Matter of Vultaggio v Vultaggio
2015 NY Slip Op 32456(U)
December 3, 2015
Surrogate's Court, Nassau County
Docket Number: 348616
Judge: Edward W. McCarty III
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Baldo Vultaggio, File No. 348616

Petitioner, Dec. No. 30971

-against-

Guiseppe Vultaggio and Salvatore Vultaggio, Co-Trustees of the First Amendment and Restatement of Trust Dated April 19, 2006 to the

FRANK VULTAGGIO
a/k/a FRANCESCO VULTAGGIO LIVING TRUST
Dated January 25, 2006,

Respondents.

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This case was tried before the court without a jury on April 9, 10, and 13, 2015. The only issue in the case was whether Frank Vultaggio, a/k/a Francesco Vultaggio, had the requisite mental capacity on April 19, 2006 to execute an amendment to a lifetime trust previously created by him. As explained below, the court concludes that he did. The petition to set aside the amendment to the trust is therefore dismissed.

Frank Vultaggio originally settled his lifetime trust on January 25, 2006. The trust provided that upon his death, the assets of the trust were to be distributed equally between his sons Baldo and Guiseppe, a/k/a Joe. At the time the trust was drafted Frank had three other children, all adult, who were disinherited. Thus, the precedent for disinheriting one or more of his children had already been established when the trust was originally settled on January 25, 2006.

The amendment to the trust at issue is dated April 19, 2006. The aspect of the amendment that generated this proceeding is that portion which removed Baldo as successor trustee and

beneficiary of one-half of the remainder and naming Joe as the successor trustee and sole remainder beneficiary. It is clear from the testamentary and documentary evidence that the genesis of the amendment was Frank's belief that Baldo had stolen from him. Frank believed that Baldo had stolen personal property as well as cash and an automobile, the ownership of which had been conveyed to Baldo's daughter. This precipitated a meeting between Frank and Madelyn Mason, the attorney who drafted the original trust instrument, on March 16, 2006. Ms. Mason testified that at that meeting Frank told her that his relationship with Baldo had changed dramatically and that Baldo had stolen from him. Ms. Mason also testified that Frank wanted Baldo removed as a trustee and did not want Baldo or any member of Baldo's family to share in the trust. Baldo was also to be removed as Frank's health care agent and attorney-in-fact. Ms. Mason prepared the necessary documents including a draft amendment to the trust. She testified that Frank called her after receiving the first draft and indicated that he wanted to remove his two nephews as alternate successor trustees and replace them with two nieces. A final version of the trust amendment was dated April 7, 2006 and mailed to Frank but it is not clear if he saw it prior to his execution of the final trust amendment in the hospital on April 19, 2006.

The petitioner's case at trial consisted of the testimony of two witnesses: Barbara Walsh, a nurse, and Dr. Leonard Timpone, Frank's attending physician and long-time family friend. Ms. Walsh had been practicing nursing for 40 years at the time of trial. She testified that she was employed by the Hospice Care Network on April 19, 2006, the date that the trust amendment was executed, and was affiliated with Franklin General Hospital where Frank had been admitted as a patient since April 9, 2006. She had no recollection of Frank or April 19, 2006; her testimony was based on a 2-page chart or report that she prepared that day. She identified the chart as a

"Hospice Care Network Initial Assessment Call Sheet." The chart indicates that Frank was oriented to person but not to time or place. She also checked a box marked "confused" but had no recollection of what caused her to make that assessment. Ms. Walsh also checked a box indicating that Frank's responses alternated between appropriate and inappropriate. Most important for purposes of this case, the chart also contains a notation, in Ms. Walsh's handwriting, that Frank "lacked capacity." Ms. Walsh testified that to her that meant that the patient "cannot fully, by himself, describe what's going on in his current situation." However, Ms. Walsh was unable to say how that comment was generated, indicating that it could have been something a doctor or other staff member said. It was not Ms. Walsh's own assessment of Frank's level of capacity, but merely a recitation of something she was told by another, most likely Dr. Timpone.

Dr. Timpone testified that he had known Frank for many years and that Frank had been a friend of his parents. Dr. Timpone testified that Frank was sometimes disoriented, meaning that he might not know what time it was or whether he was on a medical floor or hospice floor. Explaining the references to "inappropriate" responses on the Hospice Network chart Dr. Timpone testified that the patient might not know if a particular person had come to visit that day or if he had had a blood test. Dr. Timpone also testified that he thought it was a couple of days before April 19, 2006 that he came to the conclusion that Frank lacked capacity, but the capacity he was referring to was the capacity to decide whether or not to go into hospice care. Admitted into evidence were letters addressed to both Ms. Mason and another attorney shortly before the execution of the trust amendment verifying that Frank had "good mental cognition and has the mental capacity to make his own decisions as to his affairs." Upon cross-examination Dr.

Timpone testified that there was nothing anywhere in the medical records admitted into evidence which contain any indication that Dr. Timpone had determined that Frank lacked mental capacity.

The burden of proof in a proceeding to set aside a trust instrument is upon the petitioner as to all issues, including the issue of mental capacity (*Matter of McHale,* 37 Misc 3d 1204[A] [Sur Ct, Erie County 2012]; *Matter of Aronoff*, 171 Misc 2d 172, 177 [Sur Ct, New York County 1996]). A person is presumed to be competent and the burden is on the person alleging incapacity to establish that at the time the lifetime trust was executed, the settlor lacked the requisite capacity to execute the document (*Matter of Engstrom* [*Leonard B. Harmon 2003 Trust*], 47 Misc 3d 1212 [A] [Sur Ct, Suffolk County 2014]). "The law is clear that in order to set aside a contract or transfer of property on the grounds of lack of mental capacity, it is essential that the party did not understand the nature of the transaction at the time of the conveyance as a result of [his] mental disability" (*Lopresto v Brizzolara*, 91 AD2d 952, 955-956 [1st Dept 1983]; *accord Buckley v Ritchie Knop, Inc.,* 40 AD3d 794 [2d Dept 2007]). There is no evidence that Frank did not understand the nature of the transaction at the time that the trust amendment was executed. At best, the evidence indicates that on the date in question Frank vacillated between making what Nurse Walsh identified as "appropriate" and "inappropriate" responses to questions. She could not identify with any certainty why she indicated that Frank "lacked capacity," testifying that it might have been the result of a conversation with a doctor or other health care workers. Dr. Timpone's testimony was mostly unfavorable to the plaintiff's case and he testified that he never indicated anywhere on the hospital record that Frank lacked mental capacity. There being no direct proof that Frank was not lucid, alert, and oriented at the time the trust amendment was

executed, the presumption of competency was not overcome (*Feiden v Feiden*, 151 AD2d 889, 891 [3d Dept 1989]). The petition is therefore dismissed.

Settle decree.

Dated: December 3, 2015

EDWARD W. McCARTY III
Judge of the
Surrogate's Court