Matter of Baum
2009 NY Slip Op 33495(U)
March 5, 2009
Surrogate's Court, New York County
Docket Number: File No. 1175/2007
Judge: Kristin Booth Glen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT: NEW YORK COUNTY

---x

In the Matter of the Estate of

RICHARD E. BAUM, File No. 1175/2007

Deceased.

---x

G L E N, S.

In this proceeding for the removal of Valerie Greenly ("Valerie") as administrator of the estate of her husband, Richard E. Baum, and for other relief, the Court must determine whether Valerie acquired an interest in decedent's cooperative apartment by virtue of a certain recently discovered writing. The parties have agreed that the question be decided on the papers submitted.

Decedent died in 1997 survived by his wife Valerie, and by two children from a previous marriage, as his sole distributees. The apartment, registered in decedent's sole name, is the only asset of the estate with significant value. When it appeared that sale of the apartment would be necessary to effect settlement and distribution of the estate, decedent's son Richard brought a proceeding to compel Valerie's account as administrator. Richard withdrew that proceeding on Valerie's representation that she would list the apartment for sale.

Subsequently, Valerie discovered a type-written note which she claims gives her a greater interest in the apartment than a one-half intestate share as originally contemplated. The document reads in its entirety:

February 11, 1993

TO WHOM IT MAY CONCERN:

I, Richard Baum, am the sole owner of 122 shares in a cooperative apartment located at 771 West End Avenue, New York, New York 10025. The specific apartment is #6C.

It is my intention, via this statement, to notify all interested parties that my wife, Valerie Greenly, is a "co" and equal owner of these shares. This statement is made without reservation or condition of any kind.

____
RICHARD BAUM

The decedent's purported signature appears on the signature line, with a notary's stamp and signature below, although there is no oath or acknowledgment. The date "Mar 2 1993" is stamped next to the notary's signature.

Valerie contends that the paper in question granted her a present interest in one-half the shares, so that she now has at minimum a three-quarters interest in the apartment: one-half as previously conveyed to her by the note, plus a one-quarter interest representing her one-half intestate share of decedent's remaining half share. In view of this development, rather than sell the apartment Valerie proposes to buy what she figures is the son and daughter's one-quarter share. Valerie argues in the alternative that the document created a tenancy by the entirety, making her now the owner of the entire property by right of survivorship.

Valerie's second claim is disposed of easily. In 1993, the year the note is dated, co-interests in a cooperative apartment were treated the same as other personal property: pursuant to EPTL 6-2.2(a), disposition to two persons created in them a tenancy in common, unless expressly declared to be a joint tenancy. The law was later amended to provide that a disposition to a husband and wife of shares of stock of a cooperative apartment corporation is treated like a disposition of real property, creating a tenancy by the entirety unless expressly declared to be a joint tenancy or tenancy in common (EPTL 6-2.2 [c]). This amendment, however, is applicable

by its terms only to dispositions made on or after January 1, 1996. Valerie has no basis for claiming an interest in the apartment by right of survivorship as a tenant by the entirety.

It remains to determine whether Valerie acquired an interest as tenant in common by gift from the decedent. The well settled rule is that for a valid inter vivos gift there must be (1) intent by the donor to make the gift, (2) delivery of the gift – actual or constructive -- to the donee, such that the donor is divested of control of the property, and (3) acceptance of the gift by the donee (*Gruen v Gruen*, 68 NY 2d 48 [1986]). The burden of proving a gift is on the donee, who must establish the three elements by clear and convincing evidence. As Valerie has failed here to prove either actual or symbolic delivery, the gift fails.

Although it is conceded that Valerie's name was not added to the stock and proprietary lease for the apartment, she argues that re-registration was not essential because the original documents were in the possession of a bank as security for its loan and therefore not conveniently available for delivery. She relies on *Matter of Cohn*, 187 App Div 392 (1st Dept 1919) and *Berson v Blue Ridge Coal Corporation*, 197 Misc 475 (Sup Ct NY Co 1950) for the principle that physical delivery is not required in these circumstances. Both cases are distinguishable, and the court finds that relaxing the rule for delivery is not warranted here. The *Cohn* matter involved the validity of a transfer of shares of stock evidenced by an instrument of gift[1] unaccompanied by the share certificates. The donor gave the formal instrument to his wife on her birthday and told her in the presence of their family that he would give her the physical shares as soon as he had possession of them. He died unexpectedly six days later without having

---

1 The signed writing stated, "I give this day to my wife, Sara K. Cohn, as a present for her (46) forty-sixth birthday (500) five hundred shares of America Sumatra Tobacco Company common stock."

given her the certificates, which were in a safe deposit box not then accessible to him. A closely divided court found that delivery of the instrument of gift was sufficient to sustain the gift, noting that the rule requiring actual delivery of the thing given is not inflexible. It cited *Matter of Van Alstyne*, 207 NY 298 (1913), where the principle is explained:

> The delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit...It is true that the old rule requiring an actual delivery of the thing given has been very largely relaxed, but a symbolical delivery is sufficient *only when the conditions are so adverse to actual delivery as to make a symbolical delivery as nearly perfect and complete as the circumstances will allow* [emphasis added] (207 NY 298, 309-310).

Here, the court does not find the bank's possession of the documents a condition "so adverse to actual delivery" as to obviate a re-titling of the certificates. Stock certificates and proprietary leases (or affidavits of loss substituting for the original) are routinely furnished by banks when a loan is refinanced or title is transferred. Further, the bank's physical possession of the documents is the very means by which a bank protects its security against transfer and the potential impairment of its collateral without its knowledge and consent. Permitting an enforceable transfer without the bank's surrender of the documents would interfere with its rights as creditor.

The court also notes that unlike in *Cohn*, where the donor died merely six days after the event that occasioned the gift, a period of more than four years elapsed between the date on the document here and the date the decedent was first diagnosed with the condition that led to his death. *See also McGavic v Cossum*, 72 App Div 35 (1st Dept 1902) (delivery unnecessary for gift where bonds were located in safe deposit box in another city while donor was seriously ill, and death occurred one month after written instrument of gift).

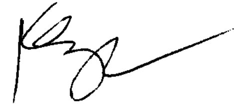
The *Berson* case on which Valerie relies concerned an alleged oral gift of stock without delivery of the shares, which the court found invalid, and does not support her position.

In the present case we have neither an instrument of gift nor its delivery. The document in question contains no words of conveyance to effect a transfer, and there is no evidence that the decedent relinquished control over it. Valerie's affidavit states she recalled the paper but had not seen it for many years and discovered it only recently when she was "going through old papers" in the apartment. Thus, not only were the certificate and proprietary lease not transferred, but the note on which Valerie relies remained available to the decedent. Any intended gift had not been completed when the decedent died.

The court does not find the tax forms 1098 and notices of late maintenance payments addressed to "Baum/Greenly" probative of transfer of ownership by the decedent.

Given the decedent's retention of control over the apartment and all indicia of its ownership, the court finds that Valerie has not met her burden to establish a gift by clear and convincing evidence. The Court will defer its decision on petitioner's request for the removal of Valerie as administrator pending further developments with respect to the sale of the apartment. Petitioner has leave to renew his request on a showing that respondent has failed to take appropriate actions to distribute the estate consistent with this decision.

This constitutes the order of the Court.



SURROGATE

Dated: March 5, 2009