

CANADA / JUDGMENT

Hugginson v. Hugginson

2025 ONCA 902

COURT

Court of Appeal for Ontario

DECIDED

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Judges

Roberts, Lois B.; Favreau, Lise G.; Rahman, Moiz

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Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: Hugginson v. Hugginson, 2025 ONCA 902

DATE: 20251224

DOCKET: COA-25-CV-0456

Roberts, Favreau and Rahman JJ.A.

BETWEEN

Heather Ann Hugginson

Applicant (Respondent)

and

Sandra Hugginson in her personal capacity and in her capacity as Estate Trustee for the Estate of Glenn Poole

Respondent (Appellant)

Jonathan Collings and Tessa Morris, for the appellant

Andrew Beney, for the respondent

Heard: December 15, 2025

On appeal from the judgment of Justice Michael R. Gibson of the Superior Court of Justice, dated March 20, 2025.

REASONS FOR DECISION

Overview

- [1] This appeal arises out of a disputed transfer of \$400,000 by the appellant to herself from the estate of the parties' late stepfather. It turns on the application judge's finding that there was evidence to demonstrate that the stepfather had the requisite, continuing intention during his lifetime to gift \$400,000 to the appellant.
- [2] The appellant was the stepfather's power of attorney and then estate trustee. Relying on her affidavit evidence and the file notes and correspondence of her stepfather's investment advisor, she maintained that her stepfather intended during his lifetime to gift her \$400,000, but died on December 26, 2022, before he could do so. The respondent is the appellant's sister and beneficiary under the stepfather's will. She brought an application and successfully challenged the transfer to the appellant.

Decision of the application judge

- [3] The parties agree that the application judge applied the correct, well-established test for proving inter vivos gifts, set out in *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 23. To prove the \$400,000 was an inter vivos gift from her stepfather, the appellant had to prove all three elements of the test: 1) her stepfather had the specific intention to make her a gift; 2) the gift was delivered to the appellant during the stepfather's lifetime; and 3) the appellant accepted the gift. There was no dispute that the onus was on the appellant to prove these three elements: *Carvalho v. Verma*, 2024 ONSC 1183, 92 E.T.R. (4th) 182, at para. 50. There was no issue that the appellant's transfer of the \$400,000 to herself satisfied the third element.

- [4] The application judge determined that the appellant had not satisfied the first two elements of the test. She had “not satisfied the onus on her to provide clear, convincing and cogent evidence” that her stepfather had a clear, continuing intention up to the time of his death to make the \$400,000 gift to her or that delivery of the gift was complete during his lifetime. The application judge ordered the appellant to return the \$400,000 to her stepfather’s estate and granted costs of \$16,000 to the respondent.

Issues

- [5] The appellant argues that the application judge made the following reversible errors:
- (1) He failed to consider salient evidence;
 - (2) He misapplied the test for the admission of evidence under s. 35 of the Evidence Act, R.S.O. 1990, c. E.23, wrongfully excluding documentary evidence from the stepfather’s investment advisor, and therefore misdirected himself as to whether the gift to the appellant was completed; and
 - (3) He misapplied the principle from *Strong v. Bird*, [1871] L.R. 18 Eq. 315, that an imperfect gift can be perfected by the appointment of the intended recipient as the donor’s estate trustee.

Analysis

1. The application judge made no error in his assessment of the evidence [6] The appellant’s first two grounds of appeal essentially take issue with the application judge’s weighing of the evidence and his findings that the stepfather did not intend to gift her \$400,000 and that the gift was not complete. Those findings are entitled to appellate deference: *Jackson v. Rosenberg*, 2024 ONCA 875, 174 O.R. (3d) 592, at para. 36.
- [7] The appellant argues that the application judge erred in disregarding the file notes of the stepfather’s investment advisor concerning her discussions with him about the gift to the appellant and that he should have considered the stepfather’s November 30, 2022 letter in the context of those notes. She also contends that the application judge incorrectly ignored the July 28, 2023 letter from the investment advisor that offered to transfer the gift to her. Finally, she takes issue with the application judge’s findings that: 1) she did not know of her stepfather’s intention to make her a gift when he told her that was his intention; and 2) the amount of the gift was not discussed between the stepfather and his investment advisor.
- [8] We disagree that the application judge ignored or misstated relevant evidence or that he erred in his finding that there was no evidence that the stepfather had formed the specific intent to gift \$400,000 to the appellant before his death.

