

**Matter of Tong**

2020 NY Slip Op 33605(U)

October 14, 2020

Surrogate's Court, New York County

Docket Number: 2014-450/B

Judge: Rita M. Mella

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

... Court  
Date: October 14<sup>th</sup> 2020

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Proceeding for Imposition of a Constructive Trust, Estate of

DECISION  
AFTER TRIAL  
File No.: 2014-450/B

SYLVIA MAO TONG,

Deceased.

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M E L L A, S. :

Decedent Sylvia Mao Tong died intestate at age 86 on January 22, 2014. She was a widow, survived by two sons, petitioner Teddy Tong and respondent Eugene Tong, as her sole distributees. This proceeding concerns a brokerage account that decedent transferred from her own name to Eugene's shortly before her death. Alleging undue influence, Teddy, as limited administrator, seeks the imposition of a constructive trust on the assets.

Background

In 2007, Eugene moved to Seattle with his wife and children but he spent 50 or 60 percent of his time in New York, as required for his work in the field of information technology. When in New York, he stayed with his mother in her apartment. Teddy lived with his family in California where he had a medical practice. Teddy would visit his mother with his wife and two children once or twice a year. He stayed in close touch with her, calling her every morning before work, five times a week.

Until the transaction at issue here, decedent's assets consisted primarily of the brokerage account, worth approximately \$490,000, and an Individual Retirement Account (IRA), worth approximately \$600,000. The brokerage account had been titled in decedent's name, payable on death to Country Network, a religious charity. The same charity was named as beneficiary of one-half the IRA, with Teddy and Eugene designated as beneficiaries of one-quarter each.

In early December 2013, decedent transferred all the assets in her brokerage account into an account in Eugene's name and changed the beneficiary of her entire IRA to Eugene alone. Approximately three weeks thereafter, on December 21, 2013, decedent fell to the floor in her apartment. She sustained severe injuries to her head, ribs, and leg, which led to her death four-and-a-half weeks later.

Eugene was appointed administrator of his mother's estate, and Teddy was granted limited letters of administration with authority to bring this proceeding. Teddy initially sought turnover of the brokerage account and the IRA.

Eugene moved to dismiss Teddy's petition. In a decision dated July 14, 2017, the court granted Eugene's motion with respect to the IRA for lack of subject matter jurisdiction, without prejudice to bringing the proceeding in another forum. The court denied the motion with respect to the brokerage account, leaving for trial the question of whether the evidence warranted the imposition of a constructive trust. The court held a bench trial over two days, at which three witnesses testified for petitioner and three witnesses testified for respondent.

#### Constructive trust

Courts generally describe a constructive trust as comprised of four elements: a confidential relationship; a promise, which may be implied; a transfer made in reliance on that promise; and unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119 [1976]). Rigid adherence to these factors, however, is not necessary, and this equitable remedy has no fixed definition. In the words of Judge Desmond (*Latham v Father Divine*, 299 NY 22, 27 [1949]),

“A constructive trust will be erected whenever necessary to satisfy the demands of justice. Since a constructive trust is merely ‘the formula through which the conscience of equity finds expression’ its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them” (internal citations omitted).

### Confidential Relationship

A mother-son relationship does not constitute a confidential relationship in and of itself, nor does one party's dependence on another because of physical limitations. These were the circumstances in *Matter of Bonczyk v Williams* (119 AD3d 1124 [3d Dept 2014]), where the court affirmed the denial of a motion, as premature, for a declaration of the existence of a confidential relationship, explaining that there was no evidence that the respondent had controlled the decedent's financial decisions. The court defined a relationship as "confidential" when it

"is 'of such a character as to render it certain that [the parties] do not deal on terms of equality.' Such inequality may occur from either one party's 'superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence' or from the other's 'weakness, dependence, or trust justifiably reposed' on the stronger party" (*id.* at 1125-1126) (internal citations omitted).

The court further explained,

"[E]ven where there is evidence of one party's complete dependence on the other as a result of physical limitations, the relationship may not be unequal as a matter of law if, at the time of the challenged transactions, the physically weaker party remained able to exercise free will" (*id.* at 1127).

The relevant evidence at trial was scant and conflicting.

Decedent's goddaughter testified that, although she and decedent had been very close, and talked on the telephone for hours every week or every other week, she had not visited decedent's home at all during the last two or three years of decedent's life. Her goddaughter said this was because decedent did not like to have visitors in her home and "her age [did] not allow her to go out anymore."

One longtime neighbor testified that she had seen decedent come and go alone from her apartment for grocery shopping at a nearby store, but her testimony was not specific about the period late in 2013 when the account changes occurred. Another neighbor of several decades said he had not been “around” enough to know how often, if ever, decedent left her apartment. Both neighbors’ interactions with decedent took place mostly in the hallway, and neither was aware of the month-long stay of decedent’s nephew in the summer of 2013, discussed below. These neighbors described decedent in conclusory terms as “independent,” but there was no indication that they had more than a cordial but superficial relationship with her. Neither was clearly in a position to observe whether Eugene had a controlling influence over his mother.

About six months before her death, decedent contracted a temporary illness while Eugene was away with his family. Her cousin’s son, who considered her his aunt (and who is referred to here as decedent’s nephew), came to stay and take care of her for about a month. He testified (through a Mandarin interpreter) that decedent had been unable to leave her apartment during the illness, and he had helped by picking up her medicine and doing all her cooking, shopping, and cleaning. The nephew agreed, however, that, except during this temporary illness in the summer of 2013, “[P]hysically for an 86-year-old woman she was in good health.”

Regarding decedent’s mental status, all the witnesses were aware that she had a laptop computer which she used frequently for trading stocks. The only evidence of possible mental decline prior to December 2013 related to a chronic subdural hematoma noted in her hospital records when she was admitted for treatment the day after her accident. Teddy, a medical doctor, testified that a chronic hematoma can be present for weeks and that this condition “can have a great effect on the mentation or the mental capacity of the patient, in the ability of the patient to express himself . . . .” But Teddy also said that his mother’s mental status had been

good before the fall. He could not point to any decline in her mental faculties prior to the accident, other than her complaint that she could no longer remember the names of all the people for whom she prayed. Significantly, Teddy acknowledged that his mother had been capable of living on her own, except during the illness when her nephew stayed to take care of her. It is notable that decedent's nephew testified that her mental status was "clear" even when she was first hospitalized after the fall.

While it is possible that decedent was dependent on Eugene for purchasing her food and medications, and for other household chores, the evidence was not sufficient to establish that she depended on him in other respects or that she was susceptible to his control. The strictures of CPLR 4519 may have prevented a more complete presentation of the relevant facts. The court is nevertheless constrained to hold that Eugene and decedent did not have a confidential relationship.

#### Reliance on a Promise

As noted above, it is not strictly required that the often-cited four factors, including a confidential relationship, be proved to prevail on a theory of constructive trust in favor of the estate. Given the limited proof adduced here, however, Teddy needed to show, at a minimum, that Eugene either promised or had an implicit agreement or understanding with his mother that she would retain control of her investment account after the account transfer, or would have access to the funds, and that such access would devolve upon her estate.

This case is distinguishable from *Sharp v Kosmalski* (40 NY2d 119 [1976]), where plaintiff transferred all his property to defendant, who then forced him to vacate his former home, leaving him with no place to live and no means of livelihood. The court there inferred a promise that defendant would permit plaintiff to remain on the property he had conveyed, and

to continue to operate the farm he owned before the transfer. In contrast, decedent in our case maintained ownership and control of her substantial IRA. Respondent was also able to show that this was not a situation in which decedent was left with no income after the transfer: her social security income, combined with her annual minimum distributions from the IRA as required under the tax code, were sufficient to meet her living expenses. Further, even if the court could infer a promise in these circumstances—*i.e.*, that Eugene would allow decedent continued access to the transferred funds—there is no evidence that he breached such a promise. Unlike the facts in *Sharp*, we have no evidence that decedent, as the implicit promisee, requested the use of her funds, or that Eugene, as the implicit promisor, breached his promise and withheld from decedent any funds she requested.

Petitioner argues that an incident involving mishandling of decedent's checking account is evidence that she believed she had access to her brokerage account after the transfer. She wrote a check dated December 19, 2013, to Country Network in the amount of \$30,000. This was a donation to the charity, consistent with her pattern of annual giving, but the check was returned for insufficient funds. Eugene explained that decedent was in the habit of transferring funds to cover her checks, but her fall two days after she wrote this check and her subsequent hospitalization prevented her from doing so in this case.<sup>1</sup> The court is satisfied with this explanation because, as of the date of the check, decedent had more than adequate funds in her IRA to cover it.

Decedent's elimination of the religious charity as a beneficiary of her assets was certainly not characteristic. There was considerable evidence that she was a very religious woman and had expressed to others her desire to leave her money for religious purposes,

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<sup>1</sup> Eugene later covered the check from his own funds.

although the testimony showed some inconsistencies. Her goddaughter overheard Eugene bragging that he was going to inherit “millions” from his mother after she died. According to her goddaughter, when she reported this incident to decedent, decedent said she was very disappointed with Eugene for thinking he could still inherit from her, because she had already given him substantial financial support. The goddaughter testified,

“And my godmother always told me the money is God money because she has a promise with God, that these [*sic*] is going to support Country Network and mission, and he has been doing that, and she had been managing the money all this time and, you know, through the [brokerage account], managing this money. She constantly saying she don’t spend any money even times refrigerator needed repair, she will pray and \$700 refrigerator she would not buy. She will pray and ask for God to allow her to do that because she told me because of her promise with God in early stage of her life, and she want to commit that.

“And we always talk a lot about, discussion about the worship and ties to God, and I believe when you put God first, your cup never empty.”

When her nephew was asked whether decedent ever discussed with him her intentions for her money when she died, his testimony was different:

“She told me several different times with several different versions.

“She told me with regard of her private account, that the apartment will be given to Eugene, whereas her bank, private bank account and her stocks, 20 percent goes to –20 percent to Teddy, 80 percent to Eugene.

“In addition, she told me there is a certain amount of money is [*sic*] for me.”

Eugene did not offer an explanation for the changes in decedent’s accounts. Petitioner has alleged undue influence as the means, but a finding of undue influence “can only be established by evidence that is not inconsistent with a contrary hypothesis” (*Matter of Walther*, 6 NY2d 49, 56 [1959]). “[U]ndue influence may also be proved by circumstantial evidence but

this evidence too must be of a substantial nature” (*id.* at 54) (internal citations omitted). Here, it is plausible that decedent chose to favor the son who was able to spend more time with her, and who perhaps had greater financial need. Moreover, because decedent maintained control over her IRA, the court cannot infer or speculate that she expected or needed Eugene to give her continued access to the brokerage account. No evidence has been produced to support such a conclusion.

#### Unjust enrichment

Having determined that the evidence is insufficient to establish a confidential relationship or decedent’s reliance on an implied promise, the court need not consider the issue of unjust enrichment. Teddy argues strenuously that Eugene was not the dutiful son he portrayed himself to be and points to behavior allegedly showing that Eugene was more interested in inheriting their mother’s money than in taking care of her. Most of the incidents Teddy cites or alleges occurred after the account changes were made, including Eugene’s failure to bring decedent to the hospital until the day after her serious fall; his attempts to restrict Teddy’s access to decedent’s doctors, and to restrict access to her doctors by another family member who is also a doctor; his unilateral decision to transfer decedent to a hospice program without consulting family; and his concealment of the account changes until after decedent’s death.

The relevant issue is not whether Eugene may have been undeserving, but whether his enrichment was unjust. Petitioner has not met his burden to establish the relief he seeks.

Accordingly, the petition is denied.

This decision constitutes the order of the court.

Dated: October 14, 2020

  
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