

**Crawford v Smith**

2020 NY Slip Op 30070(U)

January 6, 2020

Supreme Court, Suffolk County

Docket Number: 18411/2012

Judge: Martha L. Luft

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Index No. 18411/2012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART A50 - COUNTY OF SUFFOLK

**DECISION AFTER TRIAL**

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RICHARD CRAWFORD, as nominated  
Executor under the Will of JOAN T.  
SMITH, and RICHARD CRAWFORD,  
Individually,

Plaintiff,

-against-

KENNETH SMITH,

Defendant.

\_\_\_\_\_ x

**PLAINTIFF'S ATTORNEY**

Akiva Shapiro, Esq.  
Akiva Shapiro Law, PLLC  
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Old Bethpage, NY 11804

**DEFENDANT'S ATTORNEY**

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The Law Firm of Gary N. Weintraub, PC  
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The parties in this action are brothers and this long-standing controversy concerns the ownership of their deceased mother's home located at 832 Hampshire Road, W. Bay Shore, New York. There is no dispute that on February 26, 2010, Joan T. Smith, the parties' mother, executed a deed transferring that property to defendant, Kenneth Smith, while reserving to herself a life estate therein. A non-jury trial was conducted in this matter before the undersigned at which the plaintiff, Richard Crawford, asserted two theories as bases for voiding the deed, namely, that their mother was not mentally competent at the time of the transfer and/or that defendant had exercised undue influence over the mother to procure the transfer.

At trial, the plaintiff presented the testimony of three witnesses. Dr. Israel Birnbaum, a consulting psychologist at Our Lady of Consolation, the nursing home at which the mother resided when the transfer took place testified regarding his psychodiagnostic evaluation of Ms. Smith. This evaluation took place on January 22, 2010 and was prompted by Ms. Smith's accusations of mistreatment by the staff. The accusations, such as that a staff member hit her with a frying pan, were not credible, and Dr. Birnbaum described them as "delusional." He found it noteworthy that one of her medications, Seroquel, had been decreased recently and he recommended returning her to the previous dosage. He noted that she had experienced a similar episode in May of 2009. The primary diagnosis was dementia with delusional features. An entry

in her medical record from January 25, 2010 indicated that the Seroquel had been increased and that there had been no accusations against staff.

Other notes in her medical record indicated her chronic neck pain. A progress note that covered the period of February 26, 2010 through March 5, 2010, indicated, in regard to her physical therapy, as of March 5, 2010, that she had limited participation in those sessions and was often lethargic and unable to actively participate. She was admitted to the hospital on March 9, 2010 with a diagnosis of altered mental status and urinary tract infection.

On April 20, 2010, Dr. Birnbaum again performed a psychodiagnostic evaluation of Ms. Smith, prompted by a request that her capacity to make decisions be assessed prior to her executing a power of attorney. He found her to be competent and noted that the "previous medical record indications of dementia are not borne out by present evaluation." Dr. Birnbaum noted that her chronic pain could have affected her mental state. He stated that he found it difficult to speculate as to Ms. Smith's mental capacity on February 26, 2010.

The second witness presented by plaintiff was Raymond M. Smolenski, an attorney with whom Ms. Smith consulted July 21, 2011. The consultation was arranged by the plaintiff, who provided all of the background information Mr. Smolenski received. Mr. Smolenski testified that he was hired to investigate, not to litigate, the issue of getting Ms. Smith's house back. He met with her at the nursing home on the aforementioned date and in September of 2011. Mr. Smolenski testified that Ms. Smith did not recall details of the transfer of her property, just that defendant came to the nursing home and had her sign some papers. She was adamant about getting the house back in her name. Mr. Smolenski sent some correspondence to the attorney who prepared the deed and the attorney who prepared the power of attorney for Ms. Smith. He also wrote to defendant asking him to voluntarily transfer the house back to his mother. When his efforts failed to achieve the desired result, his legal work for Ms. Smith was at an end. Upon cross examination, he stated that he had no information about Ms. Smith's intent in February of 2010, nor about whether plaintiff had pressured his mother in any way.

