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

In the Matter of the Estate of	)	
	)	**Decision & Order**
	)	
ROBERT W. NEILL,	)	File No.: 2008 - 475/A
	)	
Deceased.	)	

Eugene M. O'Connor, Esq., Chamberlain D'Amanda, Rochester, New York, Counsel for the Estate (Eric Neill and Carol Sherwood).

Charles W. Rogers, Esq., Rochester, New York, Counsel for Sophie Schubert, Respondent.

FACTS

Robert W. Neill ("Decedent") died on January 22, 2008 survived by a son, Eric Neill, a daughter, Carol Sherwood, and six grandchildren. The Decedent's Last Will and Testament, dated June 27, 2000 was admitted to probate, and Letters Testamentary were issued to his two children on March 3, 2008. The Will left each of the Decedent's six grandchildren $25,000.00, and named his two children equal residuary beneficiaries. Due to the Decedent's Alzheimer's disease and advanced dementia that ultimately caused his death, Carol Sherwood was appointed Guardian of the person and property pursuant to Mental Hygiene Law Article 81 in New York State Supreme Court in the Fall of 2007. The Decedent had been a successful business man during his life, operating a sole proprietorship known as Robert W. Neill, Inc. until May 1, 2006. Sophie Schubert was his long time secretary and bookkeeper. Mrs. Schubert retired from Robert W. Neill, Inc. on June 25, 2005, but continued to assist the Decedent with business and personal affairs.

On February 26, 2009, the Estate commenced a discovery proceeding against Mrs. Schubert alleging that she used her relationship as the Decedent's long time companion and secretary to unduly influence a series of pre-death non-probate transfers and business decisions in her favor, contrary to the Decedent's estate plan. On December 18, 2009, counsel for Mrs. Schubert filed an Answer. The parties thereafter conducted discovery. After a number of court conferences, the parties ultimately failed to reach a settlement, and a hearing pursuant to SCPA 2103 and 2104 was held in May, 2011 relative to Mrs. Schubert's undue influence upon the Decedent, and the Decedent's capacity to make the non-probate transfers and decisions in dispute.

The disputed transfers occurred between 2005 and 2008, and consisted of the following: loans made to an individual named John Trickey which were assigned to Mrs. Schubert pursuant to a Memorandum of Understanding dated July 1, 2005; loans to John Trickey which were conditionally assigned to Mrs. Schubert, Carol Sherwood and Eric Neill by Agreement and Memorandum of Understanding dated May 11, 2006; various corporate debts assigned to Mrs. Schubert commencing May 1, 2006; accounts and an annuity naming Mrs. Schubert a 1/3 transfer-on-death beneficiary along with the Decedent's two children; a Prudential Whole Life Insurance Policy for which Mrs. Schubert was made the designated beneficiary as a result of a corporate resolution signed by Mrs. Schubert as Secretary of the Decedent's corporation on January 7, 2008; corporate checks made payable to cash signed by Mrs. Schubert; and bank accounts of the Decedent held jointly with Mrs. Schubert. It is alleged that the value of the disputed transactions had a value of approximately $195,000.00 on the date of the Decedent's death.

Throughout the pendency of this proceeding, including the hearing, both Petitioner and Respondent largely dealt with the various disputed transfers as one central dispute. However,

different law and burdens of proof apply, and therefore they must be evaluated separately in three groups: (1) the loan and debt assignments, and account beneficiary designation; (2) the life insurance beneficiary designation and corporate checks signed by Mrs. Schubert; and (3) the joint bank accounts.

At the hearing, two of the Decedent's physicians testified as to the Decedent's capacity: Charles Duffy, M.D., and Jeffrey Vuillequez, M.D. Dr. Duffy stated that the Decedent had been diagnosed with Mild Cognitive Impairment, and that he was unable to state with a reasonable degree of medical certainty that the Decedent would have been unable to understand the nature of the transactions in question at the time of his signing of the documents. However, medical records were introduced into evidence that showed that on October 22, 2003, Dr. Duffy recommended that the Decedent contact an elder care attorney, "about dissolving his business and settling his affairs appropriately," based on ongoing complaints of the Decedent regarding his memory issues and confusion.

Dr. Vuillequez testified that he had personally witnessed the rapid deterioration of the Decedent's condition. A letter from Dr. Vuillequez dated November 9, 2007 was admitted into evidence in which Dr. Vuillequez voiced his support for Carol Sherwood's petition for Article 81 guardianship due to the Decedent's "incapacity to make financial and medical decisions himself."

