

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

ESTATE OF MAIKA

NO. 26

20 Eagle Street
Albany, New York
March 16, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

MARY L. D'AGOSTINO, ESQ.
HANCOCK ESTABROOK, LLP
Attorney for appellant
1800 AXA Tower
100 Madison Street
Syracuse, NY 13202

DANIEL R. ROSE, ESQ.
COSTELLO COONEY & FEARON, PLLC
Attorney for respondent
211 West Jefferson Street
Syracuse, NY 13202

Colin Richilano
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Good afternoon and
2 welcome. The first appeal on our calendar today is Estate
3 of Maika. Counsel, whenever you're ready.

4 MS. D'AGOSTINO: Good afternoon, Your Honors.
5 I'm Mary D'Agostino from Hancock Estabrook, and I'm here on
6 behalf of petitioner-appellant. If I may, I would like to
7 reserve two minutes for rebuttal, please.

8 ACTING CHIEF JUDGE CANNATARO: You have two
9 minutes.

10 MS. D'AGOSTINO: Thank you. If the Court permits
11 the Appellate Division decision to stand, then the
12 conveyance will have escaped the heightened forms of
13 scrutiny and presumptions that typically apply when an
14 attorney-in-fact engages in self-dealing and when services
15 are rendered to family members of the same household.

16 The decision below should be reversed for the
17 reasons stated in the dissenting opinion for the following
18 three reasons. First --

19 JUDGE SINGAS: Doesn't the fact that there was a
20 majority of people and not just one diffuse that argument?

21 MS. D'AGOSTINO: I disagree with that, Your
22 Honor. Yes, there was a majority of people that voted, in
23 terms of this committee -- the committee that was permitted
24 to act under the power of attorney. But the deciding vote
25 was someone that was interested in the outcome of the



1 decision. So setting his vote aside, there isn't a
2 majority. You have the two individuals that voted for the
3 conveyance. You have one individual that voted against the
4 conveyance. And then you have someone that's interested in
5 the outcome. The very fact that his -- his vote --

6 ACTING CHIEF JUDGE CANNATARO: Was the person who
7 voted against the conveyance a person who was authorized to
8 vote? Did they have the power of attorney that allowed
9 them to do that?

10 MS. D'AGOSTINO: Yes, that's correct.
11 Originally, there were five individuals under the power of
12 attorney. One of them resigned, so that left four
13 individuals under the power of attorney.

14 JUDGE WILSON: Aren't they all interested?

15 MS. D'AGOSTINO: To a certain extent because
16 they -- they --

17 JUDGE WILSON: They would inherit if the transfer
18 weren't made, so.

19 MS. D'AGOSTINO: Correct, so you have two -- two
20 individuals that by voting to convey the property at issue
21 here that they would take less in the event that -- in --
22 on the decedent's death, correct. So to a certain extent,
23 they were interested. And that's the --

24 JUDGE TROUTMAN: What about the best interests of
25 the decedent? Do the attorneys-in-fact, have the authority



1 to do that which was in the best interests of the decedent?

2 MS. D'AGOSTINO: They did, but they were also the
3 fiduciary for the decedent. So they had an obligation
4 under the power of attorney to act in the best interest of
5 his financial estate and tax plans.

6 JUDGE TROUTMAN: What about the fact that he
7 didn't want to go into a nursing home?

8 MS. D'AGOSTINO: I don't think that's necessarily
9 clear on the record, Your Honor. There were
10 conversations --

11 JUDGE TROUTMAN: So could the case go back for
12 hearing on the best interest aspect of it because it was
13 not done before?

14 MS. D'AGOSTINO: At worst, I think there is a
15 question of fact here. But I would submit to you that on
16 this record right here, simply that respondents didn't meet
17 their burden of proof by clear and convincing evidence to
18 demonstrate that --

19 ACTING CHIEF JUDGE CANNATARO: How -- how would
20 respondents meet their burden of proof in a scenario like
21 this one, where the principal I believe was incapable of
22 speech, right?

23 MS. D'AGOSTINO: That's my understanding,
24 correct.

25 ACTING CHIEF JUDGE CANNATARO: So the only thing



1 you really have to go on are the attorneys-in-fact's
2 recollections or representations, about what the principal
3 actually wanted?

