

**Matter of Albert Nathan Eisenberg Revocable Trust**

2012 NY Slip Op 34000(U)

March 9, 2012

Surrogate's Court, New York County

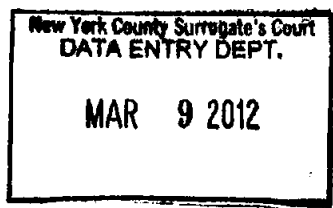
Docket Number: File No. 2010-2629/E

Judge: Kristin Booth Glen

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



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In the Matter of the Account of Proceedings of :  
Citibank, N.A., as Co-Trustee of the :  
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 :  
**ALBERT NATHAN EISENBERG** :  
**REVOCABLE TRUST,** :  
 :  
 :  
as Amended and Restated on June 11, 2004. :  
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File No. 2010-2629/E

G L E N, S.

This case presents a narrow issue as to the validity of two alleged gifts: was there legally cognizable "delivery" to support the claimant's allegation that her companion, Albert Eisenberg, gave her \$3 million from his revocable trust prior to his death.

Facts

Citibank, N.A., petitioner in a proceeding to settle its account as co-trustee of a trust created by Albert Eisenberg, as amended and restated on June 11, 2004 and known as the "Albert Nathan Eisenberg Revocable Trust," has moved for summary determination of certain claims filed by Etsuko Hamada, the settlor's companion of many years.<sup>1</sup> Eisenberg, who had been Citibank's co-trustee, died at age 93 on June 1, 2010. At the time of his death the trust was valued at \$6.5 million.

The trust instrument provides for the termination of the trust upon Eisenberg's death and the distribution to Hamada, at that time, of \$2 million. That disposition is not in dispute.

Hamada, however, claims Eisenberg also made two inter vivos gifts to her from the trust in 2005,

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<sup>1</sup> Hamada's claims, dated January 24, 2011, are attached to the accounting petition and reflected on Schedule J of the account.

more than four years before his death, aggregating an additional \$3 million (and thereby increasing her share from less than one-third to more than three-quarters of the trust's value).

One of her claims is for \$2 million, plus accumulated income or the legal rate of interest, and is based on her allegation that Eisenberg made an "oral gift" to her of \$2 million on February 8, 2005. In support of this claim Hamada submits a CD with telephone conversations recorded from her and Eisenberg's home. On the date in question there were two recorded conversations between Eisenberg and his personal banker at Citibank, David Katz. In the first, Eisenberg is heard to say, "I need to send, uh, Etsuko Hamada, uh, 2 million" but shortly thereafter says, "Just a minute— maybe I made a mistake there" and abruptly terminates the call. In the other conversation, no mention is made of the size of any gift. After the bank officer explains the bank's policy that instructions for a gift would need to be in writing, the call ends with Eisenberg's agreement that there would be a follow up call the next day.<sup>2</sup> In neither

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<sup>2</sup> According to a transcript prepared by Citibank from the CD's, after initial pleasantries, the first conversation proceeded as follows:

ALBERT EISENBERG: I need to send, uh, Etsuko Hamada, uh, 2 million.

DAVID KATZ: 2 million?

ALBERT EISENBERG: Yes.

DAVID KATZ: Okay.

ALBERT EISENBERG: Just a minute — maybe I made a mistake there.

[LAUGHTER IN BACKGROUND]

ALBERT EISENBERG: She's laughing.

DAVID KATZ: She's laughing. Are you sure? [CHUCKLES]

ALBERT EISENBERG: [CHUCKLES] I hope she's not crying. Uh, she'd be —

DAVID KATZ: I'd be laughing too if you said that to me. I'd be laughing happily, but, uh, you know, I —

[VOICE IN BACKGROUND]

DAVID KATZ: Explain to me what — uh — you — ex — could —

ALBERT EISENBERG: Let me just, uh —

DAVID KATZ: Sure.

ALBERT EISENBERG: I'll call you back in just a minute.

conversation was Eisenberg speaking with his trust officer, and he never mentioned the trust.

Hamada's other claim, for \$1 million plus statutory interest, is based on a document entitled "Deed of Gift" which, according to her, Eisenberg signed and gave to her on November 30, 2005, and which provides in its entirety: "ALBERT NATHAN EISENBERG, hereby

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DAVID KATZ: Okay, thank you.  
[CALL ENDS]"

The second recorded call on February 8, 2005, also was initiated by Eisenberg. It began:

"DAVID KATZ: Hello?  
ALBERT EISENBERG: Hello?  
DAVID KATZ: Hi.  
ALBERT EISENBERG: [CHUCKLES]  
DAVID KATZ: Okay, so we left – where we left off –  
ALBERT EISENBERG: Yeah. Uh, we left off, uh, with the mention of the amount.  
DAVID KATZ: Yes."

But settlor and Katz never discussed "the amount." Instead, settlor said merely: "I want Etsi [Hamada's nickname] to have this. Etsi Hamada."

Katz then informed settlor:

"DAVID KATZ: "Um, what we'll do is we'll need – we'll probably, uh, we would have to send you something in writing so that you could sign it to instruct us to do this.  
ALBERT EISENBERG: I see.  
DAVID KATZ: Um, what I'm going to do is I'm going to call John Cullen. Do you remember John?  
ALBERT EISENBERG: Yes, sure.  
DAVID KATZ: Okay, I'm going to call John and just let him know, uh, what you, you want to do and we'll get to work on this. Um, it's not going to happen today, obviously, 'cause it's five minutes before five.  
ALBERT EISENBERG: Yes.  
DAVID KATZ: But, um, what we can do is follow up with you tomorrow on this, if that's okay?  
ALBERT EISENBERG: Yes, fine."

irrevocably and unconditionally transfers and gives to Etsuko Hamada the sum of One Million Dollars (\$1,000,000).”

Hamada opposes Citibank’s motion to dismiss her claims. She contends the question of whether Eisenberg gave \$3 million to her can be determined only after discovery and a trial. The Attorney General, on behalf of the ultimate charitable beneficiaries of the trust remainder, supports Citibank’s motion.

### Discussion

On a summary judgment motion, the court must examine the evidence in a light most favorable to the party opposing summary judgment (*see Council of City of New York v Bloomberg*, 6 NY3d 380, 401 [2006]). That party “must assemble and lay bare its affirmative proof to demonstrate the existence of genuine, triable issues” (*Corcoran Group v Guy Morris et al.*, 107 AD2d 622, 624 [1st Dept 1985], *affd* 64 NY2d 1034 [1985]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, given the strict test that must be applied to prove an inter vivos gift, the facts presented by Hamada – viewed in the light most favorable to her – fail to support her claims.

It is well established that an inter vivos gift has three elements, each of which must be proved by clear and convincing evidence: intent on the part of the donor to make a gift, delivery of property pursuant to such intent, and acceptance of the property by the donee (*e.g. Matter of Szabo*, 10 NY2d 94, 98 [1961]; *Lichtenstein v Eljohnan*, 161 AD2d 397, 398 [1st Dept 1990]);

*Matter of Baum*, 66 AD3d 412, 413 [1st Dept 2009]).<sup>3</sup>

The law imposes a rigorous standard in assessing the element of delivery required for a valid gift. The nature of the delivery must be such that the donor is divested of all control over the property (*e.g. Isaacs v Isaacs*, 193 AD2d 468, 468 [1st Dept 1993]). A definitive statement of the long established standard is set forth in *Matter of Carr* (99 AD2d 390, 393 [1st Dept 1984], appeal dismissed 62 NY2d 802 [1984]), quoting *Matter of Van Alstyne* (207 NY 298, 306 [1913]):

“[Delivery] by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title.”

Application of this strict standard by New York’s courts grows out of the inherent susceptibility of these transactions to fraud or mistake, particularly after the death of the putative donor. As the Court of Appeals explained in an early case,

“*Because many gifts are sought to be shown by oral evidence after the donor's death, it is necessary for the public good to require clear and satisfactory evidence of the fact to prevent fraud and perjury.* There must be a delivery which results in a present change of dominion and ownership. Intention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given” (*Matter of Van Alstyne, supra*, 207 NY 298, 308 [emphasis added]).

See also Am Jur, Gifts § 19 (“The requirement of delivery is based upon public policy and convenience and constitutes a means of preventing mistake, fraud, and perjury”).

