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

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In the Matter of an Accounting by the Co-Executors of the Estate of

GRACE T. RELLA,

Deceased.

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File No. 2010-2633

ANDERSON, S.

The contested accounting for the estate of Grace Rella was transferred to this court from the Surrogate's Court of Bronx County. The executor,[1] Gilbert Rella ("Gilbert"), has moved for partial summary judgment (SCPA 3212) dismissing objections contesting a gift that decedent (his mother) had made to him a few months before her death.

As a preliminary matter, objectants (two of decedent's other children) challenge the motion as untimely under CPLR 3212. Under the statute, a motion for summary judgment must be made within 120 days of the filing of a note of issue unless a different deadline has already been set by the court or there is "leave of court on good cause shown" (CPLR 3212[a]). In 2005, while this proceeding was still in Bronx County, objectants filed a Note of Issue and, in response, the executors moved to strike. Ultimately, however, the parties agreed to take further discovery and to hold the motion in abeyance in the interim. Some seven years later, now that the matter has been transferred to this venue, it appears that the motion to strike remains outstanding (if not rendered moot by the completion of discovery). The ambiguity of the situation with respect to the Note of Issue is itself "good cause" under the statute to allow the summary judgment motion

[1]The accounting had been commenced by the current executor and his co-fiduciary. The latter has since died, however, and the fiduciary of her estate has been substituted for her in the proceeding.

to be made at this juncture.

Background

Decedent, an octogenarian,[2] died on April 15, 1997, survived by five children. In a will executed on November 11, 1992, as modified by a codicil dated November 7, 1996, decedent divided her estate equally among four of the five children and named Gilbert and her daughter Marie Ann Sedacca as co-executors. The disinherited child objected to probate, but her years-long challenge ultimately failed after a trial on issues of testamentary capacity and undue influence (*see Matter of Rella*, 278 AD2d 136 [1st Dep't 2000]). The propounded instruments were admitted to probate on January 15, 2007.

The gross estate thus bequeathed to the four children, worth about $917,000, would have been significantly larger had decedent not transferred to Gilbert her 50 per cent interest in a close corporation, Coliseum Fuel Distributors ("Coliseum"), a few months before her death. Decedent had obtained her interest in Coliseum, a real estate holding company, by inheritance from her husband, who had died in 1992. Gilbert – who operated a business in a building that constituted Coliseum's sole asset – had obtained ownership of the other 50 per cent interest in the company while his father was still alive, by purchase from his father's business partner.

Decedent's transfer of her Coliseum shares to Gilbert was implemented by him as corporate officer in accordance with a donative plan reflected in a document signed by decedent

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[2]There appears to be some question as to whether decedent was 84, or 89, years old at the time she made the gift (*see Matter of Rella*, 278 AD2d 136 (1st Dep't 2000). Where the grounds of mental incapacity or mental vulnerability have been raised, the chronological age of the purported victim in by no means conclusive proof or disproof of either ground, but may nevertheless have some bearing on the issue.

in her lawyer's offices on November 7, 1996, one month after she had consulted with her lawyer and his CPA colleague in their offices. According to the gift tax return filed for decedent in respect of the transfer, the value of the gift was approximately $195,000.

The present motion

Gilbert as executor seeks summary judgment dismissing the portion of objectants' pleading that challenges Schedule A's omission of Coliseum capital stock from its list of estate assets, as well as Schedule A-1's omission of the income from Coliseum. The grounds raised by these objections are that (1) decedent did not have capacity to transfer the stock to Gilbert and (2) in any event such transfer was the product of undue influence.

Parties moving for summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law, *i.e.*, that there is no open, material question of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2c 320, 324 [1986]). If movants make such a showing, the opposing parties can resist summary disposition only by producing proof, in admissible form, that a material question of fact remains open, thus requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Because summary determination of a party's position eliminates that party's recourse to a trial, it is a "drastic measure" (*F. Garofalo Elec Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]) and should therefore be granted only cautiously, according the party opposing the motion every favorable inference (*id.*). On the other hand, it must also be recognized that "timidity in exercising the power in favor of a legitimate claim and against an unmerited one, not alone defeats the ends of justice in a specific case, but contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation" (*Di Sabato v Soffes*, 9 AD2d 297, 299).