A report was also submitted from Dr. Richard Mayeux, the Co-Director of the TAUB Institute of Research on Alzheimer's Disease and the Aging Brain at Columbia University. Dr. Mayeux evaluated the Decedent as part of a 2004 study, and found the Decedent to "have trouble handling money," and that his "ability to recall information was significantly impaired, and that he had difficult performing even simple calculations."

The Court Evaluator appointed during the Article 81 Guardianship proceeding in 2007, Cynthia Snodgrass, Esq. stated that she could not testify as to the Decedent's capacity prior to December 19, 2007, but when she met with the Decedent on that date, she found him to be incapable of putting together a coherent sentence.

The Decedent's business associate, John Trickey testified that the purpose of the 2005 agreement assigning the payments on existing notes held by the Decedent to Mrs. Schubert was to augment Mrs. Schubert's compensation due to a lack of cash flow in the business. Mr. Trickey also hypothesized that this arrangement also may have been motivated by a desire on the Decedent's part to evade employment taxes. Mr. Trickey's testimony regarding the 2006 agreement assigning loans to Mrs. Schubert and the Decedent's children was less direct, but he did state that Mrs. Schubert was against it. Mr. Trickey stated that he only noticed the Decedent ever appearing confused after his wife's death in 2005 and after a knee replacement surgery, but did not notice major confusion or the Decedent acting in an unusual way.

Sophie Schubert testified as well. She stated that the Decedent continued to live alone at his home until his final hospitalization on October 16, 2007. She acknowledged that the Decedent's driver's license was revoked in September, 2006, but insisted that he continued to be involved in his business and personal affairs. She testified that she and the Decedent were close, but insisted that she was just his secretary, and that the Decedent had always taken good care of her.

OPINION

Generally, SCPA 2104 places the burden of proving the estate's right to disputed property upon the estate. *See, e.g. Matter of Rabinowitz*, 5 Misc. 2d 803, 159 N.Y.S.2d 492 (Surr. Ct. Nassau Co. 1957). It is undisputed that the Decedent was diagnosed with Alzheimer's disease and dementia, and that at some point between 2001 and his death, the Decedent became incapacitated. He first reported concerns of memory loss and confusion in 2001, and ultimately died of complications relating to his advanced dementia in early 2008. However, there is no presumption that a person suffering from Alzheimer's disease and dementia is wholly incompetent. "Rather, it must be demonstrated that, because of the affliction, the individual was incompetent at the time of the challenged transaction." *Gala v. Magarinos,* 245 A.D.2d 336, 337, 665 N.Y.S.2d 95, 96 (2d Dep't 1997); *Matter of Mildred M.J.*, 43 A.D.3d 1391, 1392, 844 N.Y.S.2d 539, 541 (4th Dep't 2007). "The burden of proving mental incompetence is on the party asserting it." *Smith v. Comas*, 173 A.D.2d 535, 570 N.Y.S.2d 135 (2d Dep't 1991).

In order for a transaction to be set aside due to a person's mental incompetence, it must be shown that the person's mind was, "so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction." *Feiden v. Feiden*, 151 A.D.2d 889, 890, 542 N.Y.S.2d 860, 862 (3d Dep't 1989); *citing Aldrich v. Bailey*, 132 N.Y. 85, 89 (1892).

When the issue of undue influence based upon a confidential relationship is raised, the initial burden is on the party seeking to invalidate the disputed transaction to make the requisite showing that a confidential relationship existed between the transferor and beneficiary. *Prievo v. Urbaniak*, 64 A.D.3d 1240, 1241, 882 N.Y.S.2d 796 (4th Dep't 2009). If a confidential relationship is found

to have existed, the burden then shifts to the beneficiary to establish that the transaction was "fair and free from undue influence." *Matter of Mildred M.J.*, 43 A.D.3d 1391, 844 N.Y.S.2d 539 (4th Dep't 2007); *Matter of Ruef*, 180 A.D. 203, 167 N.Y.S. 498 (2d Dep't 1917), *aff'd*, 223 N.Y. 582 (1917).

