

Matter of Wechsler
2015 NY Slip Op 31007(U)
June 12, 2015
Sur Ct, New York County
Docket Number: 2006-2277/A
Judge: Nora S. Anderson
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New York County Surrogate's Court
MISCELLANEOUS DEPT.

JUN 12 2015

FILED
Clerk _____

SURROGATE'S COURT : NEW YORK COUNTY
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In the Matter of the Application of
ALAN D. KROLL, as Preliminary Executor
of the Estate of

File No. 2006-2277/A

LEWIS S. WECHSLER,

Deceased,

to Compel the Turnover of Property by
Joan K. Wechsler.
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A N D E R S O N, S.

In this turnover proceeding commenced by the preliminary
executor of the estate of Lewis Wechsler, respondent seeks
summary judgment dismissing the petition (CPLR 3212).

To the extent that relevant facts are undisputed, they are
as follows: Lewis Wechsler died on February 31, 2006, at the age
of 79, survived by respondent, his wife of more than 30 years,
and two children from a prior marriage. In the November 30, 2004
instrument currently offered for probate, decedent gave his
personal property to his wife and children and provided for his
residuary estate, including his cooperative apartment in
Manhattan, to be held in trust for the lifetime benefit of his
wife with remainder divided between his son (60%) and daughter
(40%). The instrument named petitioner, the attorney-drafter, as
executor and trustee. In five prior instruments, also drafted by
petitioner and executed between March 1992 and February 2003,
decedent made similar provision for respondent and his children.

This turnover proceeding involves the propriety of various

transactions, which resulted in the conversion of most of decedent's probate assets into non-probate assets, the ownership of which devolved upon respondent at her husband's death. All of the property at issue belonged to decedent alone just before the transactions, each of which was made without consideration. The first transaction took place on June 30, 2005, when decedent executed a form agreement that changed his brokerage account at Smith Barney into a joint survivorship account with respondent. The next transaction occurred five days later, on July 5, 2005, when decedent executed the necessary paperwork to establish with respondent a new joint survivorship account at Chevy Chase Trust. Two days after that, respondent, using a power of attorney executed by decedent in her favor on June 22, 2005, transferred 50% of the funds in decedent's individual account at Chevy Chase Trust to the new joint account. The remaining funds in the individual account were transferred to the new account pursuant to a letter of instruction signed by decedent on July 13, 2005.

The final disputed transfer involved decedent's cooperative apartment. First, decedent signed a letter, dated July 12, 2005, requesting that the board of the cooperative add respondent's name to the stock certificate and proprietary lease. Then, on August 3, 2005, he executed documents finalizing the assignment and assumption of the proprietary lease. There is no dispute that decedent executed each of the account/transfer documents at

issue. There is also no dispute that respondent was involved in each of the transfers either by drafting the necessary letters of instruction for decedent to sign and/or by bringing the necessary documents to him for signature and then arranging for their delivery for processing. The total value of the transfers at issue was in excess of \$800,000, not including the apartment, the value of which is not stated in the record.

At the time of the transactions, decedent had been in poor health for several years. In 2000, he had suffered a heart attack. He was later treated for lymphoma, atrial fibrillation, renal disease and depression. Two weeks before the first of the transactions at issue decedent had been hospitalized for almost a week for renal failure. During that hospitalization, he executed the power of attorney. Less than a week later, on June 28, 2005, he returned to the hospital as a result of a fall in which he hit his head. Another fall in the hospital on June 30, 2005, the day of the first transaction, required surgery on his hand the next day.¹ On July 8, 2005, decedent was discharged from the hospital to a skilled nursing/rehabilitation facility. He did not return home until after the final transaction at issue. Thus, decedent was in the hospital or in a skilled nursing/rehabilitation facility when all of the transactions took place.

¹ It is unclear from the record whether decedent signed the necessary paperwork to establish the joint account at Smith Barney before or after his fall on June 30, 2005.

According to respondent, decedent, recognizing his poor health, made the transfers of his own volition in order to ensure her financial security in the event of his death. Petitioner asserts, however, that the transactions took place at a time when decedent lacked the capacity to understand that the transfers were inconsistent with his long-standing testamentary plan to provide for his wife and his children from his first marriage. Petitioner contends further that the transactions were the products of undue influence exerted by respondent in collaboration with decedent's sister and niece.²

Summary judgment is available only where no material issues of fact exist (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.* at 324 [citation omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof, in admissible form, establishing a genuine issue of material fact or must provide an acceptable excuse for the failure to do so (see e.g. *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The party attempting to resist summary

² Decedent's sister and niece, who are not beneficiaries of any testamentary or non-testamentary assets, are not respondents in this proceeding, but they are alleged to have pressured decedent to alter his estate plan to make further provision for his wife.

judgment is entitled to every favorable inference that can reasonably be drawn from the evidence (see e.g. *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]). Nonetheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562 [citation omitted], *supra*).

