

**COURT OF COMMON PLEAS PHILADELPHIA COUNTY  
ORPHANS' COURT DIVISION  
HON. JOSEPH D. O'KEEFE, A.J.**

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In re: Estate of Hyman Bevitz	:	OC No.	371 DE of 2002
	:	Control no.	020548
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**O P I N I O N**

**In Support of Decree date 20 June 2003**

**Joseph D. O'Keefe, J.**

**25 AUGUST 2003**

**Facts and Procedural History**

On 21 May 1996, Hyman Bevitz (hereinafter referred to as "Decedent") and Ray Volusher (hereinafter referred to as "Respondent") executed a valid Antenuptial Agreement precedent to their nuptial union. The Agreement reads, in part:

**WHEREAS**, RAY is willing to waive, release and renounce all claims and rights, legal, equitable or otherwise, choate or inchoate, which, after the consummation of said marriage, she might or could have as wife, surviving spouse or otherwise, in the real and personal property and estate wheresoever situated, which HYMAN now has, or may hereafter acquire or own including, in the event of the dissolution of the marriage and right of equitable

distribution in such property, maintenance and special relief;  
and:

**MUTUAL RELEASE AND WAIVER OF CLAIMS IN ESTATES**

(a) Each of the parties to the Antenuptial Agreement desires to accord to the other the absolute and unrestricted right, privilege and power to dispose of any and all property on death which may belong to him or to her at such time. Except as specifically set forth herein, both parties acknowledge that neither has any right or interest in or to the property of the other on the date of execution of this Agreement. Therefore, each party hereby forever releases, waives, and relinquishes any and all rights or claims of any kind, character, or nature whatsoever, which he or she may hereafter acquire to the estate, property, assets or to any other effects of the other under the present or future laws of this or any other jurisdiction and furthermore waives the right:

(i) To share the estate of the other party upon the latter's death. Each party forever waives, releases and relinquishes any right or claim which he or she may ever have.

Additionally, on 21 May 1996, Decedent and Respondent signed a Deed of Trust (hereinafter referred to as "the Health Care Trust" or "the Trust").

On the stipulated to date of 17 December 1998, Decedent executed his probated Will. On that date, Decedent and Respondent also amended the Trust by signing a document entitled "Amendment to Deed of Trust" (hereinafter referred to as "the Amendment"), wherein the referenced "Trust" is the Health Care Trust.<sup>1</sup>

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Volusher, N.T. p. 49 line 25 - p. 50 line 1; identifying P-7 as a correct and accurate a copy of the original Amendment.

During their marriage, Decedent and Respondent purchased a condominium unit in Pompano Beach, Florida (hereinafter referred to as “the Pompano Beach Condominium”). The property was titled in both Decedent’s and Respondent’s names, and each party paid half of the purchase price.<sup>2</sup>

Two years later, Decedent and Respondent purchased a condominium unit in Atlantic City, New Jersey (hereinafter referred to as “the Atlantic City Condominium”) for \$62,000.00.<sup>3</sup> Events peripheral to the issues presently before this Court led Decedent to draft a check for \$30,000.00 payable to the order of Commonwealth Title Company and postdated “October 10, 2000”, representing the date of the scheduled closing. Additional events peripheral to the issues presently before this Court postponed the closing date for the Atlantic City Condominium from 10 October 2000 to 13 October 2000. On 13 October 2000, Respondent attended the closing without Decedent, and closed on the Atlantic City Condominium.

The Deed for the Atlantic City Condominium had been prepared by the Seller. Upon the direction of Respondent’s attorney, the designation “tenant by the entirety” was added to the Deed to evidence the fact that Ray Volusher and Hyman Bevitz were indeed married.<sup>4</sup>

Subsequent to Decedent’s death, Respondent sold the Pompano Beach Condominium

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<sup>2</sup> Volusher, N.T. p.19 line 25 - p. 20 line 2.

<sup>3</sup> Volusher N.T. p. 6 lines 6-16.

<sup>4</sup>

Volusher, N.T. p.17 lines 6 - 10: “[I]t looks like we weren’t married, Ray Volusher and Hyman Bevitz, two different people, but we were [married], so he [Respondent’s attorney] wanted to make sure that it was stated that we were married.”

for \$23,761.00 which proceeds she retained.<sup>5</sup> Respondent retains ownership of the Atlantic City Condominium. Decedent's Estate (hereinafter referred to as "Petitioner") petitions the Court for recovery of Decedent's property pursuant to the Antenuptial Agreement.

### **Legal Analysis**

The Antenuptial Agreement is a valid, legal document binding upon Decedent and Respondent.<sup>6</sup> The presumption of validity inherent in antenuptial agreements places the burden of proof of invalidity upon the party seeking to invalidate the agreement.<sup>7</sup> Respondent neither met her burden, nor otherwise expressed an intention to invalidate the Agreement. In all regards, therefore, the Antenuptial Agreement governs the intended transactions of Decedent and Respondent.