Objection as to lack of capacity to make a gift

There is no dispute that, as Gilbert's documents demonstrate, the transfer of decedent's interest in Coliseum was supported by two of the three prerequisites of a gift–delivery by the donor and acceptance by the donee. However, the first prerequisite of a gift – a present donative intent -- is implicitly challenged by objectants' contention that decedent did not have the mental capacity to harbor such an intent at the time of the transfer.

Where a gift is challenged, the donee bears the burden of proving by clear and convincing evidence that the donor made a present transfer knowingly or "understandingly" (*Matter of Clines*, 226 AD2d 269 [1st Dept 1996], *citing Gordon v Bialystoker Ctr.*, 45 NY2d 692, 695-96). But the donee's burden in such respect is lightened by the law's presumption that individuals have capacity (*see, e.g., Feiden v Feiden*, 151 AD2d 889, 890 [2d Dept 1989]; *Matter of Obermeier*, 150 AD2d 863 [2d Dept 1989]; *400 West 59th St. Partners, LLC v Edwards*, 907 NYS2d 765 [App. Term, 1st Dept 2010]; Prince, Richardson on Evidence § 3-110 [Farrell 11th ed.]). The donee's burden is further eased by the law's recognition that, "A person ... may be of old age and [even] mentally weak, and still be able to understand and comprehend the meaning of a deed or the transfer of property" (*Aldrich v Bailey*, 132 NY 85, 89).

In this case, the presumption of capacity is reinforced by the deposition testimony of three disinterested individuals. One is Dr. Anthony DeMartino, who had been decedent's internist for more than 15 years. Dr. DeMartino testified that he had examined decedent during seven office visits in 1996, including a visit on November 5, 1996 (*i.e.*, only two days before the transfer at issue). According to him, decedent had been alert at such times and cogent enough to have

described the pains and other symptoms of her various age-related physical ailments.

A second witness, lawyer Charles Schmelkin, had known decedent and her husband for more than fifty years, had drafted a will that she had executed shortly before her husband died, and had acted as her counsel in relation to the administration of her husband's estate. According to him, decedent had come to his office to discuss preparation of the codicil in order to disinherit her daughter Elizabeth and to make arrangements for a gift to Gilbert that would leave him with full ownership of Coliseum. Lawyer Schmelkin and his nephew, Stephen Schmelkin, a C.P.A., discussed those matters with decedent for about two hours. Gilbert, who had driven decedent to the Schmelkin offices, was present during part of the discussions. According to lawyer Schmelkin, in discussing plans for the gift, decedent at some point asserted that "she had been wanting to do this for some while." At a follow-up meeting on November 7, 1996, lawyer Schmelkin met with decedent and C.P.A. Schmelkin for a few minutes "to bring her up to date as to what [we] had done, in response to her request of October 7, '96." The two waited while decedent read instruments that had been prepared for her, including the document that lawyer Schmelkin referred to in his testimony as a "declaration of gift." According to lawyer Schmelkin, decedent at some point said, "Thank you. This is what I wanted to do." Gilbert was in attendance on this occasion too and was present during part of the discussion among decedent and the professionals.

The foregoing testimony, coupled with the presumption of capacity, is more than enough to make a prima facie case that decedent had capacity to make the gift at the time of the subject transfer. In his affirmation in opposition, objectants' counsel avers that his two clients disclaim having personal knowledge of facts that might rebut the presumption of capacity. Rather than

proffering, for example, affidavits from persons with knowledge, he instead rests on the proposition that summary judgment on the capacity issue would be improper as a matter of law in light of the history of the probate proceeding in this estate. He points specifically to the decision of the Appellate Division affirming the Surrogate's denial of a summary judgment motion by the will proponent. The trial court had ruled that questions of fact remained as to decedent's capacity to make a will on November 7, 1996[3] (*i.e.*, the same date as the gift now in question), as well as to the voluntariness of her disinheritance of Elizabeth. The Appellate Division affirmed (*Matter of Rella*, 278 AD2d 136 [1st Dept 2000]), remanding the matter to the Surrogate for trial of the capacity and undue influence objections.

On trial of the probate contest, the testator was found to have had testamentary capacity. Of course, such finding is not per se conclusive on the present issue of decedent's donative capacity, since less mental acuity is required to support a will than is required to support a lifetime gift (*Matter of Coddington*, (281 AD 143 [3d Dept 1952], *affd* 307 NY 181]). Nevertheless, objectants' burden here was to demonstrate that there is a genuine question of fact on the capacity issue by laying bare their own proofs in that connection (*Mongiovi v O & Y Equity Corp.*, 148 AD2d 358, 359 [1st Dept 1989]). They have failed to carry that burden, having submitted no evidence to create a genuine issue of fact in this connection.

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[3]The Appellate Division decision noted that affidavits from Elizabeth and one of decedent's sons (Vincent, a medical doctor who is one of the objectants in the present proceeding) provided evidence of decedent's "deteriorated physical, emotional and mental states" at the time in question (*Matter of Rella*, 278 AD2d 136 (1st Dept 2000). However, as noted in the text, *supra*, objectants have declined to submit such evidence on the summary judgment motion in the present proceeding.

Objection as to undue influence

Movant cannot prevail on his motion for summary dismissal of objectants' undue influence claim unless he has submitted prima facie proof that the transfer of Coliseum to him was free from any such taint. Gilbert's proofs (including the depositions of disinterested witnesses) satisfy that threshold requirement. For one thing, they support the proposition that the donor was cogent and, as lawyer Schmelkin put it at his deposition, "resolute." For another, they also show that the donative plan (a) could well have made sense to decedent under the circumstances, given Gilbert's existing relationship to the company, and (b) was implemented in accordance with the advice and assistance of professionals of decedent's choosing.

It is therefore incumbent upon objectants to raise a material issue of fact in connection with the undue influence claim. Objectants' papers suggest that the possibility of a confidential relationship between decedent and Gilbert raises such a question. As purported evidence of such a relationship between the two, objectants submit copies of records of various bank accounts opened, and checks drawn, by decedent for the benefit of various family members. But neither this documentation per se, nor its indication that decedent's largesse in her banking arrangements (at least during the time period spanned by these records) to some degree favored Gilbert over the others, adds up to evidence of a confidential relationship within the meaning of the cases (*see Ten Eyck v Whitbeck (56 NY 341); see e.g. Gordon v Bialystoker Center*, 45 NY2d 692, 699; *Cowee v Cornell*, 75 NY 91, 99-100; *Matter of Marocchi*, 117 AD2d 670 [2d Dept 1986]). In other words,

> "[although t]he law presumes in the case of guardian and ward, trustee and *cestui que trust*, attorney and client, and perhaps physician and patient,

> from the relation of the parties itself that their situation is unequal ... [and] while the doctrine is without doubt to be extended to many other relations of trust, confidence or inequality, the trust and confidence, or the superiority on one side and weakness on the other must be proved in each of these cases; the law does not presume them from the fact for instance that one party is a grandfather and old and the other a grandson and young .... The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely."

Cowee v Cornell, supra, 75 NY at 101.

