render the transfer binding upon himself or herself. This may be done by actually transferring the property to the donee, or by placing the property in trust for the donee. Once a deed or conveyance is fully executed, failing some further condition or particular to be satisfied, the fact that the document remains in the possession of the donor does not render it incomplete.

[25] The nature of a gift or donation *mortis causa* was explained by Lord Russell, C.J. in *Cain v. Moon,* [1896] 2 Q.B. 283 at p. 286:

> … for an effectual donation *mortis causa* three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover.

[26] Authorities are not of one opinion on the meaning of the phrase "in contemplation of death": see *Danicki v. Danicki,* [1995] O.J. No. 3995 at 34 (Gen.Div.); however, the following prepositions can be derived from case law:

- It is not necessary that the donor be "in extremis" (on the verge of death) at the time of making the gift: see *Saulnier v. Anderson* (1987), 43 D.L.R. (4th) 19 (N.B.Q.B.);

- The standard of contemplation of death is lower than an expectation of death: see *Danicki*;

- A motive of impending death can be implied by the circumstances; it need not be stated explicitly: see *Brown v. Rotenberg*, [1946] O.R. 363 (C.A.);

- If a donor dies from a peril that was different from the expected peril, the gift may not take effect: see *Wilkes v. Allington* [1931] 2 Ch. 104;

- In some cases, it was found that the conveyance was not made "in contemplation of death" where a testator, although of advanced age, was in comparatively good health and death was not expected to take place immediately or within a measured time: see *Roach Estate (Re)*, [1905] 10 O.L.R. 208 (H.C.J.); *Danicki*.

[27] The testator does not have to be at the verge of death at the time of making of the gift but death from a contemplated cause should be expected to take place at least within a measured time.

[28] The methods of making a gift were canvassed by Locke J. in *Kooner v. Kooner* (1979), 100 D.L.R. (3d) 76 at 80 (B.C.S.C.). To complete the gift and effect delivery, the donor "must have done everything, which, according to the nature of the property" was necessary to be done to transfer the property and render the settlement binding upon him: see *Kooner* at para. 18 citing Turner L.J. in *Milroy v. Lord* (1862) 45 E.R. 1185. In *Milson v. Holien*, [2001] B.C.J. No 1239 at 41 (B.S.S.C.)., it was found that the donor effected delivery of a gift of GICs, when he transferred those GICs into joint names with the recipient of the gift. Similarly, in *Beavis v. Adams,* [1995] O.J. No. 383 (Gen. Div), delivery of the gift of a bank account was not put in issue where the testator shortly before his death changed the bank account to a joint account with the recipient. The threshold for delivery under a gift of *mortis causa* is lower than for a gift *inter vivos*.

[29] Halsbury's distinguishes testamentary gifts from *inter vivos* gifts:

[30] HGF-3 Whether gift testamentary. Halsbury's Laws of Canada - Gifts (2018 Reissue) (Morin):

> A testamentary gift is a gift that is meant to take effect at the time of the donor's death. If the document evidencing the gift has the effect of transferring the property or setting up a trust thereof in praesenti, though to be performed after the testator's death, it is not testamentary. The question of whether a document evidencing a gift either by way of transfer or by creation of a trust is or is not testamentary, depends upon the intention of the settlor. The reservation of a power of revocation of a trust or of a life interest does not have the effect of making the document creating it testamentary. The following factors have been noted as appearing where documents are held to be testamentary:
>
> - no consideration passes

- the document has no immediate effect
- the document is revocable, and
- the position of the deceased and the donee does not immediately change

[31] In relation to jointly held property and survivorship, the leading authority is that of the Supreme Court of Canada in *Pecore v. Pecore*, a decision reported at 2007 SCC 17. There, an aged father deposited funds into an account in joint name with his daughter, with right of survivorship. A presumption of resulting trust is the general rule for gratuitous transfers. It applies where evidence as to the transferor's intentions in making the transfer is uncertain or unpersuasive. The onus is on the transferee to demonstrate that a gift was intended. Depending on the relationship between the transferor and the transferee, the presumption of advancement may apply. If so, it falls on the party challenging the transfer to rebut the presumption of a gift. The civil standard applied to both presumptions. The applicable presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

[32] In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, Section 13 of the *Evidence Act,* R.S.O. 1990, c. E.23, s. 13., dictates that an opposite or interested party shall not obtain a verdict, judgment, or decision, on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[33] For the purposes of this section, the direct testimony of a second witness is not essential. Corroboration may be afforded by inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement: see *McDonald Estate v. McDonald* (1903), 33 S.C.R. 145. In *Thompson et al. v. Coulter* (1903), 34 S.C.R. 261, Killam J. addressed the issue of corroboration. He said at pp. 263-264:

> In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such "opposite or interested party" in order to entitle him to a "verdict, judgment or decision." Unless it supports that case, it cannot properly be said to "corroborate". A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.

[34] Corroboration must address a material point in the witness's testimony.

Conclusions

[35] The evidence of Colleen Henry, that her mother intended that her bank accounts be distributed by Colleen to her siblings, is corroborated by the banking documents. As Colleen makes no claim herself to benefit from the gift, her evidence does not in law require corroboration. I find that the deceased intended to make a gift to her children, in contemplation of death, and entrusted the funds in the bank accounts to Colleen to distribute, in the interests of avoiding probate. Unfortunately, it would appear that the

deceased had perhaps forgotten or failed to recognize the effect of having written a will that she had not, apparently, revoked in writing. While Colleen may have had a duty to distribute the bank accounts in accordance with the trust of her mother, I do not find she has acted in breach of trust, the funds having, ultimately been delivered to her brother Richard, as estate trustee. Leaving aside how the funds were to be distributed, Richard was charged with the obligation to administer his mother's estate. This generally is a much broader obligation than just distributing funds to the beneficiaries. I find that Colleen discharged her duties as trustee having regard to all of the circumstances and do not find her liable to her siblings as trustee.

[36] It is undisputed that Paula Lisa Henry tendered all of the consideration for the Gold Certificate. There is insufficient evidence to find that the Certificate is in the name of Lisa Anne Henry. I have weighed the fact that the will excluded this daughter, but given the chronology of events, there are no inferences that safely arise from that fact alone to weigh much on these findings. There is insufficient corroborative evidence that the Certificate is in the daughter's name. In any event, there was insufficient delivery to the daughter of the Gold, for it to have been gifted by her mother to her. Even if Lisa Anne Henry's evidence was accepted, at its highest, her mother never made an unconditional gift of the Gold Certificate to her daughter. There is nothing in the evidence to suggest that the finding of the Certificate was much less of a surprise to the children than the will. It follows that the Gold Certificate is an asset of Paula Lisa Henry's estate that will pass on intestacy to the children equally, upon administration of her estate, subject to further order of this court having regard to the distributions to date and the costs of the administration of her estate and legal costs of these proceedings.

[37] To advance the administration of the estate, this court orders that the value of the Gold Certificate dated February 18, 1991, bearing serial number GF0032639 be converted to cash and paid into court, forthwith by the Bank of Nova Scotia to the credit of this action. This court orders that all other undistributed funds be paid into court. This court orders that Jaqueline Marie Henry deliver up the ruby ring to Colleen Henry, forthwith, after having it appraised, to be held by Colleen Henry until final distribution and disposition of the estate of Paula Lisa Henry.

Mullins J

Justice A.M. Mullins

Released: January 30, 2019

CITATION: Henry v. Henry, 2019 ONSC 740

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– and –

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Justice A.M. Mullins

Released: January 30, 2019