4 MS. D'AGOSTINO: To a certain extent, Your Honor.
5 I think what's clear on the record is at the time of this
6 conveyance, the decedent was in the terminally -- terminal
7 period of his life. And at least at that point, he
8 couldn't express his intent. But beyond that, I don't know
9 what happened between 2009, when the mother died, and when
10 this particular conveyance happened in 2017. And yes,
11 there are those conversations between the attorney-in-fact,
12 but the other thing that you have in this record is the
13 decedent's will from the 1970s which expressed that he
14 wanted his entire estate to be divided among his 12
15 children.

16 JUDGE GARCIA: Is that will on the record?

17 MS. D'AGOSTINO: Yes, it is, Your Honor.

18 JUDGE GARCIA: It wasn't probated, though, that
19 will, right?

20 MS. D'AGOSTINO: Correct, because they -- they
21 weren't able to locate the original will.

22 JUDGE GARCIA: I see.

23 MS. D'AGOSTINO: So only the copy is in there.
24 But at -- at this point, on this record that's the best
25 evidence of the decedent's intent was this will --



1 JUDGE TROUTMAN: But things change. His
2 circumstances changed.

3 MS. D'AGOSTINO: Sure, they can. But we've been
4 speculating what he wanted in the terminal years of his
5 life on this record.

6 JUDGE TROUTMAN: Although you may speculate as to
7 what he may have wanted, but the question of his best
8 interests is always something that is the responsibility of
9 the attorneys-in-fact, correct?

10 MS. D'AGOSTINO: Yes, I would agree with that.
11 And it -- the assumption seems to have been made here that
12 the best interests of the decedent was that he avoid a
13 nursing home. And you're right, circumstances change.
14 Maybe there was a situation at the end of his life where
15 that wasn't in his best interests. Maybe the nursing home
16 was in his best interests. But --

17 JUDGE TROUTMAN: So you're saying there -- there
18 isn't a question of fact, but at worse, if you don't get
19 your way, there is -- they're not entitled to summary
20 judgment?

21 MS. D'AGOSTINO: Yes, Your Honor, that's correct.

22 JUDGE WILSON: But you haven't moved --

23 JUDGE RIVERA: But even if they're --

24 JUDGE WILSON: Go ahead.

25 JUDGE RIVERA: I just had a question of whether



1 or not it's he wanted or he did not want to be in a nursing
2 home, which it seems that was his intent. He didn't want
3 to be in a nursing home. Isn't there a minimum along these
4 same lines about question of fact whether or not that
5 could -- that -- that goal could have been accomplished in
6 a different way; that is to say somehow putting another
7 mortgage on the house, there would have been some other
8 way -- or bringing other people to care for him -- to
9 achieve that goal without transferring the property to two
10 of the children who were caring for him.

11 MS. D'AGOSTINO: Correct, and I -- I think that
12 goes back to the best interest inquiry. So for example,
13 they've had this power of attorney for seven years. There
14 wasn't any Medicaid planning that was done. There wasn't
15 any inquiry -- or there doesn't seem to have been any
16 inquiry toward the end of his life whether someone else
17 could have been brought in. There seems to have been some
18 cursory discussions about a reverse mortgage, but on this
19 record, we can't determine if this was actually in the best
20 interests of --

21 JUDGE RIVERA: Is there anything in the record to
22 clarify his intent with respect to whether or not he only
23 wanted family to care for him, versus an outsider?

24 MS. D'AGOSTINO: I don't believe so, Your Honor.
25 And -- and even with respect to his intent, that's even



1 less clear because the conversations occurred between the
2 attorneys-in-fact --

3 JUDGE RIVERA: Yes.

4 MS. D'AGOSTINO: -- it occurred between the
5 siblings and the mother. And I don't know his mental state
6 at the time these conversations occurred, it's not clear on
7 the record. But I don't think you can discern that from
8 this record before the Court.

9 JUDGE WILSON: You didn't move for summary
10 judgment below, so I don't believe we can do anything other
11 than vacate the grant of summary judgment and then send it
12 back. Do you agree with that?