The final witness called by plaintiff was Shannon MacLeod, an elder law attorney who provided services to Ms. Smith. She was originally contacted by the defendant in August of 2009 to provide Medicaid planning for Ms. Smith. Ms. MacLeod testified that Ms. Smith did not seem competent at that point. She met with Ms. Smith and the defendant in December of 2009. Ms. Smith refused to authorize Ms. MacLeod to contact the Department of Social Services on her behalf in connection with a Medicaid application. She was tired and did not want to discuss the topic on that occasion. Earlier, Ms. MacLeod had mentioned to defendant the various payment options available and the Medicaid requirements regarding assets an applicant could have. This included the provision that a transfer of the mother's home to an exempt individual would protect the home from consideration as an asset for Medicaid purposes, and the fact that plaintiff was such an individual and defendant was not.

Around this period of time, the nursing home was considering discharging Ms. Smith for nonpayment, in that the Medicare coverage period had ended and no Medicaid application had been filed. Ms. MacLeod filed an application. When Ms. MacLeod met with Ms. Smith in January of 2010, she was much more alert and oriented. Ms. Smith expressed that she did not wish to pursue the Medicaid application, nor any Medicaid planning because the plaintiff would pay the nursing home bills, which she had sufficient funds to cover.

In January of 2010, Ms. MacLeod received a letter from the defendant stating that his mother had enough money and did not need Medicaid. He also stated that he did not believe his mother had capacity and was concerned that the plaintiff was intimidating her. Ms. MacLeod did not hear from defendant from early February until the end of her representation of Ms. Smith in May of 2010. During January 2010, she was in more frequent contact with the plaintiff who was assisting in providing documentation for the Medicaid application, since he had access to Ms. Smith's mail and her records.

Ms. MacLeod next met with Ms. Smith in late March 2010 to discuss the denial of the Medicaid application. Ms. Smith told her that the plaintiff would pay her bills, and repeated that she had sufficient funds and did not need to do any Medicaid planning.

Her next meeting with Ms. Smith was in April of 2010. Plaintiff called her to initiate this, and, at Ms. MacLeod's request, Ms. Smith called herself to set up the appointment. Ms. Smith stated that she wanted Ms. MacLeod to prepare a power of attorney and a will for her. At the time Ms. Smith was not speaking to the defendant, with whom she was angry because he had not visited her in a while. The power of attorney was prepared and signed later that month, designating the plaintiff as the attorney in fact. Will provisions were discussed at that time.

The final meeting was on May 3, 2010, at which the will was executed. The sole beneficiary was the plaintiff. He was also designated the executor. The will contained a provision stating that designating the plaintiff as the sole beneficiary was not done out of any lack of love and affection for her other two children - the defendant and a daughter. She had expressed to Ms. MacLeod that she wanted to take care of the plaintiff who had taken care of her. She had never spoken ill of the defendant, other than to say that he did not visit her enough.

Ms. MacLeod testified that she had no reason to believe that Ms. Smith lacked competence from January of 2010 until the end of her representation in May of 2010. She also stated that she was never informed of the transfer of the house in February of 2010. She had run a title search earlier, in December of 2009 and had no reason to believe that any change had taken place. She never expressed to Ms. MacLeod that she felt bullied by either of her sons and stated that she loved all of her children. She also expressed to Ms. MacLeod that she made her own decisions. Ms. MacLeod testified that it was not uncommon for parents to provide for one child in a will and another outside of the will.

After Ms. MacLeod's testimony, the plaintiff rested. The defendant then offered into evidence a certified copy of the deed at issue and rested his case without presenting any further testimony. The recording and endorsement page reflects the name of an attorney, Millagros Rogers, Esq. and Ms. Smith's signature was notarized by Dennis M. Drumm.

