

**Matter of Salvatore Dagnell**

2010 NY Slip Op 31712(U)

June 24, 2010

Surrogate's Court, Nassau County

Docket Number: 353739/A

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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Discovery Proceeding by Robert Dagnell, Limited  
Administrator of the Estate of

File No. 353739/A  
Dec. No. 26458

SALVATORE DAGNELL,

Deceased.

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This proceeding in the estate of Salvatore Dagnell brought pursuant to SCPA 2103 has been submitted for decision based on the pleadings, sworn statements and exhibits attached thereto on the issue of whether, as a matter of law, the proceeds of certain accounts titled as Salvatore Dagnell or Deborah Rasmussen are estate assets. The petitioner is Robert Dagnell, the decedent’s son; the respondent is Deborah Rasmussen, the decedent’s daughter. Limited letters of administration were issued to Robert for the purpose of prosecuting the discovery proceeding and obtaining the decedent’s medical records.

According to a clinical abstract from North Shore University Hospital, the decedent was diagnosed with lung cancer, peritoneal carcinomatosis and deep venous thrombosis during a hospital stay from June 21, 2008 to July 4, 2008. The decedent died on July 22, 2008, leaving Robert, Deborah, and Nicholas Pasculo, the son of the decedent’s predeceased daughter, Sally Pasculo, as his sole distributees.

Robert alleges, upon information and belief, that funds totaling \$111,680 from six accounts at Roslyn Savings Bank, Astoria Federal Savings, and Country Wide Bank belong to the estate even though the accounts were titled jointly in the names of the decedent and Deborah when the decedent died. Deborah closed the accounts in question after the decedent’s death and

has not turned the proceeds over to the estate, despite Robert's request that she do so.<sup>1</sup> It is Robert's position that Deborah was named as a joint depositor on these accounts for convenience purposes only.

In support of his position that the funds from the bank accounts belong to the estate, Robert relies on a ledger created by Deborah listing accounts, a letter dated March 20, 2010 from Astoria Federal Savings to Robert's attorney, account records from Astoria Federal Savings, and deposition testimony given by Deborah in an action Robert commenced in Supreme Court, Nassau County,<sup>2</sup> against Deborah and also against John Pasculo, as parent and legal guardian of Nicholas Pasculo.<sup>3</sup> In her deposition in the Supreme Court action, Deborah testified, among other things, that the decedent gave Deborah the signature cards to sign for the accounts and that she did not deposit any of her own funds into the accounts.

According to Deborah's affidavit in opposition to the petition, on the date the decedent died: (1) Roslyn Savings Bank account xxxxxxxx5237 was titled, "Salvatore Dagnell or Deborah Rasmussen ITF Robert Dagnell" and the account was used for direct deposit of the decedent's social security and pension checks; (2) Roslyn Savings Bank account xxxxxxxx5505 was a Visa account and was titled, "Salvatore Dagnell or Deborah Rasmussen"; (3) Country Wide Bank

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<sup>1</sup> In the petition, Robert also alleges that Deborah is in possession of the decedent's banking and investment records, tax returns and other documentation that belong to the estate.

<sup>2</sup> In the Supreme Court action, Robert is seeking an order, among other things, imposing a constructive trust on real property in Valley Stream, New York, that belonged to the decedent prior to August 14, 2007 when he allegedly executed a deed transferring ownership to Deborah subject to retaining a life estate in the property. Deborah filed an answer in Supreme Court denying the allegations contained in the complaint.

<sup>3</sup> Nicholas was born on December 28, 1991 and was an infant when the Supreme Court action was commenced. Nicholas has since reached the age of 18.

account xxxxxx5840 was titled, “Salvatore Dagnell or Deborah Rasmussen ITF Robert Dagnell”;

(4) Astoria Federal Savings account xxxxxx2807 was titled, “Salvatore Dagnell or Deborah Rasmussen”; (5) Astoria Federal Savings account xxxxxx2852 was titled, “Salvatore Dagnell or Deborah Rasmussen”; and (6) Astoria Federal Savings account xxxxxx0293 was titled, “Salvatore Dagnell or Deborah Rasmussen ITF Robert Dagnell.” The letter from Astoria Federal Savings states that account xxxxxx2807 was opened on April 28, 2008 as a “Joint (or) account with Salvatore Dagnell and Deborah Rasmussen as owners with no beneficiaries,” account xxxxxx2852 was opened on May 20, 2008 as a “Sole Owner (ITF) account with Deborah Rasmussen as the beneficiary. A title change was performed the same day. The account was made a Joint (or) account with Salvatore Dagnell and Deborah Rasmussen as owners with no beneficiaries,” and account xxxxxx0293 was opened on September 20, 2006 as a “sole Owner (ITF) account with Deborah Rasmussen and Robert Dagnell as the beneficiaries. A title change was performed the same day. The account was made a Joint (or) account with Salvatore Dagnell and Deborah Rasmussen as owners and Robert Dagnell as the beneficiary.” The only signature card provided by Astoria Federal Savings shows the signatures as Salvatore L. Dagnell and Deborah Rasmussen, but is illegible as to wording on the card and the account number.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). 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]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the petitioner to make a

prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]), and the papers submitted will be viewed in the light most favorable to the respondent ( *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, summary judgment must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

“[T]he opening of an account in the names of two people in facial form to be paid or delivered to either, or the survivor of them evinces an intention to create a joint tenancy (Banking Law, § 675, subd [b]), thereby placing the burden of refutation on anyone who challenges it ” (*Kleinberg v Heller*, 38 NY2d 836, 840 [1976] [internal quotation marks and additional internal citations omitted]). “While there is a presumption that the parties to a joint account are each entitled to an equal share (Banking Law, § 675), it is well settled that the presumption is not conclusive and may be rebutted by evidence showing that the depositor established the account for convenience and not with the intention of conferring a present beneficial interest on the party claiming the half share” (*Matter of Friedman*, 104 AD2d 366, 367 [2d Dept 1984]; *Matter of Matsis*, 274 AD2d 431, 431-432 [2d Dept 2000]). With respect to all of the accounts, Deborah is not entitled to the Banking Law § 675 presumption since she has not presented the court with any evidence that they were joint with right of survivorship (*see Viola v Viola*, 71 AD3d 1129, 1129 [2d Dept 2010]). Additionally, on the record as it exists, the court cannot determine whether any of the accounts were convenience accounts. Accordingly, the court finds that there are triable issues of fact and that a hearing will be necessary in order to resolve them.

A conference is scheduled for July 13, 2010, at 3:00 p.m., with a member of the law department to schedule any necessary discovery or, if none is needed, to schedule the hearing.

This is the decision and order of the court.

Dated: June 24, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court