[9] First, the application judge made no error in excluding the file notes apparently authored by the stepfather's investment advisor. The appellant argued the notes were admissible for the truth of their contents: 1) as business records under s. 35 of the Evidence Act; or 2) under the principled exception to the hearsay rule[1].

[10] Section 35(2) of the Evidence Act provides for the admissibility of business records as follows:

Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

[11] It is not sufficient simply to tender the document. The party seeking admission must prove the two preconditions to admissibility of business records: (1) that the records were made in the usual and ordinary course of business and (2) that it was in the ordinary course of business to make such records at or reasonably close to the time of the act, transaction, occurrence or event referenced in the records: *O'Brien v. Shantz* (1998), 113 O.A.C. 346 (C.A.), at para. 11.

[12] The appellant did not call the investment advisor who wrote the notes, nor anyone else who could attest to the preconditions to their admissibility under the Evidence Act.

[13] While some forms of double hearsay contained in business records are admissible, such as statements made and recorded by two people each acting in the ordinary course of business, s. 35(2) of the Evidence Act does not allow for the admission of "unreliable third-party statements or other forms of hearsay": *Bruno v. Dacosta*, 2020 ONCA 602, at para. 61; *Gumbley v. Vasiliou*, 2025 ONCA 851, at para. 34; *Setak Computer Services Corporation Ltd. v. Burroughs Business Machines Ltd. et. al.* (1977), 15 O.R. (2d) 750, at para. 63. Even if the investment advisor's notes met the preconditions in s. 35(2) of the Evidence Act, the admissibility of a business record is premised on the fact that it is prepared by a person under a business duty, lending it reliability and accuracy. The stepfather and the appellant, whose statements were recorded in the investment advisor's notes, had no such business duty. Accordingly, the application judge made no error in declining to admit the notes as business records.

[14] Nor were the investment advisor's notes admissible under any exception to the hearsay rule. Hearsay is presumptively inadmissible unless it falls within one of the traditional exceptions or if the indicia of necessity and reliability are satisfied: see *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 60. The appellant argues that the stepfather's statements recorded in the notes satisfy the necessity requirement. We disagree. Necessity is based on the unavailability of the testimony in a non-hearsay form: *Khelawon*, at para. 78. While the appellant did not call evidence from the investment advisor, she did not prove that she was unable to do so. As for the reliability of the notes, as stated above, they constituted double

hearsay and there was no basis on which to admit them.

- [15] Further, even if the application judge had considered the investment advisor's notes, it would not have affected the outcome. The notes do not evidence that the stepfather formed the specific intent to gift a specific amount to the appellant or that he had authorized his investment advisor to make the transfer. At no point did he relinquish control over the \$400,000 at issue.
- [16] The investment advisor's notes of the September 15, 2022 meeting with the stepfather do not assist the appellant because they do not reveal that the stepfather had landed on a particular amount for the gift, or that he gave instructions to transfer any amount to the appellant. Indeed, the investment advisor confirmed in her internal email of October 3, 2022 that the "[c]lient has not requested the withdrawal yet so there is no problem with waiting." The meeting notes of October 12, 2022 do not contain instructions to make the transfer, and specifically include the investment advisor's recommendation to the stepfather that he obtain legal advice. While the notes up to December 2022 indicate further discussions between the investment advisor and the appellant, discussing conversations between the appellant and the stepfather, the notes do not record that the stepfather formally instructed the investment advisor to transfer any specific gift of money to the appellant.
- [17] Further, regardless of what prior discussions took place, the stepfather's November 30, 2022 letter to the appellant stood as his final word on the subject and is the only direct evidence of his state of mind concerning the proposed gift to the appellant. The evidence reflects that the stepfather had been thinking about making a gift to the appellant since about September 2022, when he first indicated to the appellant that he would like to make her a gift of money while he was alive. The November 30, 2022 letter represented the culmination of this narrative and, significantly, was the product of legal advice that the stepfather obtained concerning the very question of making a gift to the appellant.
- [18] There is no mention of a specific gift in the letter. Rather, the only intention expressed in the letter is the stepfather's instruction that if he gave money to the appellant during his lifetime, it would not be deducted from her share in his estate. He indicated that any gift was no more than a possibility. His letter is short and to the point:

