[Cite as *Richards v. Wasylyshyn*, 2012-Ohio-3733.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rosalie Richards

Appellee

v.

Mark Wasylyshyn, Trustee of the Kenneth James Lay Trust, et al.

Defendants

and

Bradley E. Lay and Kenneth J. Lay, Jr.

Appellants

Court of Appeals No. L-11-1037

Trial Court No. CI0201002167

DECISION AND JUDGMENT

Decided: August 17, 2012

* * * * *

Cary Rodman Cooper and Jacqueline M. Boney, for appellee.

Erik G. Chappell and Julie A. Douglas, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the February 15, 2011 judgment of the Lucas County Court of Common Pleas in an action brought by plaintiff-appellee, Rosalie Richards, for

a declaratory judgment, replevin, and conversion in a dispute over ownership and possession of two paintings of substantial value. Bradley E. Lay and Kenneth J. Lay, Jr. ("Jim Lay") are appellants and defendants in this action. The co-trustees of the Kenneth James Lay Trust ("Trust") and co-executors of the Estate of Kenneth James Lay, deceased, are also defendants, but did not appeal the trial court judgment and have not participated in this appeal.

{¶ 2} In its judgment, the trial court ruled on cross-motions for summary judgment filed by appellee and appellants. The court overruled the motion for summary judgment filed by appellants and granted appellee's motion for summary judgment. The court declared that the two paintings at issue are owned by Rosalie Richards because the paintings were inter vivos gifts from Kenneth Lay, Sr. ("Mr. Lay"), deceased, to Ms. Richards. The court ordered the defendants to transfer possession of the paintings to Ms. Richards.

{¶ 3} Mr. Lay died on January 1, 2010. His wife, Betty, and daughter, Lori, predeceased him. Appellants Bradley and Jim Lay are Mr. Lay's surviving children. Bradd Smith and Mark Wasylyshyn are the co-executors of Mr. Lay's estate and co-trustees of his trust. In their answer to the appellee's amended complaint, they stated that (1) the will of Mr. Lay provides that property owned by Mr. Lay at the time of his death is bequeathed and devised to the Trust and (2) that Bradley and Jim Lay are the beneficiaries of all tangible personal property of the Trust.

{¶ 4} Appellants assert two assignments of error on appeal:

A. The trial court erred when it granted plaintiff/appellee's motion for summary judgment.

B. The trial court erred when it denied defendants/appellants' motion for summary judgment.

{¶ 5} The undisputed evidence submitted on the motions for summary judgment demonstrate that Mr. Lay and Ms. Richards had an on again, off again romantic relationship for over ten years before his death. They began dating in 1998. Over the years they traveled extensively together, including trips to Europe and the South Pacific. They would travel two or three times a winter to Mr. Lay's condominium in Sarasota, Florida. Mr. Lay was generous and made gifts of clothing and jewelry to Ms. Richards.

{¶ 6} Periodically, they would break off their relationship over a recurring dispute over whether Mr. Lay would marry Ms. Richards. Mr. Lay's wife, Betty, died in the early 1990s. Mr. Lay repeatedly stated to Ms. Richards, to family members, and to friends that he would never remarry. It is undisputed that in October 2009, the two broke up after Mr. Lay again refused to marry Ms. Richards. Ms. Richards testified by deposition that she and Mr. Lay reconciled during his hospitalization after Mr. Lay's November 14, 2009 automobile accident.

{¶ 7} Mr. Lay collected artwork. Included in his collection were paintings by Winslow Homer titled "Portrait of Charles Savage Homes" and by Mary Cassatt titled "Mother Resting Her Head on Her Daughter's Blonde Head." Ms. Richards contends

that the undisputed evidence submitted on motion for summary judgment established that there is no dispute of material fact that Mr. Lay made an unconditional and irrevocable gift of these two paintings to her on April 3, 2009. Ms. Richards argues that the paintings were a birthday gift and that she and Mr. Lay took the paintings together from his lake house and delivered them to Ms. Richards' home on that date.

{¶ 8} Veronica Opial, Ms. Richards' mother, testified by affidavit that she was present on April 3, 2009, when Mr. Lay and her daughter brought the paintings to her daughter's house. According to Ms. Opial, as they entered the house with the paintings, Mr. Lay looked at her and stated: "Rose's birthday present." Ms. Richards also testified to this statement by Mr. Lay.