13 MS. D'AGOSTINO: I would agree with that, Your
14 Honor.

15 JUDGE WILSON: So you're sort of left with a
16 question of fact that you've got to argue before somebody
17 else, whether there is or isn't one, and then what it is.

18 MS. D'AGOSTINO: Correct, I mean, the surrogate
19 did search the record and determine that we met our burden
20 of proof, in terms of summary judgment. But I understand
21 that your -- your hands are tied in that respect. And like
22 I said, at best, I -- at worst, I think there's a question
23 of fact here.

24 JUDGE GARCIA: Counsel, how do we review their
25 determination, this -- these attorneys-in-fact? How do we



1 review their determination that this was in the best
2 interests of the principal?

3 MS. D'AGOSTINO: I don't think that you can on
4 this record. There's simply not enough information here
5 to --

6 JUDGE GARCIA: I guess my question would be, a
7 court, even if this went back, are they looking at now,
8 when we look at Medicare, when we look at this, when we
9 look at that, and we think: was that decision really in
10 the best interest? Or do we look at given what they knew
11 and that they were looking at at the time, can we say as a
12 matter of law that that wasn't in their best -- the
13 principal's best interest? How do we review it?

14 MS. D'AGOSTINO: I mean, this may be a failure of
15 burden of proof, in terms of respondents and whether
16 they'll be able to -- to demonstrate whether -- that this
17 transfer and conveyance was in the best interests of the
18 decedent.

19 JUDGE GARCIA: But isn't -- isn't the standard
20 really that they believed it was?

21 MS. D'AGOSTINO: Well, I -- I think that's where
22 the -- the Fourth Department disagreed and where there's a
23 dissenting opinion. The majority of opinions seem to say
24 that it was the intent of the attorneys-in-fact to act in
25 the best interests, whereas the dissent said that it was



1 the intent of the parent, the intent of the decedent. And
2 whether it was --

3 JUDGE GARCIA: But it seems like the whole
4 purpose of this arrangement is to get away from the intent
5 of the decedent, right? I mean, you're offshoring that
6 decision. In -- in a limited set of circumstances, but why
7 would you look back at the principal's intention if the
8 principal has signed away the ability to make that decision
9 in these circumstances?

10 MS. D'AGOSTINO: Well, I think that goes back to,
11 perhaps, the will. And -- and I under -- and again, it
12 wasn't probated because they couldn't find the original;
13 that is really the only expression of his intent and what
14 he wanted to do, in terms of his estate.

15 JUDGE GARCIA: The expression of his intent is
16 the power of attorney because his intent was to give them
17 the authority to make contracts, right?

18 MS. D'AGOSTINO: Correct, and -- and -- and I --
19 I think that perhaps goes back to the love and affection.
20 And the reason that these individuals were caring for their
21 parents, you know, that in and of itself creates a
22 presumption that they were rendering these services for
23 love and affection, not for compensation. And --

24 ACTING CHIEF JUDGE CANNATARO: Can I -- I'm
25 sorry. Can I ask you, does the statement of intent in the



1 will include some sort of presumption that the principal --
2 I'm sorry. That the -- the attorneys-in-fact will preserve
3 the estate? Is -- is that just an accepted axiom of -- of
4 a fiduciary relationship?

5 MS. D'AGOSTINO: I don't believe so, Your Honor.

6 ACTING CHIEF JUDGE CANNATARO: So that -- that
7 leads me to ask, why would -- similar to what Judge Garcia
8 just asked, why couldn't the principals decide what they
9 believed was in -- the attorneys decide what they believed
10 was in the principal's best interests at the time and
11 dispose of assets prior to death?

12 MS. D'AGOSTINO: Because I don't think there's
13 enough information here for you to determine that this was
14 in the best interests of the decedent. There's simply not
15 enough information on this record to make that
16 determination. And you know, in other -- in the other
17 cases cited, these other Appellate Division cases, you have
18 situations where the decedent was present when the
19 conveyances were made. You have situations where the
20 decedent was well aware that these conveyances were being
21 made. Here, you have an individual that was in the
22 terminal months of his life that doesn't even seem to have
23 been aware that this conveyance was made. So it's
24 difficult to conclude when the -- and the property owner,
25 the decedent, wasn't even aware that this conveyance was



1 occurring, that this was in his best interests.

