

**COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION**

**# 2 June 2007  
Control No. 075287**

**No. 1443 DE of 2006**

**Estate of RITA R. MALLON, Deceased**

**Sur account entitled First and Final Account of Thomas J. Mallon,  
Executor**

**Before O'KEEFE, ADM. J.**

**This account was called for audit**

**June 4, 2007  
February 11, 2008**

**Counsel appeared as follows:**

**ELLIOT B. PLATT, ESQ.**

**- for Thomas J. Mallon, Accountant**

**JAMES J. MUSIAL, ESQ., of RUDOLPH, PIZZO & CLARKE, LLC**

**- for Joanne Jackson, Objectant**

**Rita R. Mallon died on April 10, 2006, leaving a Will dated May 25, 2005,  
which was duly probated. The testatrix was unmarried at the time of her death  
and was survived by two children named Thomas J. Mallon and Joanne Jackson.**

**Letters Testamentary were granted to Thomas J. Mallon, the Accountant,  
on May 9, 2006; proof of publication of the grant of same was submitted and is  
annexed to the audit papers in this matter. Payment of transfer inheritance tax in  
the amount of \$6,000.00 on July 11, 2006, was duly vouched.**

**By the terms of her Will, a copy of which is annexed to the audit papers in this matter, the testatrix gave \$1,000.00 to her grandson Michael Jackson; \$500.00 to each of her nine other named grandchildren; \$500.00 to a niece; and \$500.00 to a nephew. The testatrix gave fifty percent (50%) of the residue of her estate to her son and daughter-in-law, Thomas J. Mallon and Christine Mallon, as tenants by entireties. The testatrix gave the remaining fifty percent (50%) of the residue of her estate to her daughter, Joanne Jackson. The testatrix appointed her son, Thomas J. Mallon, to serve as executor of the Will.**

**On May 20, 2003, Rita R. Mallon executed a Power of Attorney wherein she appointed her son, Thomas J. Mallon, as her Agent or Attorney-in-Fact.**

**The First And Final Account of Thomas J. Mallon, as Executor of the Estate of Rita R. Mallon, Deceased, is now before this Court for audit. Annexed to said Executor's Account is the First And Final Account of Thomas J. Mallon, as Agent under the abovementioned Power of Attorney. (See §3501.2 of the Probate, Estates and Fiduciaries Code)**

**The Account of Thomas J. Mallon, as Executor, is stated for the period April 10, 2006 to April 13, 2007 and shows receipts totaling \$137,845.54 which includes \$68,202.74 in cash received from Thomas J. Mallon as Agent; disbursements totaling \$32,029.41; distributions of pecuniary bequests totaling \$6,500.00; and a combined balance remaining of \$99,316.13 in cash.**

**The Account of Thomas J. Mallon, as Agent, is stated for the period August 4, 2003 to April 10, 2006, and shows receipts totaling \$291,838.14; disbursements**

**totaling \$73,635.40; “Transactions by Principal” totaling \$150,000.00; and a combined balance remaining of \$68,202.74 in cash.**

**In his Petitions For Adjudication And Statements Of Proposed Distribution, as Executor and Agent, Thomas J. Mallon takes the position that his mother made gifts to him totaling \$150,000.00 on August 17, 2004.**

**It is stated that notice of the audit has been given to all parties having a possible interest in the estate.**

**Joanne Jackson, daughter of the testatrix, and a residuary beneficiary, has filed Objections to the Account of her brother, Thomas, as Executor, and to the annexed Account of Thomas, as Agent.**

**In her Objections, Joanne takes the position that Thomas should be surcharged in the amount of \$150,000.00 because he has failed to include the proceeds of two checks in his Accounts. The checks in question were dated August 17, 2004, were numbered 545 and 546 and were drawn on the account of Rita R. Mallon at Citizens Bank. Each check is made to the order of Thomas J. Mallon in the amount of \$75,000.00, one check bears the memo “gift” and the other bears the memo “gifty.” Each check bears the signature of Rita R. Mallon.**

**In her Objections, Joanne avers and alleges that the checks in question were not intended as gifts to Thomas, but instead were part of a so-called “estate planning maneuver”; one check was intended as a gift to Joanne; and one was intended as a gift to Thomas. Joanne also avers and alleges that a confidential relationship existed between Rita and her son, Thomas; that the checks in**

question were drawn or made out upon the advice of Thomas; and that they were drawn under the influence of Thomas.

In considering the matter of the checks in question, I will apply the law of gifts as set forth in *Estate of Clark*, 467 Pa. 628 (1976) and Judge Robert W. Tredinnick's discussion of Burden of Proof, entitled "Presumptions and the Burden of Proof in Orphans' Court Litigation", at 7 Fiduc.Rep. 2d 125-126. The discussion reads in pertinent part, as follows:

**"III. Burden of Proof:**

- A. As literally stated by the case law:  
(excluding joint bank account cases)**
  - 1. At inception of trial**
    - (A) The burden of proof is on the proponent of the gift**
    - (B) To prove the gift (donative intent and delivery)**
    - (C) By clear and convincing evidence.**
  - 2. Thereafter, if the proponent has established a prima facie case of gift:**
    - (A) The burden of proof shifts to the contestant**
    - (B) To rebut the presumption of validity of the gift**
    - (C) By clear and convincing evidence.**
  - 3. The contestant may rebut the presumption of validity by proving a confidential relationship existed between the decedent and the donee. If he does:**
    - (A) The burden of proof shifts back to the proponent**
    - (B) To prove that the gift was freely, voluntarily and intelligently made and was not the product of undue influence.**

(C) The measure of proof is not stated.”

The term “confidential relationship” is defined in the following discussion in *Leedom v. Palmer*, 274 Pa. 22, 25 (1922) as follows:

“Confidential relation is not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed; in both an unfair advantage is possible. When these circumstances appear, the law presumes the transaction void, unless the party claiming the benefit of such transition shows affirmatively that no deception was used and the act was the intelligent and understood act of the grantor, far, conscientious and beyond the reach of suspicion. No precise language can define the limits of the relation or fetter the power of the court to control these conditions. While not confined to any specific association of the parties, it generally exists between trustee and cestui que trust, guardian and ward, attorney and client, and principal and agent. ....”  
(Emphasis supplied)

In support of her Objections concerning the checks in question, Joanne offered the testimony of seven witnesses including Thomas J. Mallon, Michael G. Jackson, Joseph Patrick Jackson, Sharyn Jackson, Francis W. Jackson, Kelly McHugh and Joanne Jackson herself. Joanne offered six Exhibits which have been marked and received into Evidence as Exhibits “O-1”, “O-2”, “O-3”, “O-4”, “O-5” and “O-6.”

In opposition to the Objections concerning the checks in question, Thomas offered two witnesses including Edward Gilson, Esquire and Thomas J. Mallon

himself. Thomas offered one Exhibit which has been marked and received into Evidence as Exhibit "R-1."

Based upon the applicable case law and relevant discussion by Judge Tredinnick, the proponent of the gift, Thomas, has the burden to prove the gift, meaning donative intent and delivery, by clear and convincing evidence. 7 Fiduc.Rep. 2d 125-126

Thomas testified that he had contacted an attorney, Mr. Maniaci, about devising an "Asset Protection Plan" for his mother in order to secure her assets. "The initial purpose of it was to get the money out of the estate so it would be protected. It wasn't to give it to me." NT 12. Mr. Maniaci prepared such a plan for the decedent's estate, entered into evidence as "O-2", advising that moving the sum of \$157,000.00 out of her accounts would best protect her estate. Thomas explained the plan to his mother and allowed her to decide what she would like to do. "The purpose of who she gave it to was for her to ultimately decide." NT 12.

Thomas testified that Ms. Mallon was upset with her daughter Joanne for removing her from her home. As a result of the move, the decedent was sent to live in a local nursing home. The decedent was upset with her living conditions and felt her daughter was responsible. Thomas testified "she would say after what she did to me she doesn't deserve a penny." NT 40. As such, she wanted to make a gift solely to Thomas as a punishment to Joanne.

Mr. Gilson, a local attorney, prepared the decedent's Will dated May 25, 2005 and a prior will which was signed in 2001. Mr. Gilson testified that "She told me she made the gift because she was mad at her daughter, that she could not

believe that her daughter had thrown her out of her house.” NT 98. Mr. Gilson also testified that “She told me she was very upset with her daughter, that her daughter had thrown her out of her house, that she wanted to cut her out of her will entirely.” NT 91-92.

At the bottom of the Asset Protection Plan, entered as “O-2” and read in court, it reads: “Tommy, I agree with the asset transfer plan above. We should transfer \$150,000 to your account. (signed) Rita R. Mallon.” Thomas explained that he had written this statement and the decedent freely signed it. Mr. Gilson and Mr. Mallon’s testimony shows that the decedent understood of what she had done, she had full knowledge that she made a gift to her son Thomas as punishment to her daughter Joanne.

Since Mr. Mallon satisfied his burden, the burden shifted to the Objectant, Joanne, to rebut the presumption of the validity of the gift by clear and convincing evidence. 7 Fiduc.Rep. 2d 125-126. This can be done by establishing the existence of a confidential relationship. Based on the discussion of *Leedom v. Palmer* above, a confidential relationship exists where one party is bound to act for the benefit of another. 274 Pa. 22, 25. It is often found in the relationship where a power of attorney is present. *Id.* Confidential relationships exist where there is weakness, dependence and trust from one party to another. *Id.* Thus, Joanne must prove the existence of a weakened intellect in her mother, a trusting relationship between her mother and Thomas and a substantial benefit to Thomas.

As counsel for Joanne argued in his brief, Thomas was not only the power of attorney over his mother's affairs, he was her only son and her certified public accountant. Ms. Mallon entrusted all of her financial affairs to be taken care of by Thomas. It was Thomas who pursued the Asset Protection Plan and made all the arrangements with Mr. Maniaci. In fact, Thomas testified the decedent never read the plan, rather he explained it to her.

Not only was Thomas in charge of her financial affairs, Thomas was in charge of where his mother was living and insuring that she was taken care of. He knew the decedent did not enjoy living in the nursing home as she often asked to leave and begged him to take her home. Thomas testified that upon the decedent's desire to go home "I often tried to dissuade her. I told her she wasn't healthy enough to go home." NT 19. Michael Jackson, the decedent's grandson, testified that "Each time I would visit my grandmom, she was emotionally upset to be living here. She never wanted to stay there. Never. She would constantly cry." NT 58. The decedent trusted Thomas to make the right decisions and care for her both financially and physically.

It is obvious that Thomas received a substantial benefit in this case. He was given \$150,000.00 cash that he had full control over. Thomas testified that "I could use the money for anything I wanted...That was my money." NT 27.

Despite the testimony as to the existence of a trusting relationship and substantial benefit, the Court holds that Thomas has presented clear and convincing evidence that the gifts were freely, voluntarily and intelligently made, and, was not the product of undue influence. The Court did not hear testimony



from a doctor as to the mental health of Rita Mallon. Rather, the Court heard her grandchildren testify that she was well aware of her funds and knew what her Will and gift had accomplished. Mr. Platt as counsel for Thomas argued in his brief, Ms. Mallon re-affirmed her intention to make a gift and her understanding of it when she told Mr. Gilson about it over eight months later. Mr. Gilson testified that “She was aware of it...And then she would say, Well, I have given Tommy 150. She was aware of that. And she made the Will with that in mind...” NT 97-98. Mr. Gilson explained to the court that he was certain the decedent understood that she had made the gift to Thomas and she knew she had done so as punishment to Joanne. The decedent had signed the actual checks in question as well as the gift tax return, acknowledging that she in fact had made a gift. The testimony of Mr. Gilson clearly and convincingly establishes the validity of the gift to Thomas.

In keeping with the foregoing discussion and findings, I hold that Rita R. Mallon intended to make a gift of the sum of \$150,000.00 to her son Thomas; that said intention was effectuated by the issuances of the checks in question; that the gift of \$150,000.00 was freely, voluntarily and intelligently made; and that the gift was not the product of undue influence. Joanne’s Objections are dismissed. The Account of Thomas, as Executor, will be confirmed as stated. Said confirmation shall relieve Thomas, as Agent, of all liability to Joanne, to the same extent as if the Account of Thomas, as Agent, had been separately filed and stated. (See §3501.2 of the Probate, Estates and Fiduciaries Code)

The Objections having been dismissed, the First And Final Account of Thomas J. Mallon, as Executor of the Estate of Rita R. Mallon, Deceased, shows a combined balance on hand, after distribution of pecuniary bequests, of \$99,316.13 which is rewarded as requested, to wit: \$1,000.00 to the Accountant as a reserve for payment of a drug bill; one-half of the balance then remaining, or residue, to Thomas J. Mallon and Christine Mallon, as tenants by entireties; and the remaining one-half of the residue, to Joanne Jackson.

The above awards of principal and income are made subject to all payments, assignments, transfers and conveyances heretofore properly made on account of distribution.

Leave is hereby granted to the Accountant to make all payments, assignments, transfers and conveyances necessary to effect distribution in accordance with this adjudication.

AND NOW, , the First And Final Account of Thomas J. Mallon, as Executor of the Estate of Rita R. Mallon, Deceased, is confirmed absolutely. Said confirmation shall relieve Thomas J. Mallon, as Agent, of all liability to Joanne Jackson, to the same extent as if the Account of Thomas, as Agent, had been separately filed and stated. (See §3501.2 of the Probate, Estates and Fiduciaries Code)

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An Appeal from this Adjudication may be taken, to the appropriate Appellate Court, within thirty (30) days from the date

**of the issuance of the Adjudication. (See Phila. O.C. Div. Rule 7.1.A and Pa. O.C. Rule 7.1, as amended and Pa.R.A.P. 902 and 903)**

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**O'KEEFE, ADM. J**