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<sup>3</sup> Acceptance of an item of value, however, such as the \$3 million at issue here, may be presumed (*Gruen v Gruen*, 68 NY2d 48, 57 [1986]; *Anagnostou v Stifel*, 168 AD2d 256, 256 [1st Dept 1990]).

So important is the putative donor's release of control that, with respect to a gift of stock, for example, the courts have generally required transfer of the shares on the books of the corporation (*e.g. Matter of Szabo, supra*, 10 NY2d 94, 98 [1961])["delivery must proceed to a point of no return, and this point can only be reached when there is a transfer of record on the stock books of the company"]. Even a gift by check remains incomplete, and therefore invalid, unless and until paid by the bank *before the death of the donor*. Until payment, the donor has the ability to stop payment on the check and therefore retains dominion and control over the subject funds; and the death of the donor before payment revokes the authority of the depository to issue a payment on the donor's account (*Matter of Mead*, 90 Misc 263 [1915], *affd* without op 173 AD 982 [2nd Dept 1916], *affd* without op 221 NY 645 [1917]; *Matter of Ross*, 6 Misc3d 1040(A) [Nassau Co Sur Ct 2005]; *Rosano v United States of America*, 245 F3d 212, 213 [2d Cir 2001] [applying the law of New York for tax purposes]). The principle is clearly stated in *Matter of Ludlam* (158 Misc 283, 285 [Sur Ct New York Co 1936]):

"In an unbroken line of authorities beginning with *Harris v. Clark* (3 N. Y. 93), the courts of our State have followed this rule. The pertinent principles enunciated by these decisions may be summarized as follows: (1) The check of itself is a mere order for the payment of money . . . (2) *It does not operate as an assignment, either legal or equitable, of any part of the fund . . .* (3) The death of the principal revokes the authority of the agent to collect the check" (internal citations omitted; emphasis added).

The test for delivery can sometimes be difficult to satisfy and may appear rigid. In order to avoid inequities, in certain circumstances the law accepts symbolic or constructive delivery in lieu of physical delivery. This occurs, for example, where a donor makes a deathbed gift of property not susceptible of actual delivery during what remains of the donor's life, but where the donor has done everything possible to effect the

transfer. One such case was *Matter of Wilson* (26 Misc 2d 839, Sur Ct New York Co 1960), where a seriously ill hospital patient instructed a third party who was then in possession of her jewelry to give it to the donor's sister. The court ruled the gift valid despite the death of the donor before the jewelry could be physically delivered. Notably, the court found that the donor "could do no more than she did do in her efforts to effect the gift" (*id.* At 842). The case illustrates the principle that while the nature of the required delivery is flexible to the extent appropriate in any particular set of circumstances, delivery nevertheless "must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit" (*Matter of Szabo, supra*, 10 NY2d 94, 98 [1961], citing *Vincent v Rix*, 248 NY 76, 83 [1928]).

As to the \$2 million that was the subject of the alleged oral gift on February 8, 2005, there is no question that the property remained in Eisenberg's trust account, vested in the co-trustees. Hamada has conceded as much, as she must.<sup>4</sup>

Further, the conduct of all parties involved reflects their unanimous understanding

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<sup>4</sup> In a related proceeding, Hamada has filed a memorandum of law which states,

"All discussions thereafter [after the personal banker suggested that her lawyer attend a meeting to discuss the transfer] changed and confused Ms. Hamada's and Mr. Eisenberg's intentions to transfer the initial two (\$2) million dollars into Ms. Hamada's personal account so that she would be 'protected.' Having spoken to [the banker] regarding taxes, Ms. Hamada herself then reduced the transfer to one (\$1) million out of concern and pressure from Citibank. Mr. Eisenberg's intentions were always to provide more for her. Even after Ms. Hamada reduced her bequest in half, *still no transfer was made*" (emphasis added) (Memorandum in opposition to proceeding to remove trustee ¶ 21).

Here the court also notes that Hamada's claim that *she* reduced her "bequest" betrays her misunderstanding of a gift. It is the donor, not the donee, who makes a gift.

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that Eisenberg maintained dominion and control over the trust assets in question. Recordings of subsequent telephone conversations and correspondence submitted by Hamada establish beyond question that she, Eisenberg, his lawyer, and bank representatives continued to discuss the amount and composition of any gift that might be made. Eisenberg even stated a week later, “I don’t know whether I should, whether I should be just making a payment, switching something to Etsuko Hamada’s account now.” As in *Matter of Baum, supra* (66 AD3d 412, 414 [1st Dept 2009]), where the court rejected a claim of a gift of shares in a cooperative apartment corporation, “there is no evidence that decedent ever relinquished dominion and control over the [property]; he was free to change his mind at any time.”

Nor do Eisenberg’s fragmented conversations with the bank officer on the date he allegedly made the gift satisfy the requirement that a donor do all that is reasonably possible to transfer property when actual delivery is not possible. In the days, months, and even years that followed prior to his death, nothing— assuming he had the requisite capacity— prevented Eisenberg from giving the written instructions requested by the bank to effectuate a gift.

As to the alleged later gift of \$1 million, again, no transfer ever occurred. Hamada argues the “deed of gift” was symbolic of a transfer to her of \$1 million from the trust. However, even if Eisenberg had signed and delivered the document entitled “deed of gift” to her on November 30, 2005, it would not have effectuated such a gift. Here, the trust assets, securities and cash, were susceptible of actual delivery. Delivery of securities to Hamada could have been accomplished by Eisenberg’s written instructions to the

depository of his funds either for the transfer of securities into a brokerage account in her name, or for the re-registration of securities directly into her name. Similarly, Eisenberg could have accomplished delivery of cash to Hamada by giving written instructions, first, for the sale of securities to the extent necessary to raise cash, and then for the issuance of a draft payable to her. Many years intervened between the date on the instrument and the date of Eisenberg's death. In these circumstances, symbolic delivery is not available. As the court stated in *Matter of Lederer* (225 AD2d 395, 395-396 [1st Dept 1996]), "Without actual delivery of the funds to the alleged donees, *which in the present circumstances could readily have been accomplished*, the alleged inter vivos gifts were never completed during the lifetime of the decedent" (emphasis added; internal citation omitted).

The instant document would fail even if symbolic delivery were otherwise available. A deed of gift, according to the Restatement (Third) of Property (Wills and Other Donative Transfers) § 6.2(p), is an "inter vivos donative document" which may effect a transfer of personal property. An essential component of a deed of gift is that it "describes the subject matter of the gift" (*id.* at § 6.2[q]). With no instruction as to the intended source of the gift – leaving the possibility that the gift had previously been made from another source – no depository could reasonably act on the strength of the document Hamada presented.

As demonstrated, symbolic or constructive delivery to sustain the alleged gifts is not available with respect to either alleged gift. Even if circumstances were different and symbolic delivery were available, neither Eisenberg's conversations with his personal

banker nor the “deed of gift” would have qualified as a substitute for actual delivery.

Since there was no delivery of either alleged gift, the court need not reach the question of whether Eisenberg had the requisite intent to make the claimed gifts, or indeed whether he had the capacity to make those gifts. Neither alleged gift can be sustained.

Finally, the court rejects Hamada’s argument that discovery of Citibank is necessary to aid her in eliciting information to oppose this motion for summary judgment. The court in *Baldasano v Bank of New York* (199 AD 2d 184, 185 [1st Dept 1993]), upon which she relies, held that “[s]ummary judgment is not justified where the existence of essential facts depends upon knowledge exclusively within the possession of the moving party.” But here Hamada gives no indication of “essential facts” within or even possibly within Citibank’s knowledge that would have a bearing on the validity of the alleged gifts.

She claims that evidence adduced in discovery will show that Citibank intentionally prevented the proceeds of the alleged gifts from being paid. Her position not only presupposes that valid gifts were made, but also is not relevant to this accounting proceeding.<sup>5</sup> Hamada has not identified any information, nor could the bank have information not already known to Hamada, that would pertain to an essential but missing element of proof in this case: Eisenberg’s surrender of control over the trust assets. Lack of discovery is not a bar to summary judgment in these circumstances.

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<sup>5</sup> Hamada has brought contract, tort, and other claims against the bank in separate proceedings. These claims are not relevant to the issue of the validity of the alleged gifts.

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The motion of Citibank, N.A., for summary determination dismissing Hamada's claims is granted. This decision constitutes the order of the court.



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S U R R O G A T E

Dated: March 9, 2012