Accordingly, objectants cannot invoke a presumption to support the proposition that Gilbert was in a position of special trust and control vis-a-vis decedent. Nor can the facts establishing a confidential relationship be derived from the conclusory, unsubstantiated allegations of an affiant or affirmant who does not speak from personal knowledge – all that is offered by the affirmation of objectants' counsel. Furthermore,

> "even if the court were to find the existence of a confidential relationship, its effect would be negated by the [mother]-son relationship of the parties for purposes of raising an inference of undue influence (Matter of Walther, [ ]). Lastly, for the court to draw an inference of undue influence from a confidential relationship, such inference must be the only one that can reasonably be drawn, in circumstances that are 'not inconsistent with a contrary inference' (Matter of Walther, supra, at 54, quoting Matter of Reuf, 180 AD 203, 204 [2nd Dept, 1917]; Matter of Leone, NYLJ Feb 3, 2000, at 36, col 2 [Sur Ct Westchester Co.]). That is not the case here."

Matter of Whitney, NYLJ, Jul. 21, 2009, at 34, col 6 [Sur Ct, New York County]).

Moreover, although the record indicates that Gilbert was present for a portion of decedent's discussions with the professionals, objectants cite no precedent in which such fact has been deemed a per se basis for an inference of undue influence, much less basis for excluding a contrary inference. Indeed, such an inference would be particularly inapt where, as here, the

professionals in question were the donor's own long-time advisers, and where there is no suggestion that their primary allegiance was for some reason to the donee rather than to the donor.

Even worse perhaps for objectants' position on this motion, there is no evidence that Gilbert's relations with decedent, however close, tended to isolate her from objectants or from anyone else. Moreover, there is no evidence that decedent was so dependent upon Gilbert as to be vulnerable to his replacing her volition with his own. To the contrary, the record indicates that the gift now in issue was prompted by, as lawyer Schmelkin testified at his deposition, decedent's wish to "protect" Gilbert.

Nor is evidentiary value added to objectants' case by their speculation that decedent (who had inherited her interest in Coliseum only a few years earlier[4]) was unaware of the value of the gift, since speculation cannot serve as a substitute for evidence (*see e.g. Matter of Ryan*, 34 AD2d 212, 213 [1st Dept 2006]; *Matter of Weltz*, 16 AD3d 428, 429 [2d Dept 2005]; *Matter of Bush*, 85 AD2d 887, 889 [4th Dept 1981]). Indeed, it is undisputed that decedent ultimately signed the gift tax return prominently disclosing the value of the gift, and there is no suggestion in the record that decedent failed to notice the valuation on the face of the return or that, on noticing it, she expressed discomfort or surprise. Finally, Gilbert's inconsistent responses at separate depositions when asked whether he had been aware of the planning for the gift before it was made – he at first disclaiming, but later conceding, such awareness – cannot be the basis for denial of summary judgment on the gift issue, any more than objectants' mutally contradictory

[4]It is not clear whether decedent had been the fiduciary of the estate of her husband (from whom she inherited her interest in the company), although the record does indicate that it was she who paid the fee of counsel in connection with the estate's administration.

deposition testimony[5] could be the basis for a grant of such relief.

For the foregoing reasons, Gilbert's motion for summary dismissal of the objections challenging decedent's transfer of her interest in Coliseum to Gilbert is granted.

This decision constitutes the order of the court. In due course, the parties will be notified of a conference date for discussion of matters preliminary to trial of the remaining objections.

Dated: MAR 29, 2012

SURROGATE

[5]Thus, at a deposition of objectant Anthony Rella, the deponent had the following exchange with counsel: "[Counsel]Q.: I'm going to ask you again, as you sit here now, in what way do you know that Marie Ann took advantage of your mother?" "A.: At this point I can't think of anything. I know Gilbert did because of the alleged gift. That's how, you know and I don't–...." "[Counsel] Q.: Is there any other way that Gilbert would have taken advantage of your mother other than to be the recipient of this gift?" "A.: Things like I'm saying, the banking. I don't know what happened in the banking. I know there were cashed checks that were cashed by Gilbert ...." By contrast, at a prior deposition (in the probate proceeding), objectant Vincent Rella, M.D., responded "No" to the question, "Do you have any reason to believe that your brother, Gilbert, was exercising control over your mother?"