

Matter of Hoelzer

2008 NY Slip Op 31295(U)

March 21, 2008

Surrogate's Court, Nassau County

Docket Number: 0345220/2007

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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Proceeding by Jeanne Schieck, as Limited Administrator
of the Estate of

File No. 345220

EVELYN MAY HOELZER,
a/k/a EVELYN HOELZER,

Decision No. 886

Deceased,

to Discover Property Allegedly Withheld from the Estate.
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Before the court in this SCPA 2103 proceeding is Jeanne Schieck's application for a preliminary injunction with respect to a Roth IRA held at Charles Schwab. On June 12, 2007, the court issued limited letters of administration to Jeanne, said letters limited to prosecuting a discovery proceeding. The discovery proceeding was commenced by order to show cause. The order to show cause contained a temporary restraining order restraining certain financial institutions, including Charles Schwab, from allowing withdrawals or transfers from any account in the name of the decedent, Evelyn May Hoelzer, or John Hoelzer in which the decedent had an interest pending the hearing of the order to show cause. One of the accounts that is restrained is the decedent's Roth IRA at Charles Schwab. Later, the court signed a supplemental order to show cause directing service of the petition on Mary Grigonis. Service upon her was effectuated, and a hearing was held on November 14, 2007 as to whether a preliminary injunction should

issue with respect to a Roth IRA.¹ The court allowed the parties to submit post-hearing memoranda of law.²

The decedent died on October 13, 2006. She was never married and had no children. Jeanne is a niece of the decedent. John and Richard Hoelzer are the decedent's brothers. Richard is also the nominated executor under the decedent's last will and testament dated September 5, 1986. The court issued preliminary letters testamentary to him on June 12, 2007. Mary is John's daughter.

The Roth IRA dates back to December 10, 1999 when, according to a TIAA-CREF Mutual Funds Confirmation Statement, there was a "participant rollover" of an account titled in the decedent's name. The primary beneficiary of the account is listed on the confirmation statement as John C. Hoelzer and the secondary beneficiary as Regina M. Hoelzer. Regina is another daughter of John. A TIAA-CREF statement dated December 29, 2005 shows the primary beneficiary as John C. Hoelzer. No secondary beneficiary is listed on that statement.³

The account was transferred to Charles Schwab in February 2006, approximately eight months prior to the decedent's death while she was a resident at Harbor House Assisted Living, a

¹The parties have stipulated to having the temporary restraining order continue pending further order of the court with respect to the other accounts that came under restraint as a result of the order to show cause.

²Counsel for Jeanne and counsel for John and Mary have each submitted a post-hearing memorandum. Annexed to Jeanne's memorandum are seventeen exhibits, consisting of affidavits that postdate the hearing, printouts of emails, copies of checks, excerpts of John's deposition testimony and other documents. The court will not consider those exhibits that were not part of the court record as of the date of the hearing.

³John and Mary assert that the decedent had changed the secondary beneficiary from Regina to Mary while the Roth IRA was still at TIAA-KREF. This may be true, but there is nothing in the record that substantiates this assertion.

licensed adult home where a diagnosis of Alzheimer's Disease or dementia is required for admission to the facility. Mary is named as the beneficiary of the account on the Schwab IRA Account Application and remained as such when the decedent died. John facilitated the transfer of the account from TIAA-CREF to Charles Schwab at Evelyn's behest. It is unclear from the record whether John took any actions in this respect in his capacity as the decedent's attorney-in-fact. Jeanne alleges that the decedent lacked the capacity to make the transfer and to name Mary as the beneficiary of the account and that, even if Evelyn possessed sufficient capacity, John exerted undue influence on her. Jeanne asks the court to issue a preliminary injunction on the account, which she asserts should be an estate asset.

