[Cite as *Estate of Goldman v. Goldman,* 2009-Ohio-5186.]

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

Estate of Bertha B. Goldman, etc.	Court of Appeals No. L-09-1003
Appellant	Trial Court No. CI-200707898
v.	
Gordon M. Goldman, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 30, 2009

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Erik G. Chappell and Jon M. Hanna, for appellant.

James P. Silk, Jr., for appellees.

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HANDWORK, P.J.

This accelerated case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas.

Bertha and Harry Goldman were married in 1982. Each of the Goldmans had adult children from previous marriages. These children include appellees, Harry's son,

Gordon Goldman M.D., and daughter-in-law, Roberta L. Goldman. In 2002, Bertha and Harry met with Gordon and Bertha's daughter, Marcia Zimmerman, at the law offices of Joseph L. Wittenberg for the purpose of transferring $140,000 of their funds to appellees. The Goldmans had previously transferred approximately $160,000 to Gordon. The reason for giving these funds to appellees was to protect these assets so that either Bertha and/or Harry would be covered by Medicaid if either or both needed to reside in a nursing home. A certified public accountant, Harold Damrauer, was also present at this meeting.

Apparently, Bertha died sometime in 2007. It is undisputed that Harry Goldman is still alive. On December 5, 2007, appellant, the estate of Bertha Goldman, filed suit against Gordon and Roberta arguing that appellees converted the monies given to them by Bertha and Harry. Appellees answered and denied all of appellant's allegations. In addition, they contended that Harry, the sole beneficiary of Bertha's estate, did not wish to pursue this action.

Appellees subsequently filed a motion for summary judgment in which they claimed that the monies provided to them by Bertha and Harry were a gift. The motion was supported by the affidavits of Attorney Wittenberg, Harold Damrauer, and Harry Goldman. In his affidavit, Wittenberg averred, inter alia:

"The parties were told that this was an outright gift to Dr. Goldman, they had no legal ability for the return of the funds, which were an outright gift and were not conditional. I asked Mr. & Mrs. Goldman if that was their understanding, and they agreed that it was."

In his affidavit, Harold Damrauer swore that he informed Bertha and Harry of the fact that both the $140,000 and $160,000 given to Gordon were gifts and that these gifts were unconditional. Finally, Harry's affidavit avowed that he was the sole beneficiary of Bertha's estate and that he alone would receive the award, if any, resulting from appellant's lawsuit. He also swore that he never gave his permission for appellant's lawsuit and did not want it to proceed.

The estate filed a memorandum in opposition to appellees' motion for summary judgment in which it claimed that a letter, dated July 10, 2002, allegedly sent by Gordon to Marcia Zimmerman shows that the monies provided to appellees were not irrevocable gifts. This claim was supported by the affidavit of Bertha's daughter, Linda Linsky, who swore, among other things, that "through personal familiarity," she recognized Gordon's signature on this letter. The pertinent portion of the letter reads:

"It was, and continues to be understood, that if Harry and [Bertha] should decide they wished [sic] return of any part or the entire assets of the account, that request will be executed by Roberta and me, in the form of *gifts* back to each of them." (Emphasis added.)

On December 11, 2008, the trial court determined that the monies given by Harry and Bertha to Gordon and Roberta were a gift and granted their motion for summary judgment. Appellant filed a timely notice of appeal from this judgment and sets forth the following assignment of error:

"The trial court's award of summary judgment to Defendants-Appellees was erroneous because it was based upon the erroneous reasoning that transfers of funds from Plaintiff-Appellant to Defendants-Appellees were irrevocable gifts."

Because an appellate court reviews the grant of a summary judgment de novo, the standard applicable to appellant's assignment of error is found in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. In determining a motion for summary judgment, a court considers the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact. Id.

Appellant maintains, as it did below, that the funds transferred to appellees were not a gift. An inter vivos gift occurs when there is an immediate, voluntary, gratuitous, and irrevocable transfer of property by a competent donor to another. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 161, fn. 2, citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21. See, also, *Smith v. Shafer* (1993), 89 Ohio App.3d 181, 183 (citation omitted). A determination of whether all of the elements of a gift were proven presents a mixed question of law and fact that must be decided upon all of the facts and circumstances of a given case. *In re Guardianship of Marsh*, 2d Dist. No. 2007 CA 94,

2008-Ohio-5375, ¶ 13, quoting *In re Estate of Kenney* (May 13, 1993), 2d Dist. No. 13384.

As applied to the present case, the material facts, as set forth above, viewed in a light most favorable to appellant do not create a genuine issue of material fact as to whether the funds given to appellees by Bertha and Harry were not an immediate, voluntary, gratuitous and irrevocable transfer of that property by two competent donors, i.e., were not a gift. The sentence in Gordon's letter actually bolsters this finding because it states that in order to return any of the funds to Bertha and Harry, Gordon must give them these funds as a gift. Accordingly, the trial court did not err in granting summary judgment to appellees, and appellant's sole assignment of error is found not well-taken.

The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, P.J. _____

JUDGE

Mark L. Pietrykowski, J. _____

James R. Sherck, J. _____

JUDGE

CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.