2 JUDGE WILSON: But I'm not sure why that matters
3 to you. Let me try Judge Garcia's question from the other
4 direction.

5 MS. D'AGOSTINO: Okay.

6 JUDGE WILSON: If there were no conflict of
7 interest, right, so they're all disinterested trustees
8 or -- right, and if there were no restriction on the
9 ability to give gifts, I'm not sure you would be here,
10 arguing about the intent of -- of the now decedent, right?
11 Because he's delegated -- not exclusively, but he's
12 delegated to this group the power to transfer his assets,
13 there's no conflict, and it's not a gift. So it's within
14 their powers. We wouldn't care what his intent was, would
15 we?

16 MS. D'AGOSTINO: Well, I mean, even the
17 attorneys-in-fact disagreed over whether this was in their
18 best interests. You have one that voted against this
19 conveyance. And then if you --

20 JUDGE WILSON: Yeah, but if there had been a real
21 majority, right, and the -- and the instrument says a
22 majority can decide, I don't -- would you be here, arguing
23 about what his intent is?

24 MS. D'AGOSTINO: All right.

25 JUDGE WILSON: I mean, as I understood it, your



1 two arguments really were the conflict and the restriction
2 on gifts. And whether this is a gift or not turns --
3 that's somewhat where the intent figures in.

4 MS. D'AGOSTINO: Correct, so if intent doesn't
5 matter, then you're back to whether the attorneys-in-fact
6 were -- were acting in the best interests of the decedent,
7 meaning --

8 JUDGE WILSON: Yeah, but this is sort of Judge
9 Garcia's question, I think, which is if you take out these
10 other two things, right, the -- the restriction on gifts
11 and the conflict --

12 MS. D'AGOSTINO: Um-hum.

13 JUDGE WILSON: -- do we really look behind? I
14 mean, let's say it was a unanimous vote. Would we be
15 looking behind that to ask about their -- the decedent's
16 intent?

17 MS. D'AGOSTINO: Perhaps not with a unanimous
18 vote, but you don't have a unanimous vote here, at least in
19 terms of the attorneys-in-fact. There was a question from
20 them whether this was -- whether they were acting with the
21 utmost good faith, moral fidelity that's required when
22 someone is given a power of attorney, when someone is
23 acting as an attorney-in-fact.

24 JUDGE WILSON: So the rule would be even if an
25 instrument says majority vote, if there's a dissent, then



1 you would apply a different standard of scrutiny than if it
2 was unanimous?

3 MS. D'AGOSTINO: Well, the issue here is Philip
4 because Philip --

5 JUDGE WILSON: Because of a conflict. I
6 understand that.

7 MS. D'AGOSTINO: Correct, so --

8 JUDGE WILSON: I'm trying to put that aside for a
9 minute.

10 MS. D'AGOSTINO: So putting Philip aside, though,
11 then you don't have a majority of attorneys-in-fact acting
12 on behalf of the decedent.

13 JUDGE WILSON: Right. I'm asking about a
14 hypothetical rather than this particular case. I just want
15 to -- I -- as I understood your argument from the papers,
16 and maybe I misunderstood it, there were -- you have two
17 problems, really. One was that this might be characterized
18 as a gift. And if it's characterized as a gift, then the
19 group does not have the power to make this transfer.

20 MS. D'AGOSTINO: Correct.

21 JUDGE WILSON: That's one argument.

22 MS. D'AGOSTINO: Yes.

23 JUDGE WILSON: The other is that that aside,
24 because Philip is interested, you -- he can't really
25 participate. And that either completely voids whatever the

1 group did or at least it takes his vote out of it and
2 there's no majority and therefore the --

3 MS. D'AGOSTINO: Correct.

4 JUDGE WILSON: Those are the two arguments you're
5 making, I think.

6 MS. D'AGOSTINO: Yes, that's correct.

7 JUDGE GARCIA: So where is intent relevant, then?
8 Which one of those two arguments, and why?

9 MS. D'AGOSTINO: It -- it seems to come into
10 play -- give me just a minute, Your Honor.

11 JUDGE GARCIA: Sure.

12 MS. D'AGOSTINO: I'm sorry. It seems to come in
13 with respect to the fact that there's a conflict. And
14 that's what the dissent at the Fourth Department said; that
15 when there is a conflict with one of the attorneys-in-fact
16 benefitting from the transaction, then you have to look at
17 the parent's intent and whether the parent actually
18 intended to compensate for the services rendered.

19 JUDGE GARCIA: But it seems like that would be --
20 to follow up on what Judge Wilson was saying, why wouldn't
21 that just be the end of it? I mean, if -- if you don't
22 have enough to vote, there's no transfer.

23 MS. D'AGOSTINO: Because you're still dealing --
24 this isn't someone, you know, a nonparty nurse that's
25 rendering services to the decedent. You're still dealing



1 with family members that are living in the same household
2 that are caring for -- caring for their aging father. And
3 the presumption that arises with that is that they're doing
4 that with love and affection. And that's why I think that
5 you look behind -- behind the powers of attorney and look
6 at the intent. Did the decedent intend to compensate his
7 children for caring for him in -- in the -- in the last
8 years of his life.

9 JUDGE WILSON: And that's why I thought that you
10 would have -- that's why I guess I was surprised by your
11 answer just a minute ago because I would have thought the
12 intent would have gone to the question of whether this was
13 a gift.

14 MS. D'AGOSTINO: Okay.

15 JUDGE WILSON: That is, if we had clear evidence
16 that the decedent intended to pay his children for their
17 services, then we would conclude this was not a gift.

18 MS. D'AGOSTINO: Correct.

19 JUDGE WILSON: Okay.

20 ACTING CHIEF JUDGE CANNATARO: Thank you,
21 Counsel.

22 MS. D'AGOSTINO: Thank you.

23 MR. ROSE: Good afternoon, Your Honors. Daniel
24 Rose, Costello, Cooney & Fearon, on behalf of the
25 respondents. As I've listened to this discussion so far



1 today, I -- it occurs to me that -- that we're a little bit
2 losing for the for -- the forest for the trees. The -- the
3 primary question to address, and which raised -- was raised
4 by the dissent is whether or not this was a sell -- this
5 self-dealing presumption arises. In my view, if the self-
6 dealing presumption does not arise because only one of
7 these four committee members is implicated by the transfer,
8 then we need not inquire as to the intent of the decedent.

9 JUDGE SINGAS: But the transfer doesn't happen
10 unless the self-interested individual votes that way.

11 MR. ROSE: But if only one of the four, does --
12 does that make it a self-dealing? Because the other three
13 don't take. They don't benefit from this transaction in
14 any way. So that's -- that's the -- the origin -- that's
15 the first inquiry: Does the self-dealing presumption arise
16 when only one of the four benefits from the transaction?

17 JUDGE RIVERA: Let me -- let me ask I guess what
18 is obvious. I take it there is no dispute that you count
19 for majority purposes from the four, not the five because
20 one has left, so there's nothing -- let me just put it this
21 way. There's nothing in the power of attorney instrument
22 that requires that the majority be measured by the initial
23 individuals who are identified as having this power of
24 attorney?

25 MR. ROSE: I believe the language is --



1 JUDGE RIVERA: Still left with you've got to have
2 three.

3 JUDGE GARCIA: But even if you had four, wouldn't
4 you need three?

5 JUDGE RIVERA: No. That's not -- that's not the
6 question. The question is whether or not you must always
7 count from five. I know you're counting from four to get
8 the majority; that's not the question.

9 MR. ROSE: The language within the power of
10 attorney states --

11 JUDGE RIVERA: Um-hum.

12 MR. ROSE: -- that a majority of my agents must
13 act. Okay.

14 JUDGE RIVERA: Um-hum.

15 MR. ROSE: So to the extent that one has
16 resigned, she is no longer an agent. Now you have four
17 agents. My read of that language is --

18 JUDGE RIVERA: So why doesn't that create an
19 ambiguo -- ambiguity that makes summary judgment improper,
20 as to whether or not the number is five? Because if it's
21 five, it's clearly not going to be a majority, regardless
22 of who you're counting.