Respondent has made a prima facie showing that decedent made the transactions at issue "voluntarily and understandingly ... uninfluenced by fraud, duress and coercion" (*Matter of Clines*, 226 AD2d 269, 270 [1st Dept 1996] [citation omitted]). There is a presumption that decedent had the requisite capacity to make each of the disputed transactions (see e.g. *Feiden v Feiden*, 151 AD2d 889 [3d Dept 1989]). Respondent has also submitted medical records, other documentary evidence and deposition testimony supporting her contention that decedent understood the nature of the transactions when he signed the necessary paperwork and that he intended their effect upon his estate plan.³ The issue is whether petitioner has proffered sufficient evidence to create a

³ In support of her motion, movant has offered unsigned transcripts of certain non-party witnesses, including three employees of Chevy Chase Trust. However, in the absence of proof that the witnesses were given an opportunity to review their transcripts for correctness, as required by CPLR 3116(a), they may not be used to support the motion (see e.g. *Castano v The City of New York*, 122 AD3d 476 [1st Dept 2014]; *Palumbo*, 175 Misc 2d 156 [Sup Ct, New York County 1997], *affd* 251 AD2d 246 [1st Dept 1998]). For the same reason, petitioner cannot rely upon such testimony to oppose the motion.

genuine issue of material fact on the issues of capacity and undue influence (see *Zuckerman v City of New York*, 49 NY2d 557, *supra*).

Capacity

As to the issue of decedent's ability to understand the transactions at issue, the day before his Smith Barney account was changed to a joint account with right of survivorship, hospital admission notes indicate that, "[a]ccording to family, the patient has been becoming more confused recently with waxing and waning mental status, sometimes mistaking wife for daughter, etc." Treatment notes that same day indicate "depression/anxiety" and that decedent was "occasionally forgetful" and had "lapses in short-term memory." A "Document Review Report" from the same date indicates that decedent was "[t]aking [one] or more sedatives" and that he had "[c]ognitive impairment, with periods of confusion" that were a "[b]arrier to [l]earning." On the day of the transaction, June 30, 2005, another "Document Review Report" states: "Disoriented and/or confused; Unable to follow commands; Impaired attention: Yes."

Respondent points to multiple notes in the medical records, made from the time of decedent's admission on June 28, 2005, through June 30, 2005, indicating that decedent was "conversant," and "alert and oriented" and that he was able to communicate his needs and discuss his condition. She contends that the one

indication of disorientation and confusion on the day of the transaction is insufficient as a matter of law to create an issue of fact. However, although it is well established that even a diagnosis of Alzheimer's is not, in and of itself, sufficient to establish incapacity (see e.g. *Matter of Dolleck*, 11 AD3d 307 [1st Dept 2004]), the record here contains conflicting evidence regarding decedent's mental state on the day of the first transaction.

Moreover, the one case cited by respondent for the proposition that a single notation of confusion in a decedent's medical records is insufficient to create a fact issue on capacity is readily distinguishable. In *Matter of Devlin* (NYLJ, May 10, 2007, at 30, col 5 [Sur Ct, Kings County 2007]), the court's determination that the decedent had capacity was not made on a motion for summary judgment. Rather, the determination was made after a bench trial, which required the court, as finder of fact, to draw conclusions from conflicting evidence.

Given the conflicting medical evidence concerning decedent's mental state on June 30, 2005, a fact issue exists as to whether decedent had the capacity on that day to convert his Smith Barney account into a joint survivorship account with respondent. The motion for summary judgment is therefore denied on the issue of capacity as it relates to the June 30, 2005 transaction.

The same is not true of the other transactions at issue.

Petitioner fails to point to a single notation in the medical records suggesting that decedent was anything other than "alert and oriented as to time, place and person" on the days in question. Petitioner's submission of an affidavit and report of a physician who never personally examined decedent or discussed decedent's condition with any of his attending physicians or nurses is insufficient to create an issue of fact.

Apart from the fact that evidence of this type is generally considered to be the "weakest and most unreliable kind of evidence" (*Matter of Van Patten*, 215 AD2d 947, 949 [3rd Dept 1995] [citation omitted]; see also *Matter of Katz*, 103 AD3d 484 [1st Dept 2013]), the expert's medical opinions, including that decedent was "suffering from diminished cognitive functioning," are not grounded in specific references to the medical records, although such support could have been readily provided by reference to the records' bates stamped numbers. Of no more weight is the expert's dismissal of notations in the medical records indicating that decedent was "alert" and could perform simple cognitive functions during the relevant period. To create an issue of fact, the expert must at minimum have pointed to evidence of cognitive impairment in the record at the time of the transactions, which he did not do (*Zuckerman v City of New York*, 49 NY2d 557, *supra*).

Moreover, as pointed out by respondent, in some instances

the purported factual basis for the expert's conclusions are contradicted by readily discernable information in the medical records. In other instances, the expert's opinions relate to matters that are outside the scope of his expertise as a medical doctor. An example is his conclusion that the transactions at issue "were executed under irregular circumstances that justify suspicion that undue influence might have been exerted."

