SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the SCPA 2103 discovery proceeding
in the Estate of

JOHN R. OLIVERI,

deceased.

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File No. 350449

Dec. No. 599

In this SCPA 2103 discovery proceeding, the respondent moves the court for an order dismissing the petition and canceling a notice of pendency filed against the decedent's former residence. As explained below, the motion is granted in part and denied in part.

John R. Oliveri died on October 18, 2007 survived by his daughter Catherine Reynolds and his granddaughters Jeannine Bryan and Stefanie Wood, the children of a predeceased daughter Pauline Wood, as his sole distributees; his wife had predeceased him in September 2003. The petitioner in this proceeding is decedent's granddaughter Stefanie Wood, who resides in Florida and to whom limited letters of administration issued for the sole purpose of prosecuting this SCPA 2103 discovery proceeding. The respondent is decedent's daughter Catherine Reynolds, who resides in Selden, Suffolk County. Jeannine Bryan lives in Alaska.

The property which is the subject of this proceeding is a parcel of real property in Massapequa Park, Nassau County, and three bank accounts. The real property was conveyed by the decedent to the respondent by deed dated August 26, 2004 and recorded September 7, 2004. The deed purported to convey all of the decedent's right, title and interest in the property, except that it reserved a life estate in the decedent. At the time of decedent's death, the bank accounts were held either jointly between decedent and respondent or solely by respondent. Petitioner alleges that respondent was in a confidential relationship with the decedent and used that relationship to exert under influence upon the decedent to convey the real property and change

the title and/or beneficiary designations on the subject accounts. Respondent denies petitioner's allegations and contends that all the transactions reflect the exercise of the decedent's own free will.

SUMMARY JUDGMENT STANDARD

The proponent of a summary judgment motion 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 (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ Med Center*, 64 NY2d 851 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 [1957]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Mitchell v Fiorini Landscape, Inc.*, 253 AD2d 860 [2d Dept 1998]). If there is any doubt as to the existence of a triable issue, the motion must be denied. However, "[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

THE DEED OF CONVEYANCE

Respondent acknowledges that as the purported donee of a gift from the decedent, she bears the burden of proving all the elements of a valid gift, i.e., (1) donative intent; (2) delivery;

and (3) acceptance, by clear and convincing evidence (*Gruen v Gruen,* 68 NY2d 48, 53 [1986]). That burden is alleviated by the presumptions attendant upon the execution of a deed which contains an acknowledgment. First, "a certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption ... can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed" (*Son Fong Lum v Antonelli,* 102 AD2d 258, 260-261 [2d Dept 1984], *affd* 64 NY2d 1158 [1985]; *Accord, Elder v Elder,* 2 AD3d 671 [2d Dept 2003]). Also, absent evidence to the contrary, the date of the deed is presumed to be the date of delivery (*Brookhaven v Dinos,* 76 AD2d 555, 570 [2d Dept 1980]). Finally, where the gift is beneficial to the donee, acceptance is presumed (*Gruen v Gruen,* 104 AD2d 171, 179 [2d Dept 1984] *affd* 68 NY2d 48 [1986]).

In this case, the petitioner does not allege that there was no delivery or acceptance by the respondent; her argument is that the decedent lacked the donative intent to effect a valid conveyance and/or that the conveyance is the result of undue influence upon the decedent or the result of misrepresentations made by the respondent to the effect that the conveyance would be for the convenience of the decedent and was merely for Medicaid and estate tax planning.

In support of the motion, respondent attaches, among other things, the deposition testimony of John Reali, Esq., who prepared the subject deed, and Robert T. Acker, Esq., who prepared a similar deed for the decedent prior to the death of decedent's daughter Pauline. The Acker deed was dated July 8, 2004 and it was intended to convey the subject property to respondent and her sister Pauline Wood, with the decedent reserving a life estate in himself. He testified in sum and substance that the decedent's purpose in having Acker prepare the deed was to avoid probate and possibly shield the property from a reimbursement claim in the event the decedent ever required Medicaid. Acker testified that respondent was at the meeting at his office

with the decedent. Acker also testified that because many of the answers to his questions were coming from respondent, he took the decedent aside and spoke to him alone to satisfy himself that the deed was the decedent's intention, not merely respondent's. Being convinced that the decedent wanted the deed prepared as described, the deed was prepared and executed. Not long after sending the deed to a title abstract company for recording, and after Pauline's death, Acker received a phone call to the effect that if the deed had not yet been recorded, it should be retrieved by Acker and not recorded. His testimony is that he was unsure whether the first call came from respondent or the decedent, but it seems likely that it came from respondent because his testimony was that he was uncomfortable acting at respondent's direction and he advised her he would not take any action regarding the deed unless he was specifically told to do so by the decedent. He then received such a call from the decedent and was directed to retrieve the deed if it had not yet been recorded. Acker did not recall if the decedent told him why he wanted the deed back, but Acker was sure that he inquired of the decedent whether he was sure he wanted Acker to retrieve the deed and he received an affirmative response. Evidently because of delays then occurring in the recording office at the County Clerk's Office, the deed had not yet been recorded. Acker notified the abstract company to retrieve the deed before it was recorded and they did so. Acker then returned the deed to the decedent. There was some dispute over Acker's fee, which was eventually paid. Whether for that reason or another, the deed which is the primary focus of this case was prepared by another attorney, John Reali.

Reali testified that he was admitted to the bar in 1961. His primary area of practice is real estate, with a growing elder law and trusts and estates practice. He met with the decedent and respondent in August 2004, the month following the execution of the Acker deed. He prepared the subject deed as well as a will and a power of attorney. The will, which has been

filed with the court but not yet offered for probate, contains a preresiduary bequest of $5,000.00 to respondent's three daughters and $7,500.00 each to Pauline's two children, the petitioner and her sister. The remainder is left to respondent. Reali testified that at some point in the conversation it was mentioned that decedent was disappointed that Pauline's daughters had not attended the funeral of their grandmother, decedent's wife, the previous year. Upon questioning by petitioner's attorney whether it was the decedent or respondent who mentioned this, Reali testified: "I remember she's the one that mentioned it. I think in so many words he said the same thing; yes, I'm disappointed. By his body language I could see that he acknowledged that it was a disappointment to him..." (Reali Tr. p. 21-22).

With regard to the deed, Reali testified that the instruction to prepare the deed came from the decedent, not respondent, although she was present in the room at the time. That being so, Reali testified that he spoke to the decedent alone. Specifically, he testified, "For the record, after my conversation with Mr. Oliveri, I asked Mrs. Reynolds (respondent) to leave the room and she was outside the conference room, I closed the door and I said Mr. Oliveri, now that we are alone, tell me what you want to do; do want to transfer the house to your daughter, alone, yes; do you want a new will, yes. As a matter of fact, at one point, Mrs. Reynolds said my father wants to give a gift of five thousand to the grandchildren and he said I want to give five thousand to the Reynolds kids and my other daughter I want to give fifteen thousand to even it out. He understood what I was talking about. He told me to go ahead with the deed and the will" (Reali Tr. p. 27).

Reali also testified that there was no discussion about gift taxes or estate taxes. When questioned by petitioner's attorney about what decedent's estate plan was, Reali testified,

"Basically, there were two goals; one to protect the house, his assets from Medicaid and two, to give his assets to his daughter, what is her name, Catherine Reynolds" (Reali Tr. p. 31).

Reali also testified that decedent did not understand when the Acker deed was prepared that if Pauline predeceased him, respondent would essentially be partners in the property with Pauline's husband and children. Reali testified that decedent was very clear that he did not want that result to obtain (*see* Reali Tr. p. 41).

Finally, respondent's motion is supported by an affirmation submitted by the decedent's treating physician, Dr. Michael L. Sacher. Dr. Sacher affirms that he had two appointments with the decedent in August 2004 and "[o]n both those occasions, (and for years), I found him to be alert, oriented and cognitively normal– in other words, he had a clear mind, was aware of what was going on, and was capable of making decisions on his own."

Respondent has clearly made out a prima facie case that the subject deed was a valid conveyance of the property to respondent. In opposition, petitioner offers nothing but her own testimony that decedent seemed forgetful and frail at or about the time of the execution of the deed. Upon questioning by respondent's attorney she could not point to a single incident which would support a conclusion that the respondent had exercised undue influence on the decedent or had made any promise or representation to him about holding the property merely for his convenience. The only evidence casting any doubt on the bona fides of the subject deed is the deposition testimony of petitioner's sister about an incident that allegedly occurred at her parents' home after her mother's funeral. She alleges that she overheard respondent say to someone on the telephone something to the effect that now that her mother had passed away "we can get Pauline's name off the house." Even if this testimony were to be believed, it does not

rebut the overwhelming testimony from Mr. Reali that the conveyance of the property to respondent was decedent's overriding intention.

Furthermore, the record does not support petitioner's contention that decedent and respondent were in a confidential relationship. Respondent was decedent's closest relative and the only one in any proximity to decedent. Although decedent was elderly and respondent did some of the banking transactions and had arranged for his meals to be provided by Meals on Wheels, there is no evidence that decedent relied on respondent for his daily needs. He continued to pay some of his own bills and never had home health aides or nurses and continued to live alone for approximately three years after the deed conveyance. The record as a whole establishes that decedent was competent and acting of his own volition. Even if some level of dependence was established, it is counterbalanced by the closeness of the familial relationship and the circumstances of the case (*Matter of Zirinsky,* 10 Misc3d 1052A [Sur Ct, Nassau County 2005], *affd* 43 AD3d 946 [2d Dept 2007]).

Accordingly that branch of the motion seeking summary judgment on the validity of the deed and canceling the notice of pendency is granted.

THE BANK ACCOUNTS

There are three bank accounts at issue, two with Greenpoint Bank and one with Roslyn Savings Bank. The Greenpoint savings account, the last four digits in the account number being 4435, is titled in the names of decedent and respondent "payable to either or the survivor" in trust for Pauline Wood." Where, as here, the signature card used to open the account indicates that the funds in the account are payable to either or the survivor of two joint tenants, there is a presumption that the parties intended to create a true joint bank account with rights of survivorship (Banking Law § 675; *Matter of Klecar,* 207 AD2d 732 [1st Dept 1994]; *Matter of*

Gilman, 6 Misc3d 1001A [Sur Ct, Nassau County 2004]). The burden is then on the opposing party to prove fraud, undue influence or lack of capacity (*Matter of Corcoran,* 63 AD3d 93, 96 [3d Dept 2009]), or that the account was opened merely for convenience and not with the intent of conferring a present beneficial interest (*Matter of Stalter,* 270 AD2d 594, 596 [3d Dept 2000]). The signature card was sufficient to establish respondent's prima facie case and petitioner has offered no proof of fraud, undue influence, lack of capacity, or that the account was established merely for decedent's convenience; as a result, respondent was entitled to the balance in the account on the date of decedent's death (*Matter of Fayo,* 7 AD3d 795 [2d Dept 2004]; 5 Warren's Heaton on Surrogates Court Practice, § 62.04[5][b]).

With regard to the checking account at Greenpoint Bank, the last four digits of the account number being 7790, it appears that the account is payable to "John Oliver or Catherine Reynolds." Thus, there is no survivorship language and the presumption of Banking Law § 675 does not obtain (*Matter of Randall,* 176 AD2d 1219 [4th Dept 1991]. In that circumstance, the presumption is that the account is held by the two co-tenants as tenants in common (EPTL 6-2.2[a]). The presumption may be rebutted by proof that the parties intended to create a true joint account with right of survivorship (*Matter of Degnan,* 55 AD3d 1238, 1239 [4th Dept 2008]). Here, there is no indication of the decedent's intent when the account was opened in February 2004. While it may be that after Pauline's death he intended respondent to succeed to the funds in the joint checking account upon his own death, it is his intention at the time the account was opened which is controlling. There being no evidence as to his intent at that time, the motion with regard to the Greenpoint checking account is denied.

Finally, regarding the Roslyn Savings Bank totten trust account, the account had been titled in the names of Catherine Reynolds and John Oliveri i/t/f Pauline Wood. On August 5,

2004, the title of the account was changed to "Catherine Reynolds i/t/f Kimberly J. Wilson," thus effecting a gift of the entire account to respondent. Kimberly Wilson is respondent's daughter. The court notes that the instrument used to change the title on the account was signed by both respondent and decedent before a notary public. The transaction occurred six months after Pauline's death and at or about the time of the execution of the Reali deed and the decedent's last will and testament, both of which clearly evince the decedent's intention to leave the bulk of his estate to respondent, his only living child. The decedent's death did not eventuate for another three years after the transaction, and clearly was not a deathbed transfer or gift causa mortis. The court is therefore satisfied that the respondent has established all the elements of valid gift (*Gruen v Gruen* 68 NY2d 48, 53 [1986]). She is therefore entitled to summary judgment that the transfer of the Roslyn Savings Bank account was a valid lifetime gift.

Accordingly, respondent's motion is granted with respect to the deed, the Greenpoint Bank savings account and the Roslyn Savings Bank account and is denied with regard to the Greenpoint Bank checking account.

Settle order.

Dated: September 22, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court