Date: 20010719
Docket: S.C. No. 99-A0273
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

ELDON MOSIER

PLAINTIFF

AND:

JUDITH SULEY, EXECUTRIX OF THE ESTATE OF CECIL WILLIAM MOSIER, DECEASED, AND MABEL ARLENE MANDEL, EXECUTRIX OF THE ESTATE OF MABEL ELIZABETH MOSIER, ALSO KNOWN AS BETTY MOSIER, DECEASED

DEFENDANTS

ROBERT PITZEL	For the Plaintiff
KEITH PARKKARI	For the Defendant Mabel Mandel
JOHN LALUK	For the Defendant Judith Suley

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

---

[1] MARCEAU J. (Oral): This is an action between Eldon Mosier, as plaintiff, and Judith Suley, executrix of the estate of Cecil William Mosier, deceased, and Mabel Arlene Mandel, executrix of the estate of Mabel Elizabeth Mosier, also known as Betty Mosier, deceased, as defendants. It is Supreme Court action 99-A0273.

[2] Each of the defendants by notice of motion seeks to have this matter determined under Rule 18 or 18(a) of the Rules of Court by way of a summary trial. Before I am prepared to deal with this matter summarily, I have to decide whether setting this matter down for trial, where *viva voce* evidence would be presented and further pre-trial discoveries would probably take place which could touch upon credibility, is necessary to the determination of this matter. It is my view that the only way in which I should deal with the matter summarily is if putting the plaintiff's case at its best there is no hope that it could succeed in law or if putting the defence at its best there is no hope that the defence could succeed.

[3] In this case I have two affidavits, one filed by Eldon Mosier, the plaintiff, and one filed by his sister, Beatrice Givogue, and, accepting the evidence which has been given in those two affidavits as fact, I have come to the conclusion that the plaintiff's action cannot succeed.

[4] The reasons are this: First of all, clearly, in the affidavit of Eldon Mosier, the son of the deceased, he deposes that in the few days before his father Cecil William Mosier's death on August 12, 1995, he was in the presence of his father, the deceased, and his father's wife, Betty Mosier. Betty Mosier was Cecil William Mosier's second wife. By inference, I take it that Cecil William Mosier had been previously married and that Eldon Mosier was the son of Cecil William Mosier from the first marriage as was the other deponent, Beatrice Givogue. In

paragraph 15 of Mr. Mosier's first affidavit, the one sworn on the 29th of January, 2001, he deposes:

> During one hospital visit with Mark, Beatrice, Betty and Cecil present there was discussion about the passing of some of Cecil's property. My father stated that I was to take his gold Caravell [*sic*] retirement watch with gold nugget chain as he wanted the watch to stay within his family bloodline and he expected me to pass it on to Mark.

[5] In paragraph 10 of Ms. Givogue's affidavit, she states:

> My father had a Caravelle gold watch contained in a case with a gold nugget watch chain. It is quite valuable. My father advised Eldon in my presence that the watch was Eldons [*sic*] to take as he wanted to keep it in his family to be passed down to Mark.

And paragraph 11:

> I was also present in the hospital with Eldon and Mark when my father told Eldon to take his Wells Fargo safe box....

[6] The statement of claim claims, in paragraphs 4 and 5, a gift *inter vivos* to Eldon Mosier of:

(a) a solid gold Caravelle watch which was contained in a blue watch case and had a gold watch chain attached
(b) a Wells Fargo steel safe box
(c) a Sheriff's badge and badge wallet
(d) 5 mens [*sic*] gold nugget rings, large size
(e) pictures and photo albums of Cecil and his family members

[7] With respect to the sheriff's badge and badge wallet, the only evidence before me is that that was given to the plaintiff Eldon Mosier's son, Mark Mosier. Mark is not a plaintiff in this action; that is a separate and distinct action and is not before me. Therefore, the claim for the sheriff's badge and badge wallet by Eldon Mosier is dismissed.

[8] With respect to the five men's gold nugget rings, large size, pictures and photo albums of Cecil and his family members, the claim in that respect fails for two reasons. First of all, there is no evidence from Eldon Mosier that specifically five men's gold nugget rings and pictures and photo albums were given to him *inter vivos*. There is a claim that might amount in the affidavit to a settlement of a claim against the estate of Cecil Mosier, and it might be argued, based on the evidence in the affidavits, that it amounted to accord and satisfaction of a claim presented against the estate. That contention is denied in the affidavit of Ms. Suley. The claim, however, in 4(d) and (e) fails simply because it is not pled as an alternative to a gift *inter vivos*, and there is no evidence of a gift *inter vivos*.

[9] The claim with respect to (a) and (b) is on a completely different footing. I find that, accepting for the purposes of this application the affidavits of Eldon Mosier and Beatrice Givogue as truth, and putting on it the best inference in favour of the plaintiff that can be put, the statement by Mr. Cecil Mosier close to the date of his death is either a statement of intention to give immediately or a statement of intention which amounts to a *donatio mortis causa*, a statement of intention to give something with the gift becoming effective on death. There is a

third possibility, and that is that Mr. Mosier, the deceased, intended simply to make a direction which amounted to a testamentary gift, and obviously, if that spin was put upon the affidavit of Eldon Mosier, the claim would not succeed because it is not in writing and there has been no compliance with the *Wills Act*, R.S.Y. 1986, c. 179.

[10] Put at its strongest, as I said, the claim in 4(a) or (b) is that a gift was intended to be made. The law has always been clear that for a gift to be complete, *inter vivos*, there must be delivery and acceptance. Now, firstly, in order for the gift to be effective in terms of delivery, the plaintiff has to show that the deceased Cecil Mosier did all that he could to effect delivery. There is considerable question whether he did everything he could to effect delivery here because he did not give direction to his wife to deliver, which would have probably impressed a trust upon her; he did not sign any paper that would make it very clear that he intended to immediately deliver; and, looking at the *Bayoff* case, *Re Bayoff Estate*, [2000] S.J. No. 19, also reported (2000) SKQB 23, there was not even the delivery of something which would enable Mr. Eldon Mosier to take possession.

[11] It is clear to me that even if, and at best, Eldon Mosier was authorized to complete the gift by taking possession, there was no actual delivery by those words, "Take it." It was simply an authorization to complete the gift by delivery. The gift as at the death of Cecil Mosier was not completed, because there is no evidence that the plaintiff attempted to complete the gift by taking the delivery

which he was authorized to take. Therefore, I cannot distinguish this case from the *Bayoff* case, where the delivery had not taken place because the deceased had not done everything that he had to do to transfer the contents of the safety deposit box, so that as at the date of death the gift was imperfect; delivery had not, in fact, been made, although attempted. The only distinction, which is of no assistance to the plaintiff in this case, is that the donee in the *Bayoff* case was named executor by the will and that perfected the gift, or she was in a position to perfect the gift. Eldon Mosier was not the executor of the estate of Cecil Mosier.

[12] Therefore, to sum it up with respect to the Caravelle gold watch and the Wells Fargo box, put at its strongest, it is an authorization to take possession and thereby complete delivery. No attempt was made during the lifetime of the deceased Cecil Mosier to take possession; therefore, delivery was not made during the lifetime and could not be perfected. Therefore, the claim in its entirety is dismissed.

(Submissions re costs)

[13] THE COURT: I am taking into account what I had earlier said. First of all, the plaintiff Eldon Mosier has considerable sympathy because I think that since what happened in that hospital room cannot be contradicted, the Court would have to find that the deceased intended to either make a gift then and there or a gift upon his death. Secondly, looking at all of the cases that were cited to me, the question whether in law the words "take this and keep it and

pass it on to your son" amounted to an *inter vivos* gift, and delivery per se was not a clear point and probably a good point for settlement in another court, so that the case, in my view, in law, was not always doomed to failure.

[14] It is, in my opinion, equitable that the estate of Cecil Mosier bear the costs of all of the parties on column 3, so that each of the defendants will have their costs and the plaintiff will have his costs, all payable out of the estate of Cecil Mosier. Those costs include, of course, disbursements.

MARCEAU J.S.