23 MR. ROSE: Your Honor, if the number is five and
24 you need a majority, you have three, you still have three.
25 Whether it's --



1 JUDGE RIVERA: Yes, but three didn't vote in
2 favor.

3 MR. ROSE: Three did vote in favor, Your Honor.

4 JUDGE RIVERA: I'm sorry.

5 MR. ROSE: Including Philip.

6 JUDGE RIVERA: I'm sorry. I'm sorry; that's the
7 one I'm discounting, yes.

8 MR. ROSE: Right. So the only way that that
9 analysis matters, Your Honor, is if you analogize to a
10 board of directors and discount an interested vote,
11 therefore -- as if Philip had abstained --

12 JUDGE RIVERA: Um-hum.

13 MR. ROSE: -- and now you need a majority of the
14 disinterested, right. Then you don't have three of the
15 four --

16 JUDGE GARCIA: So --

17 MR. ROSE: -- should -- should the five apply.

18 JUDGE RIVERA: Um-hum.

19 JUDGE GARCIA: So even under the original five,
20 if you had two plus one, like you had here, it would have
21 been the same result.

22 MR. ROSE: That's right, Your Honor. Now, let's
23 assume for purposes of argument that the presumption arises
24 because if the presumption doesn't arise, we're finished.
25 But if the presumption arises --



1 JUDGE WILSON: Why are -- I'm sorry. Why are we
2 finished with the gift issue?

3 MR. ROSE: This was not a gift, Your Honor.
4 There -- there --

5 JUDGE WILSON: Well, but that's the other
6 argue -- that's --

7 MR. ROSE: There's no argument by respondents
8 that this was a gift.

9 JUDGE WILSON: No.

10 MR. ROSE: That if -- if this was a gift, it
11 clearly fails because there's no gift rider within the
12 stat -- within the power of attorney.

13 JUDGE WILSON: I thought that was the other
14 grounds asserted?

15 MR. ROSE: They've asserted it. We've conceded
16 from the trial court on up this was not a gift, this could
17 not be a gift. This was, in fact, a performed contract.
18 Services were provided. Compensation was given. And
19 that's in the affidavits of all of the powers of attorney
20 that are contained --

21 ACTING CHIEF JUDGE CANNATARO: But isn't your
22 adversary arguing that there was no consideration here and
23 therefore, it couldn't be compensation and therefore, it
24 was a gift?

25 MR. ROSE: Your Honor, she may argue that; there



1 was seven-and-a-half years of round-the-clock care for this
2 extremely disabled individual.

3 JUDGE WILSON: Right, and the question was
4 whether that was provided gratis or the expectation was for
5 compensation; isn't that still a live question here?

6 MR. ROSE: The -- the question presented by the
7 case law is that there is a presumption that it's done out
8 of love and affection.

9 JUDGE WILSON: Right.

10 MR. ROSE: Gratis, as you say, Your Honor.
11 Unless you rebut that presumption by showing that there was
12 a contract, express or implied, for the services.

13 JUDGE TROUTMAN: So what establishes that there
14 was a contract to pay for -- for --

15 MR. ROSE: The affidavits of the
16 attorneys-in-fact, Judge Troutman. The fact that they have
17 attested to the fact that this was, in fact, a transfer
18 done intended to compensate them for the years of service
19 that they had provided.

20 JUDGE TROUTMAN: And so their affidavits is what
21 is determinative, not the intent of the decedent; is that
22 your argument?

23 MR. ROSE: My argument is that their affidavits
24 establish that there was a performed contract. The
25 question of the intent of the decedent I think is a little



1 bit of a red herring.

2 So we know from the Mantella ca --

3 JUDGE TROUTMAN: This, as to whether there was an
4 intent that he would compensate them; that they were
5 fulfilling his wishes based on the fact that it was always
6 understood that they were to be paid.

7 MR. ROSE: So I'm not sure that there's anything
8 in the record -- and -- and nor -- nor I think is it
9 appropriate to inquire what the decedent's intent was. The
10 record does demonstrate that this was a severely disabled
11 man, incapable of speech, incapable of walking and doing
12 the most basic things on his own. He, when he was
13 competent, executed a power of attorney that gave this
14 committee the ability to act in his stead. His intent may
15 be relevant in the facts presented in some of the cases,
16 like Mantella or -- I'm going to mispronounce it -- Naumoff
17 from the Third Department, where there is a single agent
18 transferring property to himself. The question, then --

19 JUDGE TROUTMAN: So -- so your argument here is
20 there was a contract between the attorneys-in-fact and the
21 service providers that they would be paid?

22 MR. ROSE: That's correct, in his best interests,
23 Your Honor. So the dissent misses their own precedent of
24 Borders v. Borders from 2015, where they recognize that you
25 need to look -- what -- when you're questioning -- when you



1 have a self-dealing question, you look either to the intent
2 of the decedent, who presumably will always be acting for
3 his own benefit to the extent that he's able, or you would
4 do an analysis of whether this was in the best interests of
5 the principal. In this case, we --

6 JUDGE TROUTMAN: Is there enough in this record
7 to establish that this was, in fact, in his best interests?

8 MR. ROSE: I think there's nothing in this record
9 but evidence that this was in his best interests, Judge
10 Troutman. The -- the -- the --

11 JUDGE RIVERA: Aren't there questions as to other
12 ways that he could have had this medical care that he
13 needed --

14 MR. ROSE: What's in --

15 JUDGE RIVERA: -- that was not explored?

16 MR. ROSE: What's in this record establishes that
17 if he had gotten outside home care for the period of time
18 that Phil and Anne took care of their father, it would have
19 exceeded one and a half million dollars. We know that if
20 he had gone into a nursing home under Medicaid, his entire
21 estate would have been depleted.

22 JUDGE RIVERA: Um-hum.

23 JUDGE WILSON: We only know of those things after
24 the fact, though, because there is also testimony on the
25 record, I think, that nobody knew how long he was going to



1 live. They actually expected he was not going to live
2 nearly as long as he did.

3 MR. ROSE: That's true. And to the extent that
4 there was an expectation that he may have only lived for a
5 year, there may have been no compensation to Phil and Anne
6 if, in fact, his demise had come much earlier. In fact,
7 Anne raises the question with the attorneys-in-fact after
8 she has been caring for her father for a number of years
9 and says this is not sustainable if I'm not getting
10 compensated.

11 JUDGE RIVERA: But -- but with respect to the
12 numbers you quoted, isn't there still an issue -- that
13 numbers are about round -- round-the-clock care which he
14 needed. The record does establish that. I don't think
15 there's a dispute about that. But there might be something
16 short of paying for round-the-clock care that might have
17 addressed this, no? And he might have wanted to compensate
18 them, but not necessarily to cut out the rest of the
19 children from their share of the house.

20 MR. ROSE: Perhaps. Then the question becomes --

21 JUDGE RIVERA: And one of them was getting \$300 a
22 month. Which granted, of course that doesn't come close
23 to -- to the amount that a private caretaker would charge,
24 but that begs the question about what -- what a child might
25 expect as appropriate compensation and what a parent might

1 be willing to give as appropriate compensation to their own
2 child, who's living free in the house.

3 MR. ROSE: So I guess I'm not clear on your
4 question, Your Honor. But it seems that the -- the
5 shortage of evidence in the record comes --

6 JUDGE RIVERA: I guess I'm raising -- I'm raising
7 a question about whether or not there are other questions
8 of fact beyond the ones that we've been talking about,
9 regarding the compensation itself.

10 MR. ROSE: Your Honor, I don't think there are.
11 The appellant didn't introduce hardly any evidence.
12 There's no evidence that this was not in his best
13 interests. What we are here doing is speculating that
14 there might be other evidence, but that's not how summary
15 judgment works.

16 JUDGE SINGAS: Should we consider --

17 JUDGE RIVERA: Well, what's your burden?

18 MR. ROSE: Pardon?

19 JUDGE RIVERA: What was the burden of -- of your
20 clients?

21 MR. ROSE: Our burden was to establish that this
22 was not a gift.

23 JUDGE RIVERA: Um-hum.

24 MR. ROSE: The petition said this was a gift,
25 contrary to the power of attorney. And our response was



1 that this was, in fact, a contract fully performed services
2 to take care of their father for this period of time.

3 JUDGE RIVERA: Because the two caretakers wanted
4 to get compensated and a couple of other people agreed they
5 should?

6 MR. ROSE: That's right, Your Honor.

7 JUDGE WILSON: And somebody disagreed.

8 MR. ROSE: And -- and one person disagreed, one
9 of -- one of the four; that's right.

10 JUDGE SINGAS: Should we consider at all the
11 benefit that they received by living in that house
12 rent-free, not paying for utilities? Is that something we
13 should look at?

14 MR. ROSE: Your Honor, the cases seem to -- to
15 discuss whether it was a mutually beneficial arrangement.

16 JUDGE SINGAS: Um-hum.

17 MR. ROSE: And I think on this record, you
18 conclude that it -- this was not mutually beneficial. They
19 had to live there, just like an outside in-home care
20 provider would have to be there during that time.

21 JUDGE WILSON: Well, except they were living
22 there, particularly in Philip's case, for a very long time
23 before he needed any care.

24 MR. ROSE: And that may be true. What
25 occurred --



1 JUDGE WILSON: Well, is it true? It is true,
2 right?

3 MR. ROSE: It -- it is true. It is true that
4 Philip lived there for --

5 JUDGE RIVERA: During the time that the mother
6 was alive, who was indeed doing most of the caretaking at
7 that time, if not all of it.

8 MR. ROSE: He was doing some. I'm not sure
9 the -- the percentage and how much the mother was caring
10 for her husband during that period.

11 JUDGE SINGAS: And wasn't there evidence that
12 Anne was kicked out of her other residence and had no
13 choice but to live there?

14 MR. ROSE: That's the claim, that's the hearsay
15 claim by one of the other sisters. I would submit that
16 even if Anne had come home for a short period of time --
17 and I believe it also may have coincided when her mother
18 had some sort of injury and was, for that period, short
19 period, unable to care for her husband. But I would submit
20 that Anne was not obligate -- would not have been obligated
21 to stay in the house for that long period of time. Even
22 had -- even were that true, she would have gone out, found
23 another job, found another home, and not been in a
24 situation where she was caring for her father for 16, 18
25 hours a day.

1 JUDGE RIVERA: But she did -- she did receive
2 some money during that time.

3 MR. ROSE: She received a very small amount of
4 money.

5 JUDGE RIVERA: Yes, I agree that in comparison to
6 the amount of work put in, what a private caretaker would
7 request, it's -- it's a small amount of money. But that --
8 again, we go back to, well, what would have been the
9 compensation for your children to do this? If that was the
10 intent, to compensate. Now, your answer may be, as I think
11 it has been throughout, that only the attorneys-in-fact get
12 to decide what is the proper compensation, once you get
13 past the point that it's not a gift, the intent is to
14 compensate, right?

15 MR. ROSE: That's right, Your Honor.

16 ACTING CHIEF JUDGE CANNATARO: Thank you.

17 MR. ROSE: All right. Thank you, Your Honors.

18 MS. D'AGOSTINO: Thank you, Your Honors. I just
19 wanted to remind the Court of the procedural posture. The
20 respondents were the one that moved for summary judgment,
21 so all of the inferences should be drawn in favor of the
22 petitioner in connection with this because they didn't
23 cross move. Now, I understand the surrogate did search the
24 record and grant summary judgment in their favor, but those
25 issues that the -- the Court just raised, in terms of the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

respondents living in the house rent free, the respondents not having to pay utilities, all of the inferences that can be drawn from those facts are to be drawn in favor of the petitioners in connection with this matter. And unless the Court has any other questions, I'll rest on my papers.

ACTING CHIEF JUDGE CANNATARO: Thank you very much, Counsel.

MS. D'AGOSTINO: Thank you.

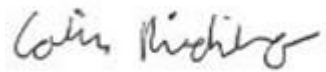
(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of Estate of Maika, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: March 27, 2023