#### **I. The Terms of The Antenuptial Agreement governed Decedent's and Respondent's Acquisition of the Atlantic City Condominium.**

Jointly owned property acquired after the marriage shall be deemed jointly owned separate property and each shall be entitled to own half (1/2) of same

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<sup>5</sup> Volusher, N.T. pp. 25-26, p. 29.

<sup>6</sup> PA Divorce Code §3501(a) (2).

<sup>7</sup>

*Harris Estate*, 431 Pa. 293, 297, 245 A.2d 647, 649 (1968). "The person seeking to nullify or avoid or circumvent the Agreement has the burden of proving the invalidity of the Agreement made neither (a) a reasonable provision for the intended Spouse, nor (b) a full and fair disclosure of his ... worth." *Hillegrass Estate*, 431 Pa. 144, 150, 244 A.2d 672, 675 (1968).

except as otherwise provided herein. (*Agreement p.4*).

Pursuant to the terms of the Agreement, Decedent and Respondent acquired the Atlantic City Condominium. Decedent contributed Thirty Thousand Dollars (\$30,000.00) toward the purchase price of the Atlantic City Condominium.<sup>8</sup> Impliedly, Respondent contributed Thirty-two Thousand Dollars (\$32,000.00) toward the purchase price of the same. Consistent with the terms of the Agreement, Decedent and Respondent thereafter “jointly owned (the Atlantic City Condominium) and each was entitled to own one half of (the Atlantic City Condominium) except as otherwise provided.”

Respondent’s insertion in the deed of the words “tenants by the entirety” is immaterial to the manner in which title was legally held. The words on the deed did not amend, nor were they intended to amend the Antenuptial Agreement. Respondent admittedly inserted the words “tenants by the entirety” solely to reflect that both she and Decedent were married.<sup>9</sup> The legal consequence ordinarily attributable to the particular use of the words “tenants by the entirety” in a deed was a right waived at the signing of the Antenuptial Agreement, and thereafter unavailable to Decedent and Respondent without a valid amendment to the Antenuptial Agreement preceding the signing of any deed. No such amendment was made to the Antenuptial Agreement, and neither Decedent nor Respondent could recapture the right of “the entirety” through a unilateral action to the exclusion of the other. As such, Respondent’s use of the words “tenants by the entirety” meant no more

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<sup>8</sup> P-2

<sup>9</sup> Volusher, N.T. p. 17 lines 6-11.

than that which Respondent specifically intended, i.e. that she and Decedent were married. The Antenuptial Agreement's governance of the entire transaction rendered the words "tenants by the entireties" otherwise void of any legal significance or consequence. Accordingly, Decedent and Respondent jointly owned the Atlantic City Condominium, and each is entitled to one half of that property's value. This Court represents Decedent's "one half" more accurately as the Thirty Thousand Dollars (\$30,000.00) that he contributed toward the purchase of the property.

The terms of the Antenuptial Agreement reveal a clear intent of the parties against the equitable division of jointly owned property.

It is the intention of the parties by this Antenuptial Agreement to effectuate a full and complete Antenuptial Agreement between them and *to make all necessary provisions to obviate the need or necessity of any Court to equitably divide their property pursuant to the law of the Commonwealth of Pennsylvania* as effective on the date of their marriage and after or pursuant to the laws of any other state, country, or territory. (*Antenuptial Agreement: p. 4, para. (a)*) (*Emphasis added*).

Accordingly, the intended method of recovering the value of an interest in jointly owned property was essentially that of a "buy-out" by one party of the other party's interest. In applying the stated intention of the contracting parties, this Court concludes that Respondent shall stay in possession of the Atlantic City Condominium, shall pay to Petitioner the Thirty Thousand Dollars (\$30,000) representative of Decedent's interest in the property, and in turn

shall receive from Petitioner a complete release of the estate's interest in the property. Thereafter, Respondent shall hold the Atlantic City Condominium in fee simple absolute.

**II. Petitioner is Entitled to Recover the Portion of Decedent's Funds Contributed Toward the Closing Costs of the Atlantic City Condominium.**

The closing costs on the purchase of the Atlantic City Condominium totaled Fifty-seven Hundred Dollars (\$5,700.00).<sup>10</sup> Of that amount, Decedent contributed Twenty-six Hundred Dollars (\$2,600.00), and Respondent contributed Thirty-one Hundred Dollars (\$3,100.00).<sup>11</sup> Petitioner's recovery, therefore, is limited to the amount of Decedent's contribution, or \$2,600.00.

Petitioner's assertion of claim to the entire amount of funds contributed toward closing costs, is ostensibly rooted in the language of the Antenuptial Agreement, as follows:

... (W)here no document evidencing title exists..., the party who can prove purchase of same shall be deemed to be the sole and exclusive owner of the same. Where no such document evidencing title exists and either party purchases an item of property *individually* by use of his or her individual checking account, it shall conclusively be deemed that party's separate property regardless of the source of the funds. (Antenuptial Agreement: p. 5, para. (b)). (Emphasis added).

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<sup>10</sup> P-3.

<sup>11</sup> Volusher, N.T. p. 12 line 15 - p.14 line 18.

While this language clearly applies to “all property ... whether real or personal,”<sup>12</sup> it cannot accurately be applied to the closing costs in this particular instance.

Decedent and Respondent intendedly purchased the Atlantic City Condominium as jointly owned separate property. To that end, each contributed a portion of the purchase price, each contributed a portion of the closing costs, and both names appear on the deed. Petitioner’s reliance upon the words “by use of his or her individual checking account” in concluding that the entire amount paid in closing on the property derived solely from Decedent “regardless of the source of the funds,” disregards one of the two fundamental elements of the clause.

The first fundamental element concerns the existence or nonexistence of a “document evidencing title.” The second fundamental element, that which the Estate disregards, concerns the “individual” acquisition of an item of property. Both elements are mutually dependent.

First, no document evidencing title to “closing costs” exists, nor should a reasonable party expect such document to exist. The closing is an essential element of the real estate transaction, necessary to the transaction, but completely dependent upon the underlying transaction’s existence. Transfer of the deed to the property *in toto* obviates the need for separate evidence of the components of the transaction. Accordingly, no title to payment of the closing costs exists.

The second fundamental element, concerns the “individual” acquisition of an item of property. It is established that Decedent and Respondent purchased the Atlantic City

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<sup>12</sup> Antenuptial Agreement: p. 5, para. (b).



Condominium as jointly owned separate property. In fact, as tenants in common, neither Decedent nor Respondent *individually* acquired any portion of the property outright. The exact account from which the closing costs derived is merely a factor in determining the source of the funds paid. The account is not, contrary to the Petitioner’s assertions, conclusive of Decedent’s individual ownership of the funds contributed. As such, Petitioner incorrectly emphasizes the ownership of the account from which the closing costs derived over the joint nature of the underlying sale in wrongly concluding that the entire closing costs belonged to Decedent “regardless of the (original) source of the funds.”

A correct reading of the Antenuptial Agreement yields the correct conclusion. Consistent with the Antenuptial Agreement, given the joint nature of the purchase of the Atlantic City Condominium, there exists a presumption of joint contribution to the purchase price and all attendant costs. Absent a showing of Decedent’s exclusive contribution to the closing costs, and in light of Respondent’s testimony accompanied by documentation<sup>13</sup> that she contributed \$3,100.00 to the closing costs, the presumption holds. Consistent with that presumption, the Court concludes that Decedent contributed Twenty-Six Hundred Dollars (\$2,600.00) of his own funds to which Petitioner is now entitled.

**III. The Terms of their Ante Nuptial Agreement governed Decedent’s and Respondent’s Acquisition of the Pompano Beach Condominium.**

Jointly owned property acquired after the marriage shall be deemed jointly owned separate property and each shall be entitled to own half (½) of same

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Volusher, N.T. p. 13 line 13 - p. 14, line 18. *With particular emphasis on p.14 lines 12 - 18:*

THE COURT: Does anyone want this marked or is this going to be flying around?

MR. KOLMAN: I don’t think, Your Honor, we don’t need it marked. I think (Respondent) has testified satisfactory (sic) to that issue.

except as otherwise provided herein. (*Agreement p.4, para. (a)*).

Pursuant to the terms of the Antenuptial Agreement, Decedent and Respondent acquired the Pompano Beach Condominium. Decedent contributed one half of the purchase price, and Respondent contributed one half of the purchase price.<sup>14</sup> The Pompano Beach property was titled in both Decedent's name and Respondent's names.<sup>15</sup> Pursuant to the terms of the Antenuptial Agreement precluding otherwise, Decedent and Respondent held the property as tenants in common, and thereafter "jointly owned (the Pompano Beach Condominium) and each was entitled to own one half of (the Pompano Beach Condominium) except as otherwise provided."

Respondent's unilateral sale of the Pompano Beach Condominium following Decedent's death effectively liquidated an asset jointly held by Respondent and Petitioner. Respondent received the liquid proceeds of the sale in their entirety without disbursing one half of those proceeds to Petitioner. The sale of the Pompano Beach Condominium netted Twenty-three Thousand Seven Hundred Sixty-One and 39/100 Dollars (\$23,761.39)<sup>16</sup> of which one half, or \$11,880.70, are correctly allocatable to Decedent's Estate.

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<sup>14</sup>

Volusher, N.T. p. 21 line 25 - p. 22 line 2. Absent any further evidence of specific contribution amounts, the Court accepts that Decedent and Respondent each contributed exactly one half of the purchase price and all attendant costs.

<sup>15</sup> Volusher, N.T. p. 21 