As for the testimony of proponent and decedent's son and daughter-in-law concerning decedent's mental state, to the extent such testimony can be considered in opposition to the motion, none of them saw decedent in person during the relevant period. Moreover, their testimony is either too vague and conclusory or without specificity as to time to create a fact issue (see e.g. *Matter of Rella*, 105 AD3d 607 [1st Dept 2013]). Accordingly, in the absence of a sufficient evidentiary showing that, when decedent established and funded the joint account at Chevy Chase Trust⁴ and transferred his cooperative apartment into joint name with respondent, he lacked the requisite capacity to understand the nature of the transactions, respondent's motion for summary judgment as to capacity with respect to these transactions is

⁴ Petitioner asserts in his motion papers that the power of attorney decedent executed on June 22, 2005 in respondent's favor was executed "while decedent was in the hospital and at the very time when his cognitive ability was most questionable." However, the petition does not specifically allege that the power was invalid and that respondent's transfer of 50% of decedent's account at Chevy Chase Trust into the joint account pursuant to such power of attorney two days later was therefore invalid.

granted.

Undue Influence

Undue influence requires a showing that the propounded instrument resulted from influence that "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire" (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]). Motive, opportunity and the actual exercise of undue influence must be demonstrated (see e.g. *Matter of Walther*, 6 NY2d 49 [1959]). Undue influence "may . . . be proved by circumstantial evidence, but this evidence . . . must be of a substantial nature" (*id.* at 54 [citation omitted]).

Where there exists a confidential relationship, however, the calculus changes. The recipient of the beneficial transfer must establish that it was "freely, voluntarily and understandingly made" (see e.g. *Gordon v Bialystoker Center and Bikur Cholim, Inc.*, 45 NY2d 692, 699 [1978]). The essence of a confidential relationship is a disparity in power of one party over the other resulting in dependency and even domination and control (see e.g. *Allen v La Vaud*, 213 NY 322 [1915]). Close family ties may negate any presumption of undue influence that would otherwise arise from a confidential relationship (see e.g. *Matter of Walther*, 6 NY2d 49, *supra*; *Matter of Swain*, 125 AD2d 574 [2d Dept 1986]).

However, where the record shows the family relationship is coupled with other factors, including that "the donor spouse was in a weakened and dependent state, that the donee spouse participated in the transaction[s] from which ... she benefited, and that there is reason to question whether the gift at issue would have been made of the donor spouse's free volition, a summary rejection of the claim of undue influence would be inappropriate" (*Matter of Greenspan*, NYLJ, July 22, 2010, at 32, col 4 [Sur Ct, New York County 2010]; see also *Preshaz v Przyziazniuk*, 51 AD3d 752 [2d Dept 2008]).

Here, there is sufficient evidence in the record to create genuine issues as to whether the transactions were the product of undue influence. Whether respondent was in a confidential relationship with decedent under the circumstances here is itself a threshold triable issue (see e.g. *Hearst v Hearst*, 50 AD3d 959 [2d Dept 2008]; *Matter of Greenberg*, 34 AD3d 806 [2d Dept 2006]). The medical records here describe decedent, at the very least, as an individual with multiple serious medical conditions, who was physically weak and frail during the period of the disputed transactions. Moreover, while movant focuses on indications of decedent's mental clarity in the record during the relevant period, the medical records and testimony provide some contradictory evidence as well.

There can be no dispute that decedent was depressed over,

among other things, his deteriorating physical condition. Nor, in view of the medical records, can there be any dispute that decedent was suffering from some cognitive impairment. Thus, on June 8, 2005, for example, decedent's long-time psychiatrist met with decedent "at the request of" respondent, who "noted deficits in naming, short-term memory [and] at times social judgment." On June 20, 2005, just 10 days before the first transaction, that same doctor saw decedent in the hospital, noting that decedent suffered from "chronic depression" and "transient cognitive impairment."

Moreover, respondent's participation in the transactions at issue cannot be ignored. For example, respondent admits to drafting letters to Smith Barney and the board of decedent's cooperative for decedent's signature, correspondence that facilitated the transfers. Necessary transfer documents were sent to decedent's and respondent's home. Respondent, in turn, brought them to decedent for his signature at the hospital or rehabilitation facility and then sent them to the appropriate party for processing. The only testimony concerning the circumstances surrounding decedent's execution of the documents came from respondent. Further, although the transactions at issue drastically altered decedent's then-recent testamentary arrangements, decedent did not consult with petitioner, who had drafted all his previous testamentary instruments, or with anyone

else. On the other hand, respondent admits to consulting with an elder law attorney during this period.

Whether under these circumstances decedent, fearing his own demise, sought to ensure the financial well-being of his long-time spouse at the expense of his children or instead was unduly influenced to do so is an issue that cannot be determined summarily on this record. This is particularly so when the medical records and deposition testimony of decedent's psychiatrist indicate that decedent felt that his marriage was troubled in recent times and that decedent had reported "marital tension" over his will and had felt pressure from his wife to revise his will to her advantage. For these reasons, summary judgment is denied on the issue of undue influence.

This decision constitutes the order of the court.

Dated: ~~May~~ ^{JUNE 12}, 2015


S U R R O G A T E