{¶ 9} Mr. Lay underwent open heart surgery at the Mayo Clinic in Rochester, Minnesota on April 10, 2009. The surgery was successful. Mr. Lay was subsequently admitted to the Toledo Hospital in Toledo, Ohio for follow up care and discharged from Toledo Hospital on May 5, 2009.

{¶ 10} On May 9, 2009, Ms. Richards returned the paintings to Mr. Lay's lake house, where they remained until his death on January 1, 2010. Afterwards, Ms. Richards made a written demand to all defendants for possession of the paintings. The request was denied. This litigation was commenced with the filing of a complaint on February 19, 2010.

I. Summary Judgment

{¶ 11} The standard of review on motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 12} Under Civ.R. 56, to prevail on a motion for summary judgment the moving party must demonstrate:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 13} Summary judgment procedure is limited to circumstances where there is no dispute of material fact for trial:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 14} We consider appellants' assignments of error together and deal first with challenges to the admissibility of evidence considered on the motions for summary judgment.

II. Admissibility of Evidence of Statements by Decedent

{¶ 15} In the February 15, 2011 judgment, the trial court ruled that statements made by Mr. Lay before his death were admissible under the hearsay exceptions provided under Evid.R. 804(B)(3) and 803(3). Appellants contend that the trial court erred and that statements by Mr. Lay to Ms. Richards, Veronica Opial (Ms. Richards' mother), and Dr. Gerald Sutherland should have been excluded from evidence as hearsay.

{¶ 16} Appellants' initial argument concerns Evid.R. 804(B)(5). Appellants argue first that the rule precludes consideration of the statements by Mr. Lay as evidence. Second, they argue that the hearsay exception under Evid.R. 804(B)(5) does not apply to the statements.

{¶ 17} Evid.R. 804(B)(5) provides:

> (B) Hearsay exceptions
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

{¶ 18} In our view, Evid.R. 804(B)(5) neither supports nor excludes admission of the statements into evidence. The rule does not exclude evidence. It creates an exception to permit introduction into evidence of statements by a decedent that might otherwise be excluded as hearsay.

{¶ 19} The hearsay exception created in Evid.R. 804(B)(5) does not apply here. The testimony of Richards, Opial, and Sutherland concerning statements by Mr. Lay were offered by appellee in support of a claim, adverse to the estate, that the paintings were an inter vivos gift by Mr. Lay to Ms. Richards. This court has previously recognized that Evid.R. 804(B)(5) does not provide a hearsay exception for evidence offered to support claims adverse to the decedent or his estate. *Testa v. Roberts*, 44 Ohio App.3d 161, 167, 542 N.E.2d 654 (6th Dist.1988). The rule creates "a hearsay exception for the declarations of a decedent which rebut testimony of an adverse party and is

available only to the party substituting for the decedent." *Testa*, 44 Ohio App.3d at 167, *citing Bilikam v. Bilikam*, 2 Ohio App.3d 300, 305, 441 N.E.2d 845 (10th Dist.1982); *accord Knowlton v. Schultz*, 179 Ohio App.3d 497, 2008-Ohio-5984, 902 N.E.2d 548, ¶ 40 (1st Dist.); *Brooks v. Bell*, 1st Dist. Nos. A-9602497 and C-970548, 1998 WL 165024, *3 (Apr. 10, 1998).

{¶ 20} Appellants argue that the trial court erred in holding that statements by Mr. Lay of donative intent are admissible under the hearsay exception provided by Evid.R. 803(3). The rule provides:

> **Evid.R. 803 Hearsay exceptions; availability of declarant immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(3) Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

{¶ 21} Appellants contend that Evid.R. 803(3) does not apply because the statements by Lay were not indicative of his then existing state of mind to make an

unconditional gift of the paintings to Richards. Appellee contends that Lay's statements to Richards and her mother, when delivering the painting and describing them as birthday gifts, were expressions of donative intent admissible under the rule.

{¶ 22} This court has previously recognized that a person's statement of donative intent at the time of delivery of personal property to a claimed donee is a statement indicative of a then-existing state of mind or intent and admissible under Evid.R. 803(3). *Charlton v. Charlton*, 6th Dist. No. WD-05-017, 2005-Ohio-7004, ¶ 49; *accord Buckles v. Buckles*, 46 Ohio App.3d 102, 114, 546 N.E.2d 950 (10th Dist.1988). Accordingly, we conclude that the testimony by Ms. Richards and her mother of an alleged statement by Mr. Lay (as the paintings were being delivered to the Richards' residence) that the paintings were "Rose's Birthday gift" is admissible under Evid.R. 803(3).

{¶ 23} The trial court also concluded that the statements by Mr. Lay come within the hearsay exception under Evid.R. 804(B)(3). Evid.R. 804(B)(3) sets forth an exception to the hearsay rule where the declarant is unavailable as a witness and the declarant's statement is against interest:

> (B) Hearsay exceptions
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> *(3) Statement against interest*. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest,

> or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement. Evid.R. 804(B)(3). (Footnote omitted.)

{¶ 24} The undisputed evidence establishes that the two paintings concerned in this case have an appraised value in excess of $1 million. Appellee argues that statements by Mr. Lay that the paintings were a birthday gift were so far against Mr. Lay's pecuniary interest that a reasonable person in his position would not have made the statements unless he believed them to be true. Appellants argue that no pecuniary interest was involved because the evidence only supports a gift cause mortis, which became void when Mr. Lay survived surgery in April 2009.

{¶ 25} Evid.R. 804(B)(3) instructs that whether a statement is admissible under the rule is to be evaluated "from the time of its making." The alleged statements by Mr. Lay to Ms. Richards and her mother concerning the claimed gift of the paintings as a birthday gift were allegedly made on April 3, 2009, prior to the April 2009 surgery. Considered from that viewpoint, whether an inter vivos gift or cause mortis gift were intended, the statements presented at least a contingent risk of loss by Mr. Lay's estate

and trust of property of over $1 million in value. In our view, a reasonable man in Mr. Lay's position would not have made such a statement unless he believed it to be true. Accordingly, we conclude that the trial court did not err in ruling that the statements were admissible under Evid.R. 804(B)(3).

{¶ 26} Appellee also submitted the affidavit of Dr. Gerald Sutherland in support of her motion for summary judgment. The affidavit does not recount any specific statement by the decedent concerning any gift of the paintings. Dr. Sutherland stated in his affidavit that he and Mr. Lay were good friends and saw each other often. He testified by affidavit to a loving relationship between Mr. Lay and Ms. Richards. He also stated that Mr. Lay said "on numerous occasions that he would 'take care of' Rose or that he would make sure that Rose was 'well taken care of.'" Appellants make the same hearsay arguments under Evid.R. 804(B)(5), 803(3) and 804(B)(3) with respect to the Sutherland affidavit as they have made to the affidavits by appellee and her mother, and the deposition testimony of appellee.

{¶ 27} We agree that the hearsay exceptions provided under Evid.R. 804(B)(5) and 804(B)(3) do not apply to Dr. Sutherland's testimony. As stated above, the hearsay exception in Evid.R. 804(B)(5) is defensive only and is not available to support claims against an estate. In our view, a general statement of intent "to take care of another" is not a statement against pecuniary interest within the meaning of Evid.R. 804(B)(3). The statement is a general statement of support that does not include any specific gift or

financial obligation. The statement is not of the type that a reasonable person in the declarant's position would not have made unless the declarant believed it to be true.

{¶ 28} The testimony by Dr. Sutherland that Mr. Lay stated that he "would take care of" Ms. Richards or that he would make sure she was "well taken care of" are statements of current intent or plan for future conduct. Under Evid.R. 803(3) such statements are admissible to show that the planned or intended act was undertaken. *See State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 99; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 33. We conclude that Dr. Sutherland's testimony of statements by Mr. Lay was admissible under Evid.R. 803(3).

{¶ 29} In summary, we conclude that the statements by Mr. Lay were competent admissible evidence appropriately considered on the motions for summary judgment under the hearsay exceptions provided in the Ohio Rules of Evidence.

III. Inter Vivos Gifts

{¶ 30} Appellee argues that the trial court correctly determined that there is no dispute of material fact and that the paintings were an inter vivos gift from Mr. Lay. This court recently considered the definition and elements of an inter vivos gift in *Eoff v. Eoff*, 6th Dist. No. L-09-1306, 2011-Ohio-151, ¶ 8:

> "An inter vivos gift is an immediate, voluntary, gratuitous and irrevocable transfer of property by a competent donor to another." *Smith v. Shafer* (1993), 89 Ohio App.3d 181, 183, 623 N.E.2d 1261. The essential

elements of an inter vivos gift are: "(1) [the] intent of the donor to make an immediate gift; (2) delivery of the property to the donee; [and] (3) acceptance of the gift by the donee." *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 694 N.E.2d 989. Generally, the donee has the burden of showing, by clear and convincing evidence, that the donor made an inter vivos gift. *Smith* at 183, 623 N.E.2d 1261." *Smith v. Emery-Smith*, 11th Dist. No.2009-G-2941, 2010-Ohio-5302, citing *Osborn v. Osborn*, 11th Dist. No.2003-T-0111, 2004-Ohio-6476.

{¶ 31} The existence of an inter vivos gift is ordinarily a question of fact. *Id*. at ¶ 9; *Wheeler v. Martin*, 4th Dist. No. 04CA15, 2004-Ohio-6936, ¶ 16.

{¶ 32} Appellants argue that there was no inter vivos gift on multiple grounds. First, appellants argue that there was no unconditional gift. Appellants argue that the evidence in the case supports a conclusion that the paintings were given to Ms. Richards in contemplation of Mr. Lay's death during tricuspid valve replacement surgery in April 2009 and that Mr. Lay did not intend to permanently relinquish control and ownership of the paintings unless he died from the surgery. Appellants argue that the existence of a gift in contemplation of death would explain the return of the paintings to Mr. Lay in May 2009, shortly after he survived the surgery.

IV. Gifts Causa Mortis

{¶ 33} Causa mortis gifts are given in contemplation of death and under an implied condition that if the donor recovers from the illness the gift is rendered void. *In*

re Estate of McGeath, 143 Ohio App.3d 835, 838, 759 N.E.2d 408 (2d Dist.2001). The elements necessary to establish the existence of a causa mortis gift are:

> 1. It must be of personal property.
>
> 2. The gift must be made in the last illness of the donor, while under the apprehension of death as imminent, and subject to the implied condition that if the donor recover[s] of the illness, or if the donee die[s] first, the gift shall be void; and
>
> 3. Possession of the property given must be delivered at the time of the gift to the donee, or to some one for [her], and the gift must be accepted by the donee. *In re Estate of Newland* (P.C.1946), 47 Ohio Law Abs. 246, 251, 34 O.O. 235, 236, 70 N.E.2d 234, 235, affirmed (App.1946), 47 Ohio Law Abs. 252, 70 N.E.2d 238. *Id*.

{¶ 34} Gifts causa mortis must be established by clear and convincing evidence. *Id.*; *In re Estate of Newland,* 47 Ohio Law Abs. at 249.

{¶ 35} Mark Wasylyshyn, co-executor of the estate and co-trustee of the Lay trust, testified that Mr. Lay expressed a concern to him (while on the way to the Mayo Clinic for surgery) that he would not survive the May 2009 surgery: "He was very concerned about the surgery. He realized that there was a very high probability that he would not survive the surgery."

{¶ 36} Mr. Wasylyshyn also testified that Mr. Lay told him "that he had taken two paintings to Rose's house in case anything happens to him when he is at Mayo." Mr.

Wasylyshyn denied knowing whether Mr. Lay gave the paintings permanently to appellee.

{¶ 37} Appellants also contend that the fact that the paintings remained at Mr. Lay's lake house residence from May 2009, until his death on January 1, 2010, also creates a presumption that Mr. Lay owned the paintings at the time of his death. Ohio recognizes that evidence of possession of personal property ordinarily constitutes "some evidence of ownership, which, of course, may be overcome by proof of ownership in another." *Mielke v. Leeberson,*150 Ohio St. 528, 533, 83 N.E.2d 209 (1948); *followed by In re Estate of Linscott*, 4th Dist. No. 1312, 1987 WL 10772, *1 (Apr. 28, 1987). Appellee argues that her evidence of an inter vivos gift rebutted the presumption by showing that while the paintings were stored at the lake house after May 9, 2009, and that for matters of convenience the paintings remained her property.

In our view, resolution of the cross-motions for summary judgment in this case requires the court to weigh evidence and determine the credibility of witnesses. This is particularly the case on issues of donative intent, delivery of the paintings, and rights of ownership and possession. This case presents disputes of material fact that must be resolved by a trier of fact at trial.

{¶ 38} Although we conclude that the trial court did not err in overruling appellants' motion for summary judgment, we find that the trial court erred in sustaining appellee's motion for summary judgment. We find appellants' Assignment of Error A well-taken and appellants' Assignment of Error B not well-taken. Therefore, we reverse

the judgment of the Lucas County Court of Common Pleas to the extent it granted appellee's summary judgment motion and remand the case to the court for further proceedings, including trial. Appellee is ordered to pay costs pursuant to App.R. 24.

Judgment reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE