IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JUNE PENNEWILL, as Executrix and	)	
Personal Administrator of the Estate of	)	
Frances M. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 3229-MG
	)	
DOUGLAS HARRIS,	)	
	)	
Defendant.	)	

MASTER'S REPORT

Date Submitted: May 7, 2010
Draft Oral Report: May 7, 2010
Final Report After Exceptions: February 4, 2011

Kathryn J. Garrison, Esquire, of Schmittinger & Rodriguez, P.A., Dover, Delaware; Attorneys for Plaintiff.

Brian P. Murphy, Esquire, Middletown, Delaware; Attorney for Defendant.

GLASSCOCK, Master

This matter was submitted to me on a stipulation of facts and motion for summary judgment. At the conclusion of oral argument, I issued a draft report from the bench. The defendant, Douglas Harris, took exception to that draft report, and in lieu of briefing on the exceptions the parties submitted brief letter memoranda. The draft report is withdrawn, and this is my Final Report on the plaintiff's motion for summary judgment.

1) Facts

The facts of this matter are not in dispute and have been stipulated to. The decedent, Frances M. Harris, opened a bank account with the Delaware Trust Company (now Wachovia Bank) in 1930. The defendant, the decedent's nephew, was added by her to the account (the "joint account") as a joint owner in 1994. The parties agree that the account was joint property with right of survivorship. All contributions to the account, both before and after 1994, however, were made by the decedent and not by the defendant. The joint account was used to pay the decedent's expenses during her lifetime. While the decedent was still competent, she arranged for her income to be placed in the joint account. The decedent had at least one other account, a savings account which was not joint.

On July 11, 2004, the decedent executed a will and general durable power of attorney. The latter document named the defendant as attorney-in-fact for the decedent. It bestowed broad powers upon him, but did not permit the attorney-in-fact to make gifts.

By September 29, 2006, the decedent had become incompetent to handle her own affairs. She required admission to a nursing home. Accordingly, the defendant sold her home for approximately $73,000, net of mortgage and expenses of the sale. Of this amount, a portion was held in escrow to cover property repairs which were the obligation of the seller. The rest of the funds resulting from the sale, approximately $61,000, were placed into the joint account by the defendant on behalf of the decedent. At the time of the sale of the decedent's home, there was $16,590 in the account, all originating from funds of the decedent. To this amount was added the $61,000 resulting from the sale of the property.

The funds in the joint account continued to be used for decedent's expenses thereafter. These included the nursing home expenses which she began to incur after that time, of approximately $7,000 per month. Although her income continued to be deposited in the joint account, decedent would have exhausted her funds in the account in a little over one year. In fact, she died five months after the sale of her home.

As of her death, decedent's property consisted of the contents of her savings account ($2,500), the remaining funds to her credit in escrow resulting from the sale of her home (approximately $12,000) and the joint account containing about $39,000. The latter account was closed by the defendant after decedent's death. He expended $11,378.34 of the funds to pay medical, nursing home and funeral expenses on decedent's behalf. He has retained the balance, totaling $27,680.66.

The Will

The decedent's will is straightforward. It named three beneficiaries, the nephew and nieces of the decedent: the defendant, the plaintiff, June Pennewill,[1] and plaintiff's sister, Virginia Austin. Property belonging to the decedent was treated in three ways under the terms of the will. Under Article 4C, any joint property (of which the joint account is the only example) was to vest outside the estate in the survivor. Under Articles 3B and 8, the decedent's house was to be divided one half to the defendant and one quarter each to the plaintiff and Virginia Austin. If the property was sold by the estate, the proceeds were to be divided in the same manner. Finally, under the residuary clause, the remainder of the estate was to be divided equally among defendant, plaintiff and Virginia Austin.

At issue is the $27,680.66 that remains in the defendant's hands from the joint account. The defendant maintains that, both as a matter of property law and under the express terms of the will, as the survivor of the joint account holders he is entitled to retain that amount, and to be reimbursed for the $11,378 that he expended from the proceeds of the joint account to defray estate expenses. According to the plaintiff, when the defendant placed the proceeds of the sale of the house into a joint account with right of survivorship (the contents of which, in the event the defendant survived his elderly and ill aunt, would pass to him solely) the defendant breached his fiduciary duty to decedent.

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[1] The plaintiff is both beneficiary and executor under the will of Frances Harris.

Accordingly, the plaintiff asks this Court to compel the defendant to disgorge the funds from the joint account to decedent's estate.[2] Both plaintiff and defendant seek summary judgment on these legal issues.[3]

2) Standard

Because there are no factual issues in dispute, summary judgment is appropriate here. Court of Chancery Rules, Rule 56(c).

3) Discussion

The bank account in question was a joint account with right of survivorship. The decedent's will provides that joint property, including bank accounts, is to pass outside her estate and to the surviving co-tenant. This language in the will is precatory: if property is held jointly with right of survivorship, it passes to the surviving co-tenant outside of the estate. Since it passes outside the estate, the ownership of that property is not affected by the terms of a will. If, on the other hand, property is not held jointly with right of survivorship, but is held instead solely in the name of the decedent, the decedent cannot provide by will that the property does not pass under the estate: her will may direct disposition only of property *in* the estate. In is clear to me that the provision in

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[2] In her complaint, the plaintiff also sought an accounting of "all actions" by the defendant as attorney-in-fact for the decedent, but that request has not been pursued in connection with her summary judgment motion, and I consider it waived.

[3] Only the plaintiff moved for summary judgment, but the defendant has made it clear that he agrees that no dispute of material fact exists, and that a decision as a matter of law is appropriate.

Article 3B of the will, therefore, is simply an expression of the testator's intent that joint property with right of survivorship be so treated, free of any resulting trust that might otherwise attach to the property in favor of the estate.[4]

Counsel for the defendant has stated that, if defendant were to testify, he would say that he was unaware of the terms of decedent's will. I found in the draft version of this report that, as attorney-in-fact for the decedent, the defendant was charged with knowledge of the decedent's estate plan; in other words, it would be considered a breach of duty for an attorney-in-fact handling all affairs for an incompetent person to fail to be aware of the terms of a valid will for that individual. The defendant took exception to this determination in the draft report. I need not consider that exception here, however, because whether the defendant was aware, actually or constructively, of Article 3B of the will is immaterial. He was certainly aware that he was an owner of the joint account, and that absent the unlikely event of his predeceasing his aunt, the contents of that account, if any, would be his solely upon her death. Indeed, upon the decedent's death, the defendant quickly closed the joint account and retained the funds as his own.

In 2007, circumstances dictated that the decedent's home be sold and the proceeds made available for her increased expenses as a nursing-home patient, as needed. The issue here, therefore, can be stated simply: is it a breach of duty for an attorney-in-fact in such a situation to place the proceeds of the sale into an account of which he is a joint

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[4] For instance, a pure convenience account created as a joint tenancy may be treated as sole property under certain conditions. *See, e.g.*, Estate of Waller, Del. Ch., No. 94160, Jacobs, V.C.(June 1, 1993)(Mem. Op.).

owner? The defendant points out that the proceeds of the sale of the house, although owned by him jointly, were at all times available for the decedent's benefit, and that if the decedent had lived another year, the contents of the joint account would have been expended entirely for her benefit. On the other hand, up until the time of the sale of the property, only a modest amount had accumulate in the joint account. The proceeds of the sale, once deposited in the account, increased the joint property by a factor of nearly five. Does the deposit of these funds into the joint account, then, amount to a breach of fiduciary duty? If the answer is no, the defendant is entitled to retain the proceeds of the joint account. Conversely, if the answer is yes, under a theory of surcharge or trust, the proceeds of the account held by the defendant are the property of the estate, to be distributed under the residuary clause, one-third, one-third, and one-third.[5]

Fiduciary Duty

An attorney-in-fact serves as a fiduciary for his principal. An attorney-in-fact who uses the power given to him by the principal to transfer assets to himself has committed improper self-dealing, absent the voluntary and knowing consent of the principal. *E.g.*, Coleman v. Newborn, Del. Ch., 948 A.2d 422, 429 (2007). A self-dealing transfer is

[5] Under the will, the real property was to be divided, one-half to the defendant and one-quarter each to the plaintiff and her sister. The defendant conceded in his answer that sale of the property during decedent's lifetime worked an ademption of this devise, but in briefing this matter he argued, in the alternative, that the proceeds should be deemed to preserve the quality of real estate and distributed accordingly under the will. The defendant cites Bank of Delaware v. Hargraves, Del. Ch., 242 A.2d 476 (1968) as compelling this result. The Court's holding in Hargraves was limited to cases involving condemnation of an incompetent's property by the state, however; the Court there provided that "when property of an incompetent is sold in order to provide maintenance for such incompetent, an ademption pro tanto, of course, occurs." Hargraves, 242 A.2d at 476.

voidable. *Id*. In examining actions including the transfer of property by an attorney-in-fact from her principal to herself, our Supreme Court held that:

> The creation of a power-of-attorney imposes the fiduciary duty of loyalty on the attorney-in-fact. The issue raised in this appeal is whether the agent's fiduciary duty of loyalty was waived so as to have permitted her to self-deal or make gratuitous transfers to herself…. The common law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duties of trust law must, therefore, be applied to the relationship between a principal and her attorney-in-fact. An attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure…. Under current Delaware law, [self-dealing] transactions are voidable at the behest of the beneficiary.

Schock v. Nash, Del. Supr., 732 A.2d 217, 224-25 (1992). Once a self dealing transaction is challenged, the burden is on the fiduciary to demonstrate that the transaction should be upheld. An examination of the facts in this case under the rationale of Schock v. Nash makes it clear that the defendant's conversion of the proceeds of the sale of the decedent's property into joint property amounted to impermissible self-dealing.

Here, the decedent had a small income which was sufficient for her needs prior to the time she entered a nursing home. She directed that income into an account owned jointly with the defendant. From that account, she (personally or via her attorney-in-fact) paid her expenses. While her income was modest, her needs were also modest, and a small surplus accumulated in the account. At the time of the sale of the property the amount in the account was $16,590. By that point, the defendant was acting on behalf of

the decedent under the durable power of attorney, and the parties agree that the decedent was then incompetent. The defendant, after his aunt became incompetent, continued her practice of placing her income into the account of which he was a co-owner, and continued paying her expenses from that account. Because that was obviously his aunt's intent during the time when she was still competent, this represented no breach of duty, and the plaintiff does not contest that if the decedent had died before the sale of the real property the balance in the joint account would have belonged to the defendant as the survivor of the joint tenancy.

In 2007, however, the decedent's need for cash was about to increase dramatically upon her entry into a nursing home. Using the power of attorney, the defendant sold the decedent's real estate to provide her with ready cash to pay her nursing home expenses. This decision was entirely proper on behalf of the attorney-in-fact. In fact, the sale was against the interest of the defendant, as it worked an ademption of the gift of one-half of the real estate to the defendant under the decedent's will. Once the real estate was exchanged for cash, however, that cash was the property of the decedent under the control of the attorney-in-fact subject to his fiduciary duties. The cash was an asset belonging solely to the decedent. By placing the cash in an account of which he was a joint owner, the defendant converted it from the sole property of Frances Harris to joint property owned by the decedent and the defendant, jointly. This was an act of self-dealing, because it converted an asset of the decedent to the defendant. The sale proceeds differ from the modest amounts which the decedent had directed be placed in the joint account

in the past: defendant's placement of the funds into the joint account increased the jointly-owned property dramatically. There is nothing in the record to indicate that the decedent consented to the defendant's conversion of the proceeds of the sale of her real property to joint property, and the power of attorney did not provide the defendant with the power to make such a gift to himself.

The placement of the proceeds into the joint account was self-dealing in two ways. First, it created, from decedent's sole property, joint property immediately subject to the defendant's use for his own purposes, since each joint tenant is the owner of the entirety of the joint estate. *E.g.*, Farmers Bank of the State of Delaware v. Howard, Del. Ch., 258 A.2d 299, 301 (1969). And, because the property was placed in a joint tenancy, it was foreseeable that the property would become the sole property of the defendant, rather than the estate, in the likely event he outlived his elderly and ill aunt. *See,* Kirby v. Wooters, Del. Ch., No.1351, Noble, V.C. (June 6, 2007)(Mem. Op.) at 2-3 (holding fiduciary's placement of principal's sole funds into joint account, shortly before her death, breach of duty).

The defendant points out that the proceeds of the house, placed in the joint account, remained available to the use of the decedent during her lifetime, that her expenses were around $7,000 a month, and that if she had lived another year, all the money in the joint account would have been exhausted on her behalf. I have no doubt that the defendant intended to use this money for his aunt, so long as she lived. Nonetheless, he is now in the position of arguing that, because he converted the

decedent's sole property to joint property he is entitled to it as his sole property as a result of her death. This is self-dealing.

By the time of the decedent's death, the amount in the joint account had dwindled to $39,059. This money would have been the sole property of the decedent at the time of her death, had not the defendant used the power of attorney to convert it to joint property with right of survivorship in favor of himself. If the defendant had not converted this sum, therefore, it would have passed to the estate and to be distributed under the residuary clause of the will. Because this money was converted to the defendant through self-dealing, a constructive trust attaches to these funds. Therefore, the $39,059 belongs to the estate, for distribution under the residuary clause.[6]

4) Conclusion

The defendant acted entirely appropriately with respect to the decedent in the sale of her property. The property needed to be sold for her use, and the defendant undertook that sale even though the sale worked an ademption of a devise he would have received

[6] I have determined that the contents of the joint account at the time of death, $39,059, were the equitable property of the estate subject to distribution to the beneficiaries. Because one-third of this amount would be distributed to the defendant in any event, it is appropriate for him to retain one third of this amount as a distribution from the estate, assuming the estate is solvent. I note that the parties have stipulated that defendant has expended $11,378.34 of these funds to pay expenses of the estate, which must be credited against the amount to be repaid. To the extent there is a dispute about the precise amount which must be returned to the estate by the defendant, I retain jurisdiction over this issue, and no exceptions to this final report need be taken in order for any party to contest the amount defendant must pay into the estate.

upon his aunt's death, and was thus against his self-interest. This was consistent with his fiduciary duty as attorney-in-fact.

When the property was sold, however, the funds resulting were the sole property of the decedent. In converting those funds to joint property, the defendant committed an act of self-dealing. This act of self-dealing may not have been apparent to the defendant, and no intentional act of disloyalty may have taken place. Nevertheless, the defendant has benefitted from this self-dealing act, and it is appropriate that a trust be imposed as a remedy. Therefore, the amount retained by the defendant, with the adjustments described at note 6, must be returned to the estate for the distribution to the beneficiaries.

/s/ *Sam Glasscock, III*
Master in Chancery