Some relationships, such as attorney and client or parent and child, are deemed confidential as a matter of law. Where, as here, the relationship is not confidential as a matter of law, the party seeking to set aside the transfer must prove that a fiduciary relationship existed between the parties, giving one a controlling influence over the conduct and interests of the other. *Allen v. LaVaud*, 213 N.Y. 322 (1915). For a relationship to be deemed confidential, the proof must show that the decedent was dependent on the beneficiary of the transfer, and that the beneficiary intruded upon the decedent's freedom of action. *Matter of Arnold*, 125 Misc.2d 265, 479 N.Y.S.2d 924 (Surr. Ct. Bronx Co. 1983). A confidential relationship exists when one person is dependent on and subject to the control of the other . Such a relationship exists where one party "reasonably relies on the other's superior expertise or knowledge." *Sears v. First Pioneer Farm Credit*, 46 A.D.3d 1282, 1286, 850 N.Y.S.2d 219, 223 (3d Dep't 2007).

While the existence of a confidential relationship increases the possibility that the grantor was unduly influenced by that relationship, much more must still be shown. It must be shown that the beneficiary had motive, an opportunity, and that undue influence was actually exercised. *Matter of Fiumara.* 47 N.Y.2d 845, 418 N.Y.S.2d 579 (1979); *Matter of Mildred M.J.*, 43 A.D.3d 1391, 1392, 844 N.Y.S.2d 539, 542 (4th Dep't 2007); *Matter of Morrison*, 270 A.D. 552, 60 N.Y.S.2d 546 (1st Dep't 1946). "No inference of undue influence may be drawn from the fact that proponents had the opportunity and motive, absent evidence that such influence was actually utilized." *Matter of*

Bush, 85 A.D.2d 887, 889, 446 N.Y.S.2d 759, 761 (4th Dep't 1981); *Matter of Vukich*, 53 A.D.2d 1029, 1030, 385 N.Y.S.2d 905 (4th Dep't 1976), *aff'd.*, 43 N.Y.2d 668 (1976).

The Court of Appeals has defined undue influence as:

> *influence exercised that 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.*

Matter of Walther, 6 N.Y.2d 49, 188 N.Y.S.2d 168, 172 (1959); *see also*, *Matter of Bush*, *supra*, 85 A.D.2d 887 *at* 888.

Mrs. Schubert was a close friend of the Decedent; the medical records reflecting the Decedent's visits to Dr. Vuillequez are replete with mentions of his "girl friend," "long time friend," "secretary," and "partner." Sophie Schubert accompanied the Decedent to his appointments and provided him with assistance at home and with remembering his medication. On November 18, 2004, the Decedent confessed to Dr. Vuillequez that he was "becoming more dependent on another person." On September 30, 2005, the Decedent told his doctor that he had a girlfriend. However, based on the evidence presented, it is the opinion of this Court that Mrs. Schubert's relationship with the Decedent cannot be deemed 'confidential' as it is defined by case law. The two had worked and spent time together for years, and the Decedent presumably trusted her a great deal. However, there is no evidence that she possessed the requisite level of control and dominion over his will and conduct. *See, e.g.*, *Allen v. LaVaud*, 213 N.Y. 322 (1915).

Mrs. Schubert was the Decedent's long-time employee and partner, and at least in later life, his companion, but there is no indication that the Decedent trusted her above himself with respect to business and financial decisions. To the contrary, he was a successful business man who continued to express confidence in his remaining business dealings to his doctor even while complaining of trouble remembering how to drive to the doctor's office.

Further, even assuming *arguendo*, that the relationship could be deemed confidential, there is insufficient evidence that undue influence was exercised by Ms. Schubert at the time of the execution of the disputed transactions. There was no testimony by the physicians or court evaluator as to the Decedent's mental condition at the time any of the disputed transactions took place. As there is no direct proof that the Decedent was not lucid at the time of the transactions, the dual burdens of assuming capacity and against the use of undue influence have not been overcome. *See, e.g.*, *Feiden v. Feiden*, 151 A.D.2d 889, 890, 542 N.Y.S.2d 860, 862 (3d Dep't 1989); *Smith v. Comas*, 173 A.D.2d 535, 570 N.Y.S.2d 135 (2d Dep't 1991); *Matter of Brownstein*, N.Y.L.J., January 29, 1985, *at* 11, col. 5 (Surr. Ct. Queens Co. 1985) (estate failed to satisfy burden of proof that property in party's hands was obtained by fraud or undue influence).

Circumstantial evidence can be used to find that undue influence was exercised. *See, e.g. Matter of Brandon,* 79 A.D.2d 246, 436 N.Y.S.2d 329 (2d Dep't 1981). However, there is no such evidence in this case. The Decedent was in a pattern of giving Mrs. Schubert money, and compensating her in non-traditional ways for her work for the corporation. It is reasonable to assume that he thought of her as something like a business partner, to be included in both the work and the profits of his business. The disputed assignments that the Decedent was involved in do not mark a significant departure in his behavior. *Matter of Besdansky*, 31 Misc. 3d 1210(A), 929 N.Y.S.2d 198

(Surr. Ct. Kings Co. 2011). "Influence arising from gratitude, affection or esteem is not "undue influence." *Matter of Wharton*, 270 A.D. 670, 62 N.Y.S.2d 169 (1st Dep't 1946).

Therefore, the proceeds of the loan and debt assignments and account beneficiary designations challenged by the Estate shall remain in the possession of Mrs. Schubert. The Court finds that insufficient evidence exists to invalidate these transactions on the basis of capacity or undue influence.

With regard to the joint accounts held by the Decedent and Mrs. Schubert, it is well settled that the establishment of a joint bank account creates a presumption that the depositors intended to create a joint tenancy with rights of survivorship. *See*, Banking Law §675; *Matter of Camarda*, 63 A.D.2d 837, 406 N.Y.S.2d 193 (4th Dep't 1978). This presumption places the burden on "the party challenging the title of the survivor to establish fraud, undue influence, or lack of capacity." *Matter of Stalter*, 270 A.D.2d 594, 595, 703 N.Y.S.2d 600, 602 (3d Dep't 2000). As specified in Banking Law Section 675, the disputed accounts did provide for a right of survivorship. Therefore, for the reasons discussed above, the Estate's burden with regard to undue influence has not been met, and title to the funds in the joint accounts held by Mrs. Schubert and the Decedent shall remain with Mrs. Schubert.

Regarding the actions taken by Mrs. Schubert alone, the Court must come to a different conclusion. Mrs. Schubert made no claim and submitted no evidence suggesting that the corporate checks written to "cash" and signed by Mrs. Schubert were intended as gifts from the Decedent, and therefore, the issue of the Decedent's capacity to make such gifts is irrelevant. Mrs. Schubert claims that she cashed these checks and gave the money to the Decedent, as was their customary practice. While this seems feasible, there is absolutely no evidence that this took place. It is unknown to the

Court what the purpose or ultimate disposition of the funds negotiated by those checks was, and therefore, the amount must be charged against Mrs. Schubert. *Matter of Mirsky*, 154 Misc.2d 278, 586 N.Y.S.2d 205 (Surr. Ct. Bronx Co.1992).

Similarly, the death benefit proceeds of the Prudential Whole Life Insurance Policy transferred to Mrs. Schubert by corporate resolution dated January 7, 2008 must be invalidated. The Decedent was in the hospital at the time, and there is no evidence that he was present at the alleged Board of Directors meeting, or involved in the Request for Ownership Change paperwork completed on that day. Further, as the Decedent did take a previous loan from the policy, and pay the proceeds to Mrs. Schubert in 2001, it can be assumed that he was familiar with the terms of the policy and would have elected to cash out the policy or change the beneficiary or ownership as of that date had he intended to. The Decedent's capacity to gift is not relevant to this transaction, as there is insufficient evidence that the Decedent was involved in the transfer. Mrs. Schubert did not meet her burden to establish that the Decedent has the requisite donative intent to make a gift of the policy, or that he was involved in its delivery to Mrs. Schubert. *See, e.g.,Mortellaro v. Mortellaro,* 91 A.D.2d 862, 458 N.Y.S.2d 390 (4th Dep't 1982); *Matter of Liddle*, 115 A.D.2d 815, 495 N.Y.S.2d 768 (3d Dep't 1985).

Therefore, in accordance with the above decision, it is hereby

ORDERED, ADJUDGED and DECREED, that Sophie Schubert is directed to deliver to Eric Neill and Carol Sherwood, as executors of the Last Will and Testament of Robert W. Neill, the following property: the proceeds of identified checks drawn from the accounts of Robert W. Neill, Inc. made payable to cash, and signed by Sophie Schubert, alleged to be valued at approximately

$9,400.00 as of the date of the hearing; and the death benefit proceeds of Prudential Whole Life Insurance Policy Number 74551334, valued at approximately $34,952.57 as of January 31, 2008; it is further

ORDERED, ADJUDGED and DECREED that Sophie Schubert, Respondent herein, is the owner and entitled to possession of all other property described in the Petition.

June 21, 2012

Edmund A. Calvaruso

Hon. Edmund A. Calvaruso, Surrogate

ENTER: