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

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In the Matter of the Estate of File No. 346032

JESSE ROSS, Dec. No. 26596

Deceased.

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In this proceeding to vacate a deed purportedly conveying the decedent's former residence, the co-executors of the decedent's estate are his wife Gladys Ross (hereinafter referred to as "Gladys"), his son David Ross, and an unrelated third party, Leonard Lipson (hereinafter referred to collectively as "petitioners"). It is undisputed that the property was originally held in the decedent's name alone. It is also undisputed that the decedent Jesse Ross executed the deed conveying title from himself individually to himself and Gladys as joint tenants with right of survivorship on December 14, 2004. Finally, it is also undisputed that the deed was not recorded until November 2, 2007, after the decedent's death on January 13, 2007. What is in dispute is whether the deed was ever delivered to Gladys during the decedent's lifetime. For the reasons set forth below, the court concludes that it was not and that the purported transfer is therefore ineffective and the property remains an asset of the decedent's estate.

By petition dated December 6, 2007, and filed on December 20, 2007, the petitioners commenced the instant proceeding for an order: (1) declaring the recording of the subject deed a nullity and that the recording be set aside and canceled of record; (2) directing Gladys to account for any assets that she has retained or realized from her control of the subject property; and (3) an order removing her as executor and trustee on grounds that the act of recording the deed was an act tantamount to a fraud upon the estate. Opposition was filed by Gladys and discovery was conducted by the parties, including the taking of Gladys's deposition in California where she

now resides, she being advised by her doctors that travel to New York would compromise her health and well-being. In the interim, and itself the subject of extensive litigation, the subject property has been sold and the proceeds are being held in escrow pending the court's determination of the instant petition.

A trial was held on this matter over a period of three days. Testimony was taken from, among others, Stanley Fisher, Esq., who testified that he knew the decedent both professionally and socially for over 20 years. He testified that he prepared a will for the decedent in November 2004 which contained a devise of the subject to a trust for Gladys's benefit. He also testified that in the months prior to the execution of the November 2004 will, he discussed with the decedent simply leaving the house outright to Gladys, but that the decedent indicated it was not his desire at that time to do that. About a month later and at the decedent's direction, Mr. Fisher prepared the deed which is the subject of this litigation. However, he did not arrange for its recording as the decedent advised Mr. Fisher that he intended to take the deed with him. Finally, Mr. Fisher testified that "it was clear to me at that time that he was not going out to record it himself."

Testimony was also elicited from Louis P. Karol, Esq., the attorney who drafted the instrument admitted to probate as the decedent's last will and testament. The will was executed on October 10, 2006, nearly two years after the execution of the subject deed. The will provides that the residence be placed in a marital deduction trust for Gladys's benefit. Mr. Karol testified that Gladys was present at all of his meetings with the decedent regarding his estate plan. He was asked several times during his testimony whether Gladys ever made any mention of a deed purporting to convey the property to her; he repeatedly answered that she did not, nor did she give any indication that she believed she already owned the property which her husband was

intending to place in trust for her benefit.

Mr. Karol also represented Gladys and the petitioners in the probate proceeding and the early administration of the estate before disputes arose between Gladys and the petitioners. Mr. Karol testified, and the court's file confirms, that Gladys signed the probate petition which indicates that the residence was an asset of the decedent's estate at the time of his death. Consistent with notion that the property was an estate asset, Mr. Karol also testified to conduct on his own part and on Gladys's part in ordering an appraisal of the property.

After some friction arose among the co-executors, the petitioners retained separate counsel. Mr. Karol testified that during the discussions which ensued in an effort to resolve the disputes, Gladys originally insisted that the house be sold and, in fact, a contract of sale was prepared and executed by the co-executors, including Gladys, for a sale of the property to a third party. Julie DeLeon, Esq., an associate in Mr. Karol's office who was involved in the drafting and execution of the contract testified that the contract she prepared initially identified Gladys as the seller of the property, Ms. DeLeon evidently having been under the impression that she was the owner. She testified, however, that after discussion "at length" with Gladys and her sons, the contract was modified to reflect that the seller was the Estate of Jesse Ross and Gladys signed the contract in July of 2007 "as executor." The sale of the property pursuant to this contract was never consummated.

Joseph B. Rosenberg, Esq., also testified at the trial. He testified that he was retained by Gladys in June 2007, nearly six months after decedent's death, to represent her with regard to her pursuing or foregoing her statutory right of election (EPTL 5-1.1-A) and that during his discussions with Gladys, she told him that the residence was an estate asset. Mr. Rosenberg sent

a letter dated June 22, 2007 to Mr. Karol containing the following settlement demand, "Executors will execute a deed transferring ownership of Dr. Ross's personal residence to Mrs. Ross outright and free of trust." Mr. Rosenberg testified that this demand came directly from Gladys herself. Mr. Rosenberg testified that Gladys wanted to put Mr. Karol's firm on notice that she intended to make her claim for her right of election if her demands weren't met, one of which was that the residence be turned over to her.

Petitioner's counsel successfully moved, without objection, for the receipt in evidence of Gladys's petition dated August 27, 2007, filed in this court on September 20, 2007, in which she seeks, among other things, the removal of her co-executors and co-trustees. Counsel's stated purpose in offering the document was his contention that it contains admissions by Gladys regarding ownership of the residence. Pertinent to that claim, the petition contains the following allegations:

5. A dispute has arisen between Petitioner (Gladys) and the other two Co-Executors...respecting two issues vital to the proper administration of the Estate. The first issue concerns the valuation of certain of the Decedent's assets for Estate Tax purposed. The second is concerning the sale of the Decedent's residence.

9. Furthermore, the Petitioner has been attempting to sell the Decedent's principal residence known as 382 East Shore Road, Great Neck, New York 11203. The Petitioner received an offer within the value of its value as determined by a certified appraiser. However, the other Executors refused to sign the contract of sale, which eventually resulted in losing the sale. The other Executors concluded the price was too low and offered no appraisal to support their position.

Gladys did not appear at the trial. Her attorneys called no witnesses, but moved into evidence portions of her deposition testimony.

The law presumes that a deed was delivered and accepted as of the date of its execution. However, the presumption is rebuttable and must yield to opposing evidence (*Manhattan Life Ins. Co. v Continental Ins. Cos.,* 33 NY 2d 370, 372 [1974]; *Braun v Conrail,* 158 AD2d 644 [2d Dept 1990]). The presumption of delivery of the deed "may be repelled by proof of attendant facts and subsequent circumstances, such as the possession and control of the property by the grantor, the declarations of the supposed grantee which are inconsistent with the transfer of the title, which, with the acts and conduct of the parties in relation to the property, are all circumstances to be considered in determining whether there has been a delivery and acceptance of the deed" (*Ten Eyck v Whitbeck,* 156 NY 341, 352 [1898]).

Here, there is not a shred of objective evidence that the deed executed by the decedent in 2004 was ever delivered to Gladys during his lifetime. On the contrary, the evidence, particularly Gladys's own conduct, overwhelmingly establishes that Gladys was completely unaware of the deed's existence until she happened to find it sometime after the decedent's death. Her contention that she simply forgot that her husband had delivered the deed to her until after she found it is simply incredible. Her contention is made even more incredible by the inconsistencies in her own statements. At her deposition, she testified under oath that she located the will in a piece of furniture shortly before her move to California while packing up for the move. However, in a prior sworn statement, a petition dated May 18, 2008, she averred that she found the deed while unpacking in California.

Based on all of the foregoing, the court finds that the deed to the subject property was not delivered by the decedent to Gladys during his lifetime. Since title to the property has already passed to a third-party pursuant to the agreement of the parties to this litigation, the court directs that the net proceeds of sale being held in escrow are the property of the estate of Jesse Ross and should be delivered to the executors without delay.

The court declines to pass on the other prayers for relief at the present time, but they and the other outstanding issues in this estate will be the subject of a conference to be held at the courthouse on July 21, 2010 at 9:30 a.m.

Settle decree.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court