I spoke with my lawyer, Scott Hughes, on November 2, 2022. I told him that in addition to a share of my estate, I may also leave you a gift of money while I am alive as a thank you for everything you have done for me. I asked him to prepare this letter for my signature to give to you and a copy would go to him to put with my Will. I do not want your share of my estate reduced if I do end up giving you money while I am alive.

A copy of this letter should also be sent to my investment advisor at Investors Group.

- [19] The appellant failed to produce any evidence that the stepfather subsequently authorized the transfer of a particular amount as a gift to her.

- [20] Relatedly, the appellant's reliance on the investment advisor's July 28, 2023 letter facilitating the transfer of the gift well after the stepfather's death is misplaced. The investment advisor was prepared to facilitate the transfer on the condition that the appellant sign a release. The investment advisor's authorization on these terms is not evidence of the stepfather's intention to make the gift nor does it contradict the instruction expressed in his November 30, 2022 letter.
- [21] Finally, the application judge did not misstate the appellant's evidence on this issue. In her cross-examination on the application, the appellant agreed that the investment advisor never received instructions from the stepfather between December 22, when the investment advisor last spoke to the appellant and advised such instructions would be necessary, and December 26, when the stepfather passed away. Further, the appellant agreed that because of that, she did not know if her stepfather had changed his mind or not about making her a gift before he died.
- [22] We see no error in the application judge's findings that the stepfather did not form the requisite specific intention to make the \$400,000 gift, and that the gift remained only a possibility and was therefore not complete.
2. Strong v. Bird is inapplicable [23] The appellant argues that the application judge misapplied Strong v. Bird.

[24] The application judge correctly stated the rule derived from Strong v. Bird as follows:

In Strong v. Bird (1874), L.R. 18 Eq. 315, Sir George Jessel held that a testator, having manifested an intention in his lifetime to forgive a debt, which continued unchanged down to his death, and having appointed the debtor his executor, the debt having been by this act extinguished at law, equity would regard the gift as complete. This rule had been expanded incrementally to apply to a gift of specific chattel, if it was proved to be the intention to give that specific chattel continuing down to the testator's death: Morton v. Brighthouse, [1927] S.C.R. 118, at para. 3.

[25] Based on his findings concerning the stepfather's lack of intention to make a specific gift to the appellant, the application judge concluded that Strong v. Bird was inapplicable. He explained his conclusion at para. 39 of his reasons:

As [the appellant] cannot prove [the stepfather's] specific intention to gift her a specific piece of [his] property or even that there was any intention continuing up to death, I find that the rule in Strong v. Bird has no application to the facts of this case. It does not apply to perfect and complete the gift.

[26] There is no basis to interfere with the application judge's conclusion. The appellant's argument fails because of the application judge's unassailable findings concerning the absence of the requisite, continuing intention on the stepfather's part to make the specific gift of \$400,000 to the appellant.

Disposition

[27] For these reasons, we dismiss the appeal.

[28] The respondent is entitled to costs of this appeal from the appellant in the all-inclusive amount of \$7,000.

“L.B. Roberts J.A.”

“L. Favreau J.A.”

“M. Rahman J.A.”

[1]The appellant’s reliance on the principled exception was raised for the first time in oral argument.

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