

Matter of McQuade (Graffeo)
2017 NY Slip Op 31760(U)
August 4, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-391029
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Proceeding by Lenore McQuade, as a
Distributee of the Estate of**

**DECISION
File No. 2016-391029
Dec. No. 32600**

**ACCURSIO GRAFFEO,
a/k/a GUS GRAFFEO,**

Deceased,

**to invalidate the purported Accursio Graffeo
2014 Trust dated August 11, 2014, and the Purported
Amendments Thereto Dated July 1, 2015 and
December 16, 2015, respectively.**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Order to Show Cause with Temporary Restraining	
Order & Exhibits	1
Verified and Amended Petition and Demand for	
Jury Trial & Exhibits.	2
Affidavit and Reply Affidavit of Leonore McQuade	3
Affirmation and Reply Affirmation of Robert Kurre, Esq..	4
Affidavit of Cynthia Brant.	5
Affidavit of Michael Suppe	6
Affidavit of Theresa Graffeo	7
Affidavit of Diane Young	8
Affidavit of Robert Pedley	9
Verified Answer & Petition	10
Affirmation of Joseph Hyland in Opposition	11
Affidavit of Haydee Reyes-Galecio in Opposition	12
Affirmation of Kenneth Misrok, Esq. in Opposition	13

In this miscellaneous proceeding to invalidate a trust, Lenore McQuade by order to show cause seeks a preliminary injunction (CPLR § 6301) which prohibits Haydee Reyes-Galecio, individually and as successor trustee of the Accursio Graffeo 2014 Trust and Irma

Gonzalez, individually and as second successor trustee of the Accursio Graffeo 2014 Trust from withdrawing, transferring, distributing or disposing of any funds of the Accursio Graffeo 2014 Trust including funds held or formerly held in account or accounts at the GMS Group. Ms. McQuade further seeks a preliminary injunction which prohibits Kenneth Misrok, Esq., as trustee of a second trust, the Accursio Graffeo 2016 Trust, from distributing any funds to the trustee of the Accursio Graffeo 2014 Trust including funds held or formerly held in an account or accounts at the GMS Group. Lenore McQuade is a daughter of Accursio Graffeo. The order to show cause is opposed.

I. Background

On or about August 11, 2014, Accursio Graffeo executed an inter vivos trust agreement (“2014 Trust”). The trust agreement provided, in pertinent part, the following: first, during his lifetime, Accursio Graffeo had the right to reside in the property located on Raff Avenue in Floral Park, New York; and second, the trustee had discretion to pay to or apply for the benefit of Accursio, income and principal as the settlor directs or as is necessary in the trustee’s discretion for the proper health, support, maintenance, comfort and welfare of the settlor in accordance with the settlor’s accustomed manner of living at the time of the execution of the trust. Upon the death of the settlor, the trust provided for the distribution of tangible personal property as well as distribution of the remainder to Haydee Reyes-Galecio.¹ Accursio Graffeo was the initial trustee and Haydee Reyes-Galecio was

¹On August 11, 2014, Accursio Graffeo executed a deed from himself and, as surviving spouse of Lana Graffeo, that conveyed real property located at Raff Avenue, Floral Park, New

nominated the successor trustee. On August 11, 2014, the decedent executed his last will and testament and nominated Haydee Reyes-Galecio as executor and named the 2014 Trust as the remainder beneficiary.

The 2014 Trust was subsequently amended twice. The first amendment to the 2014 Trust was dated July 1, 2015. The amendment provided that the tangible personal property as well as the remainder of the trust go to Margaret Brovetto, a neighbor of Accursio Graffeo. Accursio Graffeo also nominated Margaret Brovetto as the successor trustee.

The second amendment to the 2014 Trust was dated December 16, 2015. Upon the death of Accursio Graffeo, the tangible personal property and remainder were to be distributed to Haydee Reyes-Galecio. Haydee Reyes-Galecio was nominated as the successor trustee.

In February of 2015, Accursio Graffeo commenced a proceeding in Supreme Court, Nassau County against his daughter, Diane Young. Mr. Graffeo alleged that Diane Young's name was placed for convenience only on an investment account owned by him and managed by GMS Group, LLC. He further alleged that he did not intend to confer any ownership rights, present or future, upon Diane Young when he placed her name on the account. The matter was subsequently settled on March 29, 2016 and Accursio Graffeo and Diane Young entered into a Settlement and Mutual Release Agreement which provided, in pertinent part,

York to himself as trustee of the Accursio Graffeo 2014 trust.

at paragraph 3 the following:

“It is hereby agreed that an irrevocable trust entitled the Accursio Graffeo 2016 Trust will be established for the sole benefit of ACCURSIO GRAFFEO to be used for his health, maintenance and support (the “Trust”). Kenneth Misrok, Esq. will serve as the trustee of the Trust . . . Upon the death of ACCURSIO GRAFFEO, the remaining proceeds of the Trust account will be payable to the Accursio Graffeo 2014 Trust, or, if it is not in existence at the time of his death, then to his estate. In order to account for the plaintiff’s right to unilaterally revoke or amend the Trust pursuant to EPTL 7-1.9 since ACCURSIO GRAFFEO’s estate will be named as the remainder beneficiary, ACCURSIO GRAFFEO agrees not to amend or revoke the Trust”.

Attached as exhibits to the motion are copies of an unexecuted March 29, 2016 trust agreement between Accursio Graffeo and Kenneth Misrok, Esq. as trustee. Also attached is a copy of a Trustee Certification of Investment Powers between Kenneth Misrok, as trustee of the Accursio Graffeo 2016 Trust, and the GMS Group.

Accursio Graffeo died on August 29, 2016. He was survived by two children: Lenore McQuade and Diane Jones. Lenore McQuade is the petitioner in this proceeding. Haydee Reyes-Galecio, Accursio Graffeo’s health aide and housekeeper, is the respondent.

On or about September 28, 2016, Lenore McQuade commenced a proceeding by verified petition which seeks the following relief: invalidating the trust and trust amendments; re-registering of trust assets to the decedent’s estate; directing Haydee Reyes-Galecio to judicially settle the account of her proceedings as successor trustee; if Irma Gonzalez succeeded to the office of the trust, directing her to judicially settle her account; directing Haydee Reyes-Galecio to return to the decedent’s estate any property she

distributed from the trust; if Irma Gonzalez succeeded to the office of the trustee, directing her to return to the estate any property she distributed from the trust; and legal fees, costs and disbursements.

II. Preliminary Injunction

Pursuant to CPLR§ 6301, a preliminary injunction may be granted where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights and would tend to render the judgment ineffectual.

In order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Doe v Axelrod*, 73 NY2d 748 [1998]; *Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]; *Matos v City of New York*, 21 AD3d 936 [2d Dept 2005]).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*Ruiz v Meloney*, 236 AD3d 485, *supra*; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642 [2d Dept 2006]; *Weinreb Management, LLC v KBD Management, Inc.*, 22 AD3d 571). The decision to grant or deny a preliminary injunction rests in the sound discretion of the court (*Doe v Axelrod*, *supra*, at 750; *Ruiz v Meloney*, *supra*; *Weinreb Management, LLC v KBD Management, Inc.*, *supra*). [“It is well settled that, absent extraordinary circumstances, a preliminary injunction

will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment” (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *St. Paul Fire and Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349)].

A. Likelihood of Success on the Merits

In order for a lifetime trust to be valid, it “shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument” (EPTL § 7-1.17 [a]).

When a grantor fails to complete the formalities associated with setting up a trust, a valid trust is not created (*see Gaines v City of New York et.al*, 137 AD3d 673,674 [1st Dept 2016]).

Where no valid trust was created, any transfer into or out of the putative trust is null and void (*Fasano v DiGiacomo*, 49 AD3d 683,685 [2d Dept 2008]).

If a trust is validly executed, it may still be set aside under certain circumstances. In a proceeding to invalidate a lifetime trust, “the burden is upon the party seeking to set the instrument aside to establish that the settlor lacked capacity” (*Matter of Louise Jacobson*, NYLJ, Oct. 7, 2014, at 29, col 3 [Sur Ct, Suffolk County]; *see also Matter of McHale*, 37 Misc 3d 1204 [A] [Sur Ct, Erie County 2012], *affd* 126 AD3d 1433 [4th Dept 2015]. A person is presumed to be competent and the burden is on the person alleging incapacity to

establish that at the time the instrument 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]). Furthermore, a trust is a “bilateral agreement, the capacity necessary for executing same is like that of any other contract” (*Matter of Louise Jacobson*, NYLJ, Oct. 7, 2014, at 29, col 3[Sur [Sur Ct, Suffolk County])).

Where the claim is that the trust is a product of undue influence, the party seeking to invalidate the trust bears the burden of proof (*id.*). The party must show: the existence and exercise of undue influence; the effective operation of undue influence which subverted the mind of the grantor at the time of the execution of the trust; and the execution of the trust which would not have occurred but for the undue influence (*id.*).

B. Irreparable Injury and Balancing Equities

The petitioner must also demonstrate irreparable injury absent the granting of the preliminary injunction and a balancing of the equities that favors her position (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). Where the respondent will not suffer any great hardship as a result of the issuance of the preliminary injunction, which is necessary to preserve the status quo, an alleged factual dispute will not bar the remedy (*Burmax Company, Inc. v B & S Industries, Inc.*, 135 AD2d 599 [2d Dept 1987]). The alleged harm must be imminent and not remote or speculative (*Trump on the Ocean, LLC, v Ash*, 81 AD3d 713 [2d Dept 2011]). Finally, the balancing of the equities will favor the movant where the irreparable injury to be sustained by the movant is more burdensome than the harm caused

the respondent through the imposition of the injunction ((*Burmax Company, Inc. v B & S Industries, Inc.*, 135 AD2d 599 [2d Dept 1987] citing *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 AD2d 1021 [3d Dept 1979])).

III. Affidavits and Affirmations in Support and Opposition to the Motion

Leonore McQuade in her affidavit sets forth that her father was married two times, the first time to her mother, Theresa Graffeo, and the second time to Lana Graffeo. Lana Graffeo died in 2010. After Lana Graffeo died, Leonore McQuade stated that her father asked his former wife, Theresa Graffeo, to move in with him. Ms. McQuade indicated that her mother lived with her father for several years but that her father was agitated, hostile and drinking heavily which resulted in her mother moving out. Lenore McQuade posits that her father was admitted in early 2014 to Winthrop Hospital due to extreme dehydration. At that time, her father was confused and his memory was failing. The family was concerned about the decedent's ability to care for himself so Ms. McQuade asked her housekeeper, Haydee Reyes-Galecio, if she would be able to help care for her father, which she did. After Haydee Reyes-Galecio started caring for the decedent, Accursio Graffeo, Lenore McQuade received phone calls from various people who informed her that her father was trying to change his estate plan. In 2014, when Lenore McQuade spoke with her father, he accused Ms. McQuade's husband and her mother of stealing from him. According to Ms. McQuade, Haydee Reyes-Galecio interfered with her conversations and made it difficult to speak with her father. She also alleged that, during the time period that Haydee Reyes-Galecio cared for

her father, there was increased activity in her father's bank account for expenditures which seemingly benefitted Haydee Reyes-Galecio.

Theresa Graffeo, the decedent's first wife, in her affidavit in support, indicated that after the decedent's second wife Lana Graffeo died, she moved in with Accursio Graffeo in the early part of 2011 and stayed until early 2014. She described the decedent's behavior as becoming more extreme and irrational. Theresa Graffeo said that the decedent accused her, her daughters and her son-in-law of stealing from him. She alleged that the decedent became repetitive, had liquor delivered by the case, and cursed frequently.

Diane Young, the decedent's daughter, in her affidavit in support, claimed that she noticed a significant mental decline in her father which corresponded with increased involvement of Haydee Reyes-Galecio in his life. Ms. Young never asked for any money from her father and did not receive anything from him except for her wedding in 1986. When her father started losing track of his assets, Ms. Young added her name to her father's investment account. Ms. Young became concerned after she logged into her father's account in July of 2014 and discovered the account no longer existed. When she asked her father about this, he allegedly told her that he had no memory of what had happened.

Cynthia Brant, a friend of the decedent for approximately twenty years, in her affidavit in support, stated that she knew the decedent because a company she worked for was acquired by a company co-owned by the decedent. She described the relationship between the decedent and herself as close to familial in that the decedent was like a father to her and

she met with him regularly. She stated that her last visit with the decedent took place in the summer of 2014 when she visited him and stayed overnight. She felt that the decedent was quiet, depressed and confused. He referred to his daughters as “dirt bags” and appeared, to her, to be “lost in time.” One week after her visit, she called to see how the decedent was doing. Ms. Brant further posits that Haydee Reyes-Galecio answered the phone and said the decedent did not want to talk to her anymore. When she finally spoke to the decedent, he accused her of owing him \$15,000.00 which Ms. Brant reported was totally baseless. Ms. Brant finally stated that the decedent’s relationship with his daughters always appeared, prior to 2014, to her to be loving and happy.

Robert Pedley, a Floral Park Police officer for twenty-seven years, in his affidavit in support, stated that he was acquainted with the decedent since 1992. He further noted that in 2014 and 2015, the decedent came to the Floral Park Police Department on multiple occasions complaining, among other things, that his daughters were stealing from him. On each occasion, Mr. Pedley investigated and found the allegations to be baseless.

In opposition to the order to show cause, the respondent submitted an affidavit and the affirmation of the attorney, Kenneth Misrok. Haydee Reyes-Galecio stated that she was called at the end of 2013 or the beginning of 2014 by a family member of the decedent’s to help care for the decedent. At that time, she was told that the Department of Social Services was scheduled to visit the decedent and they wanted her to help clean the decedent up. Ms. Reyes-Galecio stated that when she arrived the house smelled strongly and that the

decedent was unwashed, had dirty clothes and smelled badly. Ms. Reyes-Galecio said that she found a “large pile of adult diapers and dirty clothes which had been thrown into the basement.” Ms. Reyes-Galecio said that her duties included arranging for all of the decedent’s needs including shopping, cleaning, cooking, doctor’s appointment, and dinners at restaurants. She stated that the decedent was angry at his children and thought that his daughter Lenore had stolen a ring. Ms Reyes-Galecio noted that as a result of his anger with his children, the decedent randomly found an attorney, Kenneth Misrok, to advise him. Ms. Reyes-Galecio stated that on July 22, 2014, she drove the decedent to his meeting with Mr. Misrok and waited outside. She also drove the decedent on August 8, 2014 to the Floral Park Police Department to file a harassment complaint against Lenore McQuade, Diane Young and Theresa Graffeo. On August 11, 2014, Ms. Reyes-Galecio drove the decedent to Mr. Misrok’s office for a further appointment, where she again, stated that she sat outside. Additional visits to attorneys offices ensued. Haydee Reyes-Galecio said that in June of 2015, “after getting tired of being continually harassed by his daughters, I requested that Accursio remove me from his estate plan as I was scared of his daughters and ex-wife.” As a result, the decedent amended his trust to name the neighbor, Margaret Brovetto, as the successor trustee and beneficiary of the trust. Ms. Brovetto reportedly brought her attorney to the decedent’s house where they amended the trust and named Ms. Brovetto as successor trustee and beneficiary of the trust. Ms. Reyes-Galecio averred that she drove the decedent on August 16, 2015 to Mr. Misrok’s office where he amended the trust again.

Kenneth Misrok, the attorney for the decedent and the nominated trustee of the 2016 Trust, filed an affirmation in opposition to the Order to Show Cause. Mr. Misrok stated that he first met the decedent on July 22, 2014. He said that the decedent was in a wheelchair, very alert, pleasant, clean and neatly dressed. Accursio Graffeo made it clear, according to Mr. Misrok, that he was upset with his family. Mr. Misrok advised that the decedent instructed him to draft documents leaving his estate to Haydee Reyes-Galecio. Mr. Misrok met again with the decedent on August 11, 2014 at which time the decedent executed a trust, a deed and his last will and testament. The attorney, in his opinion, thought that the decedent “was of sound mind, under no duress or coercion, understood the documents he executed and was not the subject of undue influence and no fraud was perpetrated upon him . . .”. After his meeting, Mr. Misrok sent a “cease and desist” letter to Lenore McQuade, Theresa Graffeo and Diane Young. Mr. Misrok subsequently met with the decedent on September 4, 2014 to discuss his relationship with his family. Mr. Misrok said that the decedent was dissatisfied with his relationship with his family and wanted to leave Haydee Reyes-Galecio everything. With regard to the investment account with Diane, Mr. Misrok stated that the decedent was infuriated by her actions which resulted in a law suit to remove Diane’s name from the account.

IV. Conclusion

The petitioner has shown a likelihood of success on the merits. The decedent, in a short period of time, changed his estate plan on at least three different occasions. He had

been hospitalized, had a new care giver and exhibited irrational behavior such as accusing family members and friends of stealing from him, which the police investigated and found to be baseless. The respondent had the motive and opportunity to influence the decedent to change his estate plan to benefit herself. Moreover, the 2016 Trust is most likely null and void as it was not properly executed (EPTL § 7-1.17 [a]).

The petitioner further argues that the actions of the respondent strongly suggest that she would “likely do everything in her power if she is given immediate access to the funds at issue, to make sure she benefits from them as soon as possible and puts them out of reach of the distributees.” The petitioner also argues that the respondent would not have the means to make the distributees whole if she were to ultimately prevail in her proceeding to invalidate the trust. The respondent has not raised any issues as to the hardship she would suffer if the relief was granted. Finally, the irreparable injury to be sustained by the petitioner is more burdensome than the harm caused the respondent through the imposition of the injunction

Accordingly, the application for a preliminary injunction is **GRANTED**, upon the posting of an undertaking.

V. Undertaking

The motion papers fail to properly address the subject of an undertaking, which is a mandatory prerequisite to an injunction (CPLR § 6313 [b]). The sum fixed by the Court for the undertaking must be sufficient to compensate the party being enjoined for the damages

and costs sustained as a result of the issuance of the preliminary injunction in the event that it is later determined that the requester was not entitled to the injunctive relief (CPLR § 6312 [b]; *Carter v Konstantatos*, 156 AD2d 632 [2d Dept 1989]). The absence of an undertaking would render the preliminary injunction voidable (*see Olechna v Town of Smithtown*, 51 AD2d 1036 [2d Dept 1976]). “The fixing of the amount of an undertaking is a matter within the sound discretion of the Supreme Court, and its determination will not be disturbed absent an improvident exercise of that discretion. The amount of the undertaking, however, must not be based upon speculation and must be rationally related to the damages the nonmoving party might suffer if the court later determines that the relief to which the undertaking relates should not have been granted” (*Olympic Ice Cream Co., Inc. v Sussman*, 151 AD3d 872 [internal citations removed] [2d Dept 2017]).

The parties shall submit papers on the issue of the amount of an undertaking (CPLR §6312 [b]) within twenty (20) days of this Decision and Order.

Dated: August 4, 2017
Mineola, New York

E N T E R :

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Judge of the Surrogate’s Court

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