PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Evelyn Citrino
O.C. No. 587 DE of 2006
Control No. 065366

O P I N I O N

Introduction

This dispute between two brothers who are both lawyers raises the issue of whether their mother gave $466, 244 in U.S. savings bond proceeds to one of them as a gift prior to her death. For the reasons set forth below, the putative donee of the inter vivos gift failed to meet his burden of proof that his mother had the donative intent necessary for a valid gift.

Factual Background

Procedural History

Evelyn Citrino died on January 5, 2006. Prior to her death, she had executed a Will dated October 25, 2001, in which she named her son, Harry Citrino (hereinafter "Harry"), to serve as executor. Evelyn's will further provided that the residue of her estate should be equally divided among her three sons: Harry, Kenneth and Michael.[1] On April 19, 2006, Harry filed a petition seeking to compel his brother, Kenneth Citrino ("Kenneth") to file an account concerning the disposition of funds he obtained by redeeming U.S. savings bonds which had been owned by their deceased mother, Evelyn. Harry alleged that Evelyn had been the owner of 68 United States Savings Bonds with a total value of $469,024. The petition asserted that only some of

[1] Ex. P-2. The Will provided that Evelyn's entire estate would first go to her husband, but he predeceased her. Consequently, the entire residue of her estate was to go in equal shares to her three sons.

these funds had been used to benefit Evelyn and sought the return of the funds to the Estate of Evelyn Citrino.[2]

Kenneth responded by filing preliminary objections, which were overruled, and then with an Answer acknowledging that Evelyn during her lifetime had owned at least 68 U.S. Savings bonds. Kenneth admitted that on three occasions, varying numbers of the 68 U.S. Savings bonds were redeemed for a total redemption value of $466,224.[3] According to Kenneth, the "proceeds of the three redemptions of the bonds were gifts to the respondent (i.e. Kenneth) who had no obligation to use the bonds for the benefit of the decedent."[4]

Redemption of the U.S. Savings Bonds

A hearing was held on January 20, 2009 on Harry's petition seeking the return of the U.S. savings bond assets to the Estate of Evelyn Citrino. Kenneth Citrino, as respondent, presented his case first with two witnesses: himself and Karen Babiarz, an employee of Fox Chase Bank who was involved all three transactions to redeem the bonds.[5]

Kenneth testified that he had redeemed the U.S. savings bonds in three separate transactions because " I was trying to keep mom's interest in mind and these were the three occasions that came up. Mom felt comfortable going to the bank, we went to the bank."[6] The first transaction occurred on August 7, 2004 when 6 bonds in the name of Kenneth's deceased father (Harry Sr.) and his mother Evelyn were redeemed for a total value of $40,488. According to Kenneth, he initially left his mother alone with Karen Babiarz, the Fox Chase Bank

[2] 4/19/06 Harry Citrino, Jr. Petition. Essentially, this was a petition seeking the return of assets to the Estate of Evelyn Citrino, but the petitioner sought to give credit for any expenses Kenneth incurred for Evelyn's benefit.
[3] 8/10/06 Kenneth Citrino Answer, ¶ 4. The bonds had a total redeemed value of $469,024 with a bank deduction of $2,800 for unearned interest. 3/10/09 Harry Citrino Memorandum at 1; Ex. R-1.
[4] 8/10/06 Kenneth Citrino Answer, ¶ 6.
[5] Counsel for respondent had sought to present Ms. Babiarz's testimony first, but she was late in arriving at the hearing. 1/20/09 N.T. at 3 (Parrott).
[6] 1/20/09 N.T. at 22 (Kenneth).

representative, because he had forgotten his father's death certificate. Upon his return, Evelyn signed two or three bonds, and then stamped the remaining bonds. According to bank records, $30,202.45 went into Kenneth's escrow account, and most of the remaining $10,000 went into Kenneth's other account. Kenneth acknowledged that his mother had no signing authority over either of these accounts.[7]

Kenneth brought his mother back to Fox Chase Bank on October 22, 2004 to redeem bonds with a total value of $292,768. Once again, Karen Babiarz was present and Kenneth remembered that he left his mother alone with Ms. Babiarz because he had forgotten Evelyn's name stamp. Once again, the funds were placed in Kenneth's accounts: $30,000 went into Kenneth's escrow account; $12,768 went into his savings account, and; $250,000 was placed in a newly opened Apex account that provided some interest. Kenneth then attempted to testify concerning his conversation with his mother over the titling of this account in his own name.[8] Counsel for petitioner, however, objected that the Dead Man's Rule precluded testimony about the statements of a deceased person to an adverse party.[9] Kenneth's counsel replied that she was in the process of presenting a prima facie case that these three transactions occurred. She nonetheless conceded that Kenneth's testimony concerning his mother's intentions was premature:

> So those things that he was saying just now, I would agree that they shouldn't be in until we finish making the prima facie case, but once the prima facie case is made out, then he should be able to testify.[10]

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[7] 1/20/09 N.T. at 6-10 (Kenneth). See also Ex. R-1.
[8] 1/20/09 N.T. at 10-14, 19 (Kenneth). See also Ex. R-1.
[9] 1/20/09 N.T. at 14 (Maxwell).
[10] 1/20/09 N.T. at 15 (Parrott).

The testimony of Kenneth Shelton that his mother had told him "I want you to have the money" was therefore stricken at this point. When asked upon further questioning, however, why Kenneth had wanted to open the interest-bearing Apex account, he replied: "I realized it was a substantial amount of money, I was uncomfortable really handling it, but I wanted her to get some interest."[11]

The final transaction occurred on March 12, 2005, once again at the Fox Chase Bank with the assistance of Karen Babiarz. The total value redeemed during that transaction was $135,768, with $15,768 deposited in Kenneth's savings account, $20,000 in his escrow account and $100,000 into the apex account in the sole name of Kenneth Citrino.[12]

After Kenneth was cross-examined, Karen Babiarz, the Fox Chase Bank representative, was asked if she remembered Evelyn Citrino and replied: "I vaguely remember her."[13] She had no recollection of whether Evelyn spoke to her about the redemption of the bonds because it "was a long time ago."[14] Ms. Babiarz did not recall the August 7, 2004 transfer from Evelyn to Kenneth; she did not recall Kenneth leaving his mother alone with her; she had no recollection of the October 22, 2004 transaction; she had no recollection of any private conversation with Evelyn. She confirmed, however, based on the bank documents (Ex.R-1) that she had been present at the three transactions and never made a suspicious activity report about the transactions.[15]

On cross examination, Ms. Babiarz did recall that there had been a problem at the first transaction because Kenneth had arrived at the bank without his mother and then had to return

[11] 1/20/09 N.T. at 18 (Kenneth)(emphasis added). See also Ex. R-1.
[12] 1/20/09 N.T. at 20-22 (Kenneth). See also Ex. R-1.
[13] 1/20/09 N.T. at 28 (Babiarz).
[14] 1/20/09 N.T. at 30 (Babiarz).
[15] 1/20/09 N.T. at 30-38 (Babiarz).

home to get her.[16] Ms. Babiarz testified that she had no independent recollection of the second or third transaction nor did she have evidence that Evelyn directed that the money be given to Kenneth.[17] At this point, Kenneth presented no additional witnesses as to the prima facie case. This court ruled that he had established his prima facie case so that the burden shifted to Harry Citrino.[18]

Harry presented five witnesses, beginning with Dr. Ruth Steinman, a psychiatrist who saw Evelyn beginning in 1997 approximately 12 times up until a final visit in 2000. According to Dr. Steinman, Evelyn had a bi-polar condition that never reached a manic stage but instead reached a level of hypomania so that her judgment remained intact. She recalled that Evelyn's husband was very involved in the administration of Evelyn's medicine. Dr. Steinman believed that Evelyn would have had the capacity to execute a will during the period when she was treating her, but the doctor refused to offer an opinion as to Evelyn's status or ability to execute a will in 2001. She also stated that she would have no way of assessing Evelyn's ability to make a gift in 2004 or 2005.[19]

Harry, who is executor under Evelyn's will, testified that he first learned that the savings bonds were gone when he prepared his mother's income tax return in April 2005. Kenneth was in the room when Harry gave Evelyn the tax return to sign, and warned her not to sign it because "there's stuff missing."[20] Harry thereafter amended his mother's income tax return to reflect the proceeds that were cashed in by Kenneth. According to Harry, the additional taxes were paid by "Ken with Mom's money" and Kenneth never asked him to prepare a gift tax

[16] 1/20/09 N.T. at 39 (Babiarz).
[17] 1/20/09 N.T. at 40-41 (Babiarz).
[18] 1/20/09 N.T. at 43-44.
[19] 1/20/09 N.T. at 45-63 (Dr. Steinman).
[20] 1/20/09 N.T. at 68, and generally 61-67 (Harry).

return for their mother.[21] Upon Evelyn's death, Kenneth told his brothers that there was no money left. Although the brothers had three meetings to discuss the missing assets, Kenneth never told his brothers that the bonds had been a gift from Evelyn to him. Instead, he offered to put together a list of how he had spent the money but never did so. This prompted Harry to file his petition seeking the return of those assets. Harry explained that he had waited to file this petition because he trusted his brother and was aware that Kenneth had spent some of the funds on funeral expenses. [22]

More generally, Harry testified that during their mother's lifetime, he and Kenneth had assumed different responsibilities for her care. Prior to his death, Evelyn's husband had assumed total responsibility for managing their finances. According to Harry, Evelyn had no concept of money, she never paid a bill, wrote a check or did any banking.[23] After Evelyn's husband's death, Harry prepared his mother's taxes.[24] Around 2001, Harry's son Christopher built a home for Evelyn and her husband across the street from Harry's house. At that time, Evelyn had become oxygen dependent and her husband had taken care of that until his death. After his father's death, Kenneth took responsibility for Evelyn's medications. According to Harry, he and his brothers were all aware that their mother would need to be taken care of and that the $500,000 was to be used for that care.[25]

Harry recalled that in August 2004 he and Kenneth had had a disagreement over Evelyn's savings bonds. At that time, Kenneth's name was on the safety deposit box where the bonds were kept, so whenever Harry needed access to a bond he had to ask Kenneth. Harry recalled writing a note to Kenneth to "bring in all U.S. savings bonds by Sunday so I can change name on

[21] 1/20/09 N.T. at 74, 69-73 (Harry). See also Ex. P-3.
[22] 1/20/09 N.T. at 74-77 (Harry).
[23] 1/20/09 N.T. at 89, 118 (Harry).
[24] 1/20/09 N.T. at 97-98 (Harry).
[25] 1/20/09 N.T. at 80-88 (Harry).

Monday."[26] According to Harry, he wanted to shift the bonds from EE to I Bonds and the names on the bonds had to be changed because their father was deceased. Harry's plan was to redeem the bonds in small increments to avoid taxes. At this point, however, Kenneth exploded at him. He told Harry that he was going to take care of everything.[27]

Harry's next witness, his son Christopher Citrino, confirmed that he had built a home for his grandmother. Christopher observed that he had never seen Evelyn prepare a meal after she moved into the house nor did she prepare grocery lists. Instead, she " was pretty well taken care of by everybody else" who helped her with the cleaning, cooking and bill paying.[28] According to Christopher, Evelyn always recognized him. She was not in the habit of making gifts except at Christmas or birthdays.[29]

Christopher's wife, Traci Citrino, testified that she had cleaned and cooked for Evelyn. She also helped occasionally with Evelyn's hygiene. In 2003 and 2004, she went to Evelyn's house to clean at least once a week; around 2004, Traci would cook for Evelyn approximately 5 times a week. She would also go over frequently to check on Evelyn and to make sure Evelyn was out of bed or had not fallen. Traci conceded she had been given checks payable to her as a gift that were signed by Harry Citrino.[30]

According to Harry's wife, Rose Citrino, Evelyn had not been able to do much to provide for her own care between 2003 and 2006. Rose noted that prior to his death, Evelyn's husband had done everything for Evelyn. After his death, Rose stepped in to provide such services as cooking, laundry and arranging doctor appointments. She did not believe that Evelyn knew how

[26] Ex. R-2. 1/20/09 N.T. at 107-09, 89-92 (Harry).
[27] 1/20/09 N.T. at 106-09 (Harry).
[28] 1/20/09 N.T. at 123, 126-27 (Christopher Citrino).
[29] 1/20/09 N.T. at 129-32 (Christopher Citrino).
[30] 1/20/09 N.T. at 134-147 (Traci Citrino). See Ex. R-4.

much money she had, noting that Evelyn never asked who was paying for all the food Rose provided.[31]

This was the final witness for the petitioner. Based on this record, the court concluded "that the prima facie evidence of donative intent has been rebutted, that Evelyn Citrino lacked the awareness of her finances, appears to have had a history of taking no independent action on her own behalf."[32] The respondent thereafter presented testimony from 9 additional witnesses as well as his own testimony. Suzanne Ozas, Evelyn's hairdresser for five to six years, and Cheryl Block, her manicurist, testified that Evelyn generally behaved appropriately in their presence, engaging in conversation and paying for their services.[33] Alvera Schneider, who had been Evelyn's neighbor for many years before moving away in 1996, testified that when she had a conversation with Evelyn sometime after August 2004, Evelyn knew who Alvera was.[34] Evelyn's nephew, Russell Pizzo, and Russell's wife, Patty, both testified that Patty went to Evelyn's house two times a week between August 2004 to March 2005 to help around the house or assist Evelyn in showering. Patty would clean up after breakfast or help Evelyn get to the couch or the bed for a nap. Patty was paid for her services at a price that was acceptable to her, Harry and Kenneth. Significantly, Evelyn was not involved in this financial decision. Both Patty and Russell observed nonetheless that Evelyn could carry on a conversation and that she recognized them.[35] Evelyn's niece, Denise D'Emilio, and her husband, Robert, testified about their visits with Evelyn, how she never expressed any regrets about giving any gifts to anyone and how she viewed all her children equally.[36]

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[31] 1/20/09 N.T. at 151-61 (Rose Citrino).
[32] 1/20/09 N.T at 164.
[33] 1/20/09 N.T. at 166-77 (Ozas and Block).
[34] 1/20/09 N.T. at 178-81 (Schneider).
[35] 1/20/09 N.T. at 183-93 (Patty and Russell Pizzo).
[36] 1/20/09 N.T. at 197-200 (Denise and Robert D'Emilio)

Anthony Starkus, who described himself as a friend of Kenneth for 30 years, testified that Evelyn repeatedly stated that she wanted to buy Kenneth a car—although he never received one from her. He observed, however, that Kenneth drove a SUV and that it was difficult for Evelyn to climb up into it. Moreover, Evelyn had never told him that she had given Kenneth a gift.[37] Maureen O'Connell, who stated that she had known Evelyn for 6 years, testified that she recalled Evelyn being mad at Harry for asking her to sign something—which may have been the bonds—without letting her read it. According to Ms. O'Connell, Evelyn told Kenneth "Don't give Harry any of my money."[38] On cross-examination, however, Ms. O'Connell acknowledged that Kenneth was helping support her child.[39]

Kenneth Citrino was the final witness, who testified as to the circumstances surrounding each "gift:"

> Mom had indicated to me that in no uncertain terms that she didn't want Harry to have anymore of her money because he wasn't spending it on her. She trusted me and she wanted to give it to me so as to ultimately protect her. And she did in fact give it to me in the way I indicated this morning. So that this way, had she needed to go into a nursing home and that we couldn't give her the care she needed at home, which we couldn't, six, eight people together, we're not professionals, we're lawyers, we are not doctors, we are not nurses, we are not psychiatrists, we couldn't give her that. She wanted to know if she was in a place she was in a safe place and that somebody would look out for her.[40]

Kenneth further stated that "Mom trusted and confided in me and she just wanted to be taken care of."[41]

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[37] 1/20/09 N.T. at 204-07 (Starkus).
[38] 1/20/09 N.T. at 217, 209-16 (O'Connell).
[39] 1/20/09 N.T. at 218 (O'Connell).
[40] 1/20/09 N.T. at 221 (Kenneth).
[41] 1/20/09 N.T. at 223 (Kenneth).

Legal Analysis

The two necessary elements for establishing a valid gift are donative intent and delivery "with intent to vest title with the donee." Rankin v. Kabian, 414 Pa. 554, 556-57, 201 A.2d 424, 426 (1964). Kenneth Citrino, as the putative donee, had the initial burden of proving by clear and convincing evident that his mother intended to make a gift of her U.S. savings bonds to him during her lifetime, and that she delivered them to him. Cole Estate, 11 Fid. Rep. 2d 17, 18-19 (Phila. O.C. 1990). Once Kenneth established this prima facie case, there would be a rebuttable presumption that the gift is valid and the burden would then shift to Harry Citrino to rebut that presumption by clear and convincing evidence. Estate of Clark, 467 Pa. 628, 634, 359 A.2d 777, 781 (1976). One way a "presumptively valid gift may be rebutted" is "by establishing that donor and donee had a confidential relationship at the time the alleged gift was made. Hera v. McCormick, 425 Pa. Super. 432, 439-40, 625 A.2d 682, 686; Rutter Estate, 22 Fid. Rep. 2d 135, 138 (Phila. O.C. 2001). If Harry Citrino met his burden and rebutted the presumption of a valid gift, the burden would then shift back to Kenneth "to show that the gift was free of any taint of undue influence or deception." Estate of Clark, 467 Pa. at 634-35, 359 A.2d at 780.

Although this court initially concluded that Kenneth had met his burden of establishing a prima facie case of donative intent and delivery, a review of the actual transcript documents that Kenneth failed to establish Evelyn's donative intent through either his own testimony, the testimony of Karen Babiarz or the bank documents submitted. Alternatively, even if Kenneth had met his burden in establishing a prima facie case, the evidence presented by Harry Citrino effectively rebutted any presumption of a valid gift. Moreover, the numerous witnesses Kenneth presented in his effort to rebut Harry's case failed to do so for the reasons set forth below.

a. Kenneth Citrino Failed to Establish His Prima Facie Case of Donative Intent by Clear and Convincing Evidence

Kenneth Citrino attempted to make out his prima facie case that his mother gave him the U.S. savings bonds as a gift by presenting only two witnesses: himself and Karen Babiarz, the Fox Chase Bank representative who was present at all three occasions when the savings bonds were redeemed. Kenneth's testimony as to his mother's intent at this point in the proceedings was limited by the Dead Man's Rule. It also underscored Evelyn's passive role in these transactions. Ms. Babiarz's testimony was limited by her vague recollection of Evelyn and the details of the three transactions. It also undermined Kenneth's claim with Ms. Babiarz's recollection that at his first visit to redeem the bonds, Kenneth had come to the bank alone. Finally, the bank documents merely indicate that the redemption of the bonds and transfer of assets took place; they do not go to the heart of the issue –whether Evelyn Citrino had the requisite donative intent.

As the first witness, Kenneth explained how he redeemed his mother's U.S. Savings bonds in three different transactions on August 7, 2004, October 22, 2004 and March 12, 2005. After the bonds were redeemed, the funds were deposited into 2 or 3 accounts belonging to Kenneth alone. Kenneth presented into evidence "U.S. Savings Bond Redemption Receipts "for these three dates as well as Fox Chase Bank documents showing the deposit of sums into various accounts in the name of Kenneth Citrino. Ex. R-1. Kenneth admitted that his mother did not have signatory authority over his accounts. Although the bond redemption receipts bore Evelyn Citron's signature or stamp, the bank records showing the deposit of funds into Kenneth Citrino's accounts were unsigned computer records.[42]

[42] Ex. R-1; 1/20/09 N.T. at 8-9, 13-19, 21 (Kenneth).

These bank documents, however, only establish that Evelyn's bonds were redeemed for a total value of $469,024, and that certain sums were deposited in Kenneth Citrino's accounts on the same dates as the bond redemptions. Ex. R-1. Additional evidence or testimony was therefore necessary to establish the elements of a valid gift.

Considered as a whole, Kenneth Citrino's initial testimony did not make out his prima facie case for donative intent. When asked why the redemptions were spread out over in three transactions, Kenneth unwittingly suggested either that his mother had played a purely passive role or that the transactions were intended to benefit her rather than to gift the bonds to him:

> I was trying to keep mom's interest in mind and these were the three occasions that came up. Mom felt comfortable going to the bank we went to the bank."[43]

Moreover, when explaining why he opened the interest bearing Apex account, Kenneth seemingly inadvertently explained "I wanted her to get some interest,"[44] thereby suggesting the unclear intent of this transaction.

In the course of his testimony, Kenneth was thwarted in his effort to recount an alleged conversation with his mother concerning the deposit of the funds into his own bank account. When Kenneth began describing this conversation, opposing counsel raised a timely objection on the grounds of the Dead Man's Rule, 42 Pa.C.S. § 5930.[45] The Dead Man's Rule or statute precludes a witness from testifying where "(1) the deceased must have had an actual right or interest in the matter at issue, i.e., an interest in the immediate result of the suit; (2) the interest of the witness—not simply the testimony—must by adverse; (3) a right of the deceased must have passed to a party of record who represents the deceased's interest." Friedeman v. Kinnen, 452 Pa. 365,368, 305 A.2d 3,4 (1973).

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[43] 1/20/09 N.T. at 22 (Kenneth).
[44] 1/20/09 N.T. at 18 (Kenneth).
[45] 1/20/09 N.T. at 14-15 (Maxwell).

In inter vivos gift cases, there is a subtle interplay between application of the Dead Man's Rule and the donee's burden of proof. This delicate pirouette of establishing a valid gift based on testimony by a putative donee as to the donor's intent in light of the Dead Man's Rule has been addressed by various Pennsylvania courts. Such testimony—without another independent source—is insufficient to establish a prima facie case of donative intent:

> We held that if a valid inter vivos transfer can be shown by independent evidence *before* the admission of any testimony by the alleged donee, the donee will be considered to represent the interest of the decedent and will be permitted to testify. Conversely, if the alleged donee fails to establish a prima facie gift by independent testimony before he takes the stand, he will not be competent to testify.
> Friedeman v. Kinnen, 452 Pa. at 369, 305 A.2d at 4.

In other words, before a putative done may testify as to a donor's intent to gift there must be independent evidence to overcome the preclusion of the Dead Man's Rule:

> Where, as in this case, there is an issue regarding the validity of an inter vivos gift, the court may not admit statements of decedent absent independent testimony establishing prima facie evidence of donative intent and delivery. If the alleged donee fails to establish prima facie evidence of a gift or transfer by independent testimony before he takes the stand, he is not competent to testify. The purpose of this rule "is to prevent the injustice which would result from permitting a surviving party to testify favorably to himself and adversely to the interest of the decedent when the representative of the decedent would be hampered in attempting to refute the testimony by reason of the decedent.
> Hera v. McCormick, 425 Pa. Super. 432, 444, 625 A.2d 682, 688 (1993).

In this case, the objection was not to Kenneth's testimony as to a whole but specifically as to his mother's comments. Counsel for Kenneth properly conceded that those comments "shouldn't be in until we finish making out the prima facie case, but once the prima facie case is made out, he should be able to testify."[46] Based on the objection—and concession—by counsel

[46] 1/20/09 N.T. at 15 (Parrott). As counsel observed:

> Your Honor, at this point I am trying to go through documentary evidence to show that the transaction has occurred, and if I have made out that prima facie case that the transaction has occurred, that it's left Mrs. Citrino, went to Mr. Citrino, then I believe he is the representation of her interest, that he should be allowed to take the stand and speak. So those things that he was saying just now, I would agree that they shouldn't be in until we finish making out the prima facie case, but once the prima facie case is made out, then he should be able to testify.

for both parties, Kenneth Citrino's statement that his mother during the October 2004 bank transaction had said "I am giving you the money" was properly stricken during the initial phase of his case.[47] Significantly, without this testimony, there was no evidence—independent or otherwise—that established Evelyn's donative intent to give Kenneth her U.S. savings bonds as a valid gift.

The testimony of Karen Babiarz, the Fox Chase Bank representative who was present during the three transactions, likewise did not suffice for various reasons to establish Evelyn's donative intent as to these three transactions. Ms. Babiarz testified that she only vaguely remembered Evelyn,[48] she had no recollection of whether Evelyn spoke to her about the redemption of the bonds,[49] and she had no evidence that Evelyn directed that the money be given to Kenneth.[50] One fact she did recall about these transactions, however, had a negative impact on Kenneth's claim. Ms. Babiarz testified that there had been a problem at the first transaction because Kenneth had arrived at the bank without his mother so he had to go home to get her,[51] thereby suggesting it was Kenneth and not Evelyn who had initiated the transaction.

1/20/09 N.T. at 15 (Parrott).

In addition, once Kenneth was subjected to cross-examination, he would be competent to testify despite the Dead Man's Rule. Hosfeld Estate, 414 Pa. 602, 604, 202 A.2d 69, 71 (1964); Hera v. McCormick, 425 Pa. Super. at 445, 626 A.2d at 689. Consequently, Kenneth's later testimony at the hearing's conclusion as to the circumstances of the gifts was admitted without challenge. See 1/20/09 N.T at 221-224 (Kenneth).

[47] 1/20/09 N.T. at 17, 14-15. Significantly, the full context of this statement renders it inconclusive as to Evelyn's donative intent. After redeeming the bonds in October 2004, Kenneth stated "[n]ow this was a substantial amount of money so I had asked Mom, I said, Mom, how do you want this money titled?" 1/20/09 N.T. at 14 (Kenneth)(emphasis added). If the bonds had been redeemed at Evelyn's initiative to give a gift to Kenneth, then this question would have been superfluous. Moreover, in explaining why he opened a new interest-bearing Apex account Kenneth stated because "I realized it was a substantial amount of money, I was uncomfortable with really handling it, but I wanted her to get some interest." 1/20/09 N.T. at 19 (Kenneth)(emphasis added). With this slip of the tongue, Kenneth betrayed the ambiguous nature of his transfer of funds to an account and suggested that the money still belonged to his mother. Hence, as petitioner suggests, he was a bailee rather than donee.

[48] 1/20/09 N.T. at 28 (Babiarz)(When asked if she recalled who Evelyn Citrino is, "Yes. I think I met with her--"I vaguely remember her")(emphasis added).

[49] 1/20/09 N.T. at 30 (Babiarz).

[50] 1/20/09 N.T. at 41 (Babiarz).

[51] 1/20/09 N.T. at 39 (Babiarz).

As a practical matter, Ms. Babiarz did not testify until after Kenneth Citrino because of her delay in arriving at the courtroom. But even if she had testified first, the testimony on record would not have provided the independent basis for a prima facie case to allow Kenneth to testify as to his conversations about the alleged gift with the decedent. Ms. Babiarz's inability to remember Evelyn or the details of the three transactions stands in sharp contrast to the Estate of Wann, 176 Pa. Super. 498, 108 A. 820 (1954) where bank representatives who had personally known the donor for many years offered specific, detailed testimony to support a daughter's claim that her mother had knowingly opened a joint account that provided that those funds remaining in the account at her death would go to her daughter. The Wann court emphasized, for instance, that the bank cashier was able to testify that the mother "asked us to place the money that was in her and her husband's name in her name and that of her daughter" and he believed she knew the amount involved in the transaction.[52]

Likewise, the bank documents presented as Ex. R-1 would not suffice to provide an independent proof of donative intent because "the mere fact that money is deposited in the account of the owner *and* another *or* the owner or another does not *standing alone*, prove a gift inter vivos." Hosfeld Estate, 414 Pa. 602, 605, 202 A.2d 69, 71 (1964). Kenneth's testimony that the bonds were redeemed in three transactions because he "was trying to keep mom's interest in mind" and when "mom felt comfortable going to the bank we went to the bank"[53] failed to convey the donative intent to gift him the bonds that appears so strikingly in Gallagher v. Rogan, 330 Pa. 545, 199 A. 168 (1938), where the court found valid gifts of decedent's mortgage, bank account and securities based on the specific initiative of the elderly donor. Several days prior to an unsuccessful operation, the donor in Gallagher personally contacted a real estate broker to

[52] Wann Estate, 176 Pa. Super. at 504-05, 108 A.2d at 823-24 .
[53] 1/20/09 N.T. at 22 (Kenneth).

prepare the assignment of a mortgage to the donee, instructed a bank employee to open a new account in the donee's name and asked the bank treasurer to transfer her securities for the donee. Kenneth, in contrast, presented no such evidence when attempting to establish a prima facie case that Evelyn had taken an active role to transfer the bonds to him for his own benefit. Consequently, he failed to establish his prima facie case on the record presented.

b. Alternatively, Even If Kenneth Had Established a Prima Facie Case of a Valid Gift to Kenneth of the Assets from the Redeemed Bonds, Harry Citrino Presented Clear and Convincing Evidence to Rebut that Presumption

Alternatively, even if Kenneth had presented a prima facie case establishing intent and delivery, Harry Citrino presented clear and convincing evidence to rebut it. The combined testimony of four of his five witnesses[54] presented by the petitioner presented clear and convincing evidence that Evelyn relied on others for all aspects of her daily care, failed to take any responsibility or initiative in the management of her financial affairs, and thus lacked the donative intent to make a gift to Kenneth. Moreover, the evidence established that she had a confidential relationship with both of her sons—Kenneth and Harry--upon whom she trusted and relied.

Both Harry and Rose Citrino testified convincingly that Evelyn had little experience in taking care of herself or her finances prior to her husband's death, and that her husband had assumed total responsibility for managing their finances and for organizing her personal medical care.[55] After Evelyn's husband died, her son Kenneth assumed responsibility for overseeing Evelyn's medications; Kenneth acknowledged that he "rendered as much medical assistance and

[54] Dr. Steinman very forthrightly limited her assessments of decedent's capacity to make a gift to the period before 2000 when she was treating Evelyn.

[55] 1/20/09 N.T. at 89, 117-18 (Harry); 1/20/09 N.T. at 151-52 (Rose Citrino).

nourishment assistance and beauty aid assistance as much as I possibly could….[56] Harry initially assumed responsibility for handing such financial matters for Evelyn as preparing her tax forms. He testified that his mother had never paid a bill, wrote a check or did any banking.[57] Significantly, the safety deposit box where the bonds were stored was in the name of Kenneth and his father—and not Evelyn[58]—symbolizing her passive role in her financial affairs.

Evelyn's grandson, Christopher Citrino testified that he had built a house for Evelyn, but had never seen her prepare a meal-or even grocery lists--while living there. His wife, Traci, cleaned and cooked for Evelyn, while occasionally helping with Evelyn's hygiene.[59]

This evidence sufficed to establish Evelyn's extreme dependence on her close family members for the management of her daily affairs. Based on this record, she had a confidential relationship with Harry, to whom she had been given a power of attorney in 1991, and on Kenneth, who assumed more control over her affairs after August 2004.

In addition to this evidence of Evelyn's passivity and dependence on others, Kenneth's actions after he informed Harry that the bonds had been redeemed are instructive and undermine his claim that Evelyn had gifted the bonds to him. When Kenneth learned that Harry had prepared their mother's 2005 income tax return, he alerted Harry that "stuff" was missing. Evelyn's income tax return was subsequently amended to reflect the taxes due on the redeemed bonds. In unrebutted testimony, Harry stated that the taxes listed in Evelyn's tax return for the redeemed bonds were paid by Kenneth with Evelyn's money.[60] This exchange cemented Harry's case that there had been no gift of the bonds to Kenneth.

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[56] 1/20/09 N.T. at 86 (Harry); 1/20/09 N.T. at 224 (Kenneth).
[57] 1/20/09 N.T. at 97-98, 89, 117-18 (Harry).
[58] 1/20/09 N.T. at 89(Harry)(noting that Evelyn never did any banking).
[59] 1/20/09 N.T. at 123, 125-27, 134-47 (Christopher & Traci Citrino).
[60] 1/20/09 N.T. at 68-74 (Harry).

The burden then shifted again to Kenneth. In the final phase of the hearing, Kenneth called nine witnesses as well as himself in an effort "to show that the gift was procured without taint of undue influence or deception." Estate of Clark, 467 Pa. at 634-35, 359 A.2d at 781. The large number of witnesses alone, however, did not render them more persuasive. Several of these witnesses such as Evelyn's hairdresser, Suzanne Ozas, her manicurist, Cheryl Block, and her former neighbor, Alver Schneider, had at best a superficial relationship with the decedent; moreover, they simply were not privy to the details of the transactions at issue. The witnesses Russell Pizzo and his wife Patty, as family members who helped care for Evelyn for pay, merely reinforced the testimony of Traci and Rose Citrino as to Evelyn's dependence on family members for her day-to-day maintenance. The testimony by Evelyn's niece, Denise D'Emilio and her husband Robert, that Evelyn never expressed any regrets about giving gifts to anyone did not address the critical, threshold issue of whether she had, in fact, given the specific gift of over $400,000 in U.S. savings bonds to Kenneth. Finally, the testimony of Anthony Starkus, a self-described friend of Kenneth, and Maureen O'Connell, who admitted Kenneth contributed to the financial support of her child,[61] lacked credibility.

It was Kenneth, however, whose testimony was critical. He testified, for instance, that "Mom trusted and confided in me and she just wanted to be taken care of,"[62] thereby acknowledging key elements of a confidential relationship. As Pennsylvania courts have recognized, a "confidential relationship exists where the circumstances 'make it certain that the parties did not deal on equal terms; where, on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed." Hera v. McCormick, 425 Pa. Super. at 447, 625 A.2d at 690 (citation omitted). In his final soliloquy attempting to explain the

[61] 1/20/09 N.T. at 203 & 218 (Starkus & O'Connell).
[62] 1/20/09 N.T. at 223-24.

circumstances of his mother's "gift" of the her bonds to him, Kenneth underscored his mother's dependence on him, her fear about her future, and her intent that the bond funds be used to protect her:

> The circumstances of each gift physically were the way I described them this morning. Mom had indicated to me that in no uncertain terms that she didn't want Harry to have anymore of her money because he wasn't spending it on her. She trusted me and wanted to give it to me so as to ultimately protect her. And she did in fact give it to me in the way I indicated this morning. So that this way, had she needed to go into a nursing home and that we couldn't give her the care she needed at home, which we couldn't six, eight people together, we're not professionals, we're lawyers, we are not doctors, we're not nurses, we are not psychiatrists, we couldn't give her that. She wanted to know if she was in a place she was in a safe place and that somebody would look after her. And that person was me.[63]

Kenneth thus concedes that Evelyn did not intend the bonds as a gift to him for his own use. Rather, she entrusted him with using those bonds to protect her. The suggestion that a dependent, 84 year old woman would have gifted away the assets vital to her continued well-being strains credulity.[64] As the Herra court observed, "[t]ransactions by which a decedent shortly before his death practically strips himself of all his available property are naturally regarded with suspicion and are to be scrutinized with a keen and somewhat incredulous eye." Herra v. McCormick, 425 Pa. Super. at 450, 625 A.2d at 691.

The record establishes that Evelyn's closest family members worked in tandem to protect and care for her in the final years of her life. As Harry observed, they all knew that Evelyn had about $500,000 to provide for those needs.[65] Harry's testimony that he was unconcerned when he first learned in April 2005 that Kenneth had cashed in the bonds because he trusted Kenneth as cooperating in the family goal to protect Evelyn was thus highly credible.[66] Harry

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[63] 1/20/09 N.T. at 221-22 (Kenneth)
[64] Ex. P-1 (1997 letter from Dr. Steinman stating that Evelyn was 75 years old).
[65] 1/20/09 N.T. at 88 (Harry).
[66] 1/20/09 N.T. at 68 -70 (Harry).

acknowledges, moreover, that Kenneth made legitimate expenditures for Evelyn's care during her life and for her funeral after her death for which he should be reimbursed by the estate.[67] Before this can be accomplished, however, Kenneth must restore to his mother's estate the $466,244 he obtained by redeeming her U.S. savings bonds between October 2004 and March 2005. In addition, Kenneth may present to the executor an itemized list of expenses he incurred for her care. The executor shall then prepare an account that shall be formally filed with the clerk of the Orphans' court and that shall set forth the proposed distributions.

Status of the Three Power of Attorney Accounts

At the conclusion of the hearing on the alleged gift to Kenneth, the parties briefly addressed the status of the three accounts that had been filed as to Harry's actions pursuant to the power of attorney. After Kenneth filed a petition seeking an accounting by Harry of his actions pursuant to the power of attorney granted to him by Evelyn, Harry filed an informal accounting on January 19, 2007. Kenneth responded by filing a petition for attachment that raised various objections to the informal account: it failed to conform to general fiduciary accounting practices; it was not filed as an account that would appear on the audit list; it failed to separate income and principal receipts; it failed to show actual dates of receipts and payments.[68] By decree dated February 14, 2007, Harry was ordered to reformat the informal account and file a formal account. On May 29, 2007, Harry filed a formal account that was scheduled for the July 2, 2007 Audit List. Kenneth, once again, filed objections to the form and substance of the account. By decree dated October 2, 2007, Edward Gilson was appointed auditor. According to the docket, he filed an "addendum to account" on May 19, 2008 and no objections were filed.

[67] 1/20/09 N.T. at 79 & 95-96 (Harry). See also Ex. P-6.
[68] 2/1/07 Harry Citrino Petition for Attachment.

At the close of the hearing on the U.S. savings bond issue, counsel for Harry Citrino argued that Kenneth's failure to file an objection to the Auditor's account constituted a waiver of the prior objections to the two accounts filed by Harry. Alternatively, she requested an additional hearing on those objections. The parties were given 20 days to brief the legal issue of waiver of objections if they decided to do so.[69] Since there are no briefs filed of record on the waiver issue, the parties may request another hearing if warranted. If they fail to do so within 20 days of this ruling, the three accounts will be returned unaudited.

DATE: _____ BY THE COURT:

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John W. Herron, J.

[69] 1/20/09 N.T. at 229-36.