Jeanne also asserts that, since at the time the account was transferred from TIAA-CREF to Charles Schwab the decedent lacked the capacity to transfer the account and to make Mary the beneficiary and/or was unduly influenced by John, the court should exercise its equitable powers based on John's "unclean hands" and declare the account to be an estate asset rather than having it revert to its status when it was held at TIAA-CREF and John was the primary beneficiary. She claims that the record clearly reflects that John took control of the decedent's assets and used his position as her attorney-in-fact to transfer all of her property to himself and others. John and Mary argue that there is no legal or factual basis for voiding Mary's right as the beneficiary of the account at Charles Schwab or for converting the funds from an E.R.I.S.A. qualified benefit plan to unqualified estate-owned funds regardless of whether or not the transfer from TIAA-CREF to Charles Schwab is ultimately upheld.

To be entitled to a preliminary injunction, the petitioner must establish by clear and convincing evidence: (1) the likelihood of success on the merits; (2) irreparable harm absent granting the preliminary injunction; and (3) a balancing of the equities in the petitioner's favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *EdCia Corp. v McCormack*, 44 AD3d 991, 993 [2d Dept 2007]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604 [2d Dept 2004]; *Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460, 461 [2d Dept 2004]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604 [2d Dept 2004]). Whether to grant a preliminary injunction lies in the court's discretion (*id.*).

"Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts'" (*Abinanti v Pascale*, 41 AD3d 395, 396 [2d Dept 2007], quoting *Peterson v Corbin*, 275 AD2d 35, 37 [2000], quoting *Nalitt v City of New York*, 138 AD2d 580, 581 [1988]). Additionally, it is a remedy that should be used sparingly, "with caution, and only when required by urgent situations or grave necessity, and then upon the clearest evidence" (*Wm. Rosen Monuments, Inc. v Phil Madonick Monuments, Inc.*, 62 AD2d 1053, 1053 [2d Dept 1978]).

Jeanne proffered one witness at the hearing. Christine Macchio, who is the administrator of Harbor House and is also a geriatric nurse, testified that Evelyn had advanced Alzheimer's Disease at the time she was admitted to Harbor House in June 2005. Medical records from North Shore University Hospital from that time period support Ms. Macchio's testimony. Thus, the

decedent may have lacked the capacity to authorize the transfer of the Roth IRA from TIAA-KREF to Charles Schwab in February 2006.⁴

While Jeanne could ultimately succeed at trial in establishing that the Roth IRA is an estate asset, she has not convinced the court that that is the most likely outcome in this litigation on the record as it now stands. She has also failed to establish irreparable injury if the preliminary injunction is not granted because even “[w]here a [petitioner] succeeds in proving . . . entitlement to equitable relief, and the granting of such relief ‘appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy’” (*Lusker v Tannen*, 90 AD2d 118, 125 [1st Dept 1982], quoting *Doyle v Allstate Ins. Co.*, 1 NY2d 439, 443 [1956]). Finally, even if Jeanne had established by clear and convincing evidence, as she must, that a balancing of the equities leans in her favor, her failure to satisfy either of the other two criteria requires denial of her application for a preliminary injunction, as all three elements must be established (*see Garden City Irrigation, Inc. v Salamanca*, 7 Misc 3d 1014A [Sup Ct, Nassau County 2005]).

In her post-hearing memorandum, Jeanne quotes the portion of the Charles Schwab agreement that states that “[i]f no designated beneficiary survives me, or I do not designate a beneficiary, pay the full value of my account to my estate.” Jeanne asks the court to enforce this provision based on John’s “unclean hands,” yet at the same time, argues that the decedent did not have the capacity to enter into the agreement with Charles Schwab. In any case, the court simply does not have enough evidence before it at this stage of the proceeding to make a determination about the ultimate disposition of the account.

⁴Jeanne offered no evidence to substantiate her allegation that John unduly influenced Evelyn to make the transfer.

Accordingly, Jeanne's application for a preliminary injunction restraining the Roth IRA is denied and the temporary restraining order on that account is vacated.

Settle order on notice.

Dated: March 21, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court