The principle has long been established that a party's competence to enter into the transfer of her property is presumed, and that the party seeking to invalidate such transfer has the burden of proving the transferor's incompetence. *Crawn v Sayah*, 31 AD3d 367, 368, 819 NYS2d 61,62 (2d Dept. 2006); *Feiden v Feiden*, 151 AD2d 889, 890, 542 NYS2d 860, 862 (3d Dept. 1989). The requisite showing must be made with regard to the day the deed was signed. *Crawn v Sayah*, *supra*; *Mastrantoni v Mancini*, 171 AD3d 908, 909, 95 NYS3d 897, 898 (2d Dept. 2019); *Matter of Nurse*, 160 AD3d 745,747, 75 NYS3d 545, 548 (2d Dept. 2018).

A diagnosis of Alzheimer's disease or other forms of dementia does not create a presumption of incompetence and one suffering from such a disease may execute a valid deed. *Matter of Nurse*, *supra*; *Feiden v Feiden*, *supra*; *In re Lee*, 294 AD2d 366, 367, 741 NYS2d 721, 722 (2d Dept. 2002); *Gala v Magarinos*, 245 AD2d 336, 337, 665 NYS2d 95, 96 (2d Dept. 1997). In such a situation, the party seeking to set aside the deed must establish that, at the time of signing, the person was so affected by the disease that it rendered him or her "wholly and absolutely incompetent to comprehend and understand the nature of the transaction (*citations omitted*)." *Matter of Nurse*, *supra*.

In the present matter, there was no testimony from anyone present at the time of the execution of the deed, such as the attorney who prepared the deed or the notary public who notarized Ms. Smith's signature. The evaluation performed by Dr. Birnbaum took place a month before the execution of the deed and indicated that she was suffering paranoid delusions at that time. His evaluation did not address her ability to comprehend information presented to her. His recommendation that her Seroquel be increased to the previous dosage apparently had a salutary effect because a notation in her medical record from a few days later indicated that with the increased dosage there were no more of the accusations against staff, the behavior that had prompted Dr. Birnbaum's evaluation.

Moreover, when Dr. Birnbaum performed another evaluation of Ms. Smith in April of 2010, he found the prior diagnosis of dementia was not borne out. He stated that it would be difficult for him to speculate as to Ms. Smith's competence on the date of the execution of the deed. While her history did contain evidence of a few episodes involving some sort of altered mental state, there also was ample evidence of extended periods of her being alert and oriented. Such a showing simply does not meet the heavy burden the law requires in order to overcome the presumption of competence on the day of execution of the deed. *Feiden v Feiden*, 151 AD2d at 891, 542 NYS2d at 862-863.

The second basis asserted by plaintiff for setting aside the deed is that it was executed as

a result of the undue influence of the defendant. While there is no doubt that the burden of proof in this regard rests with the one asserting its existence (*Matter of Nurse*, 160 AD3d at 748, 75 NYS3d at 549), plaintiff relies on the corollary principle that the burden shifts to the beneficiary of the transaction to establish its fairness where that person stands in a confidential relationship with the one executing the transaction, in this case the deed. *Id.* Determination of the undue influence issue in this matter hinges on whether plaintiff established that the defendant stood in such a confidential relationship with his mother, thus shifting the burden to defendant to establish that the transaction was fair, something the defendant did not even attempt to do.

The analysis begins with the proposition that “the existence of a family relationship does not, per se, create a presumption of undue influence; there must be evidence of other facts or circumstances showing inequality or controlling influence.” *In re Estate of Nealon*, 104 AD3d 1088, 1089, 962 NYS2d 481, 482 (3d Dept. 2013), (quoting *Feiden v Feiden*, *supra*), *aff’d* 22 NY3d 1045, 981 NYS2d 353 (2014); *see also Cowee v Cornell*, 75 NY 91, 101 (1878) (law does not presume confidential relationship where parties are grandfather and grandson, such depends on the circumstances of each case); *In re Marcus Trusts*, 297 AD2d 683, 684, 747 NYS2d 187 (2d Dept. 2002).

The Court of Appeals has set forth the criteria for determining undue influence as follows:

It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear . . . lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation (citations omitted).

*In re Walther’s Will*, 6 NY2d 49, 53, 188 NYS2d 168, 172 (1959).<sup>1</sup>

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<sup>1</sup>Plaintiff’s reliance on *Gordon v Bialystoker Center & Bikur Cholim*, 45 NY2d 692, 412 NYS2d 593 (1978) as support for the general proposition that only “slight evidence” is required to shift the burden is misplaced. First, the proposition only came into play after it was clearly established that the parties, an elderly patient and an

In the present matter, the plaintiff presented no direct evidence of inequality or controlling influence on the part of the defendant. While he was involved in arranging for his mother to meet with Ms. MacLeod, the testimony of the latter presented a picture of Ms. Smith as an independent-minded woman, who felt free to express her displeasure with the infrequency of defendant's visits, as well as to express her disinclination to apply for Medicaid benefits. There was nothing in her description of her interactions with Ms. Smith to lead the court to view the latter as "too weak to resist" the importuning of anyone. The plaintiff was the son who apparently handled certain of Ms. Smith's affairs in that he is the one she consistently stated would pay the nursing home bills and also was the one to receive her mail at home. The circumstances regarding how another attorney was enlisted to prepare the deed in question were never explained. That person was apparently deposed in the course of pre-trial proceedings in this matter, and the court can only assume, based upon plaintiff's failure to call her as a witness, that her testimony would not have supported his case. Nor did the court hear from the notary public who witnessed Ms. Smith's signature.

Ms. Smith's periodic experiences of delusions, as testified to by Dr. Birnbaum, do not establish a basis for finding that defendant exercised a controlling influence, any more than they would to find that plaintiff, or, indeed, anyone else exercised such influence. *See Feiden v Feiden*, 151 AD2d at 891, 542 NYS2d at 863 (where elderly father was alert and oriented at times and suffered periods of confusion and disorientation, showing not sufficient to shift burden of proof regarding deed transfer to sons). The only other evidence presented was from Mr. Smolenski, who did not even meet Ms. Smith until almost a year and half after the transaction in question. While he did indicate that Ms. Smith wanted to recover full title to the property and claimed she had not understood the transaction, such testimony does not support a finding of coercion or undue influence on the part of defendant at the time of the transaction.

Moreover, while undue influence may be established by circumstantial evidence, "[a]n inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference. (citation omitted)." *In re Walther's Will*, 6 NY2d at 54, 188 NYS2d at 173; *see also Matter of Estate of Swain*, 125 AD2d 574, 509 NYS2d 643 (2d Dept. 1986). Plaintiff's witness, Ms. MacLeod, testified that it was not unusual for a parent to provide for one child outside of the will and another by way of the will. Such an inference from the present set of facts is just as likely as the inference plaintiff wishes the court to draw.

The court finds that the plaintiff did not establish that there existed the requisite confidential relationship between defendant and his mother to warrant shifting the burden to the former to establish that the transaction was fair, and also did not establish that the transaction

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infirmity to which she donated money, did not act from positions of equality. Second, the issue of whether a confidential relationship was analyzed separately. *See* Appellate Division decision at 59 AD2d 522, 396 NYS2d 896, 897 (2d Dept. 1977). In the present case, the issue being addressed is whether plaintiff established that there was, indeed, a confidential relationship between Ms. Smith and the defendant, and there is no authority to state that only slight evidence is required in that regard.

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was the result of or affected by any undue influence.

Based upon the foregoing, the complaint is dismissed.

Submit judgment.

Date: January 6, 2020  
Riverhead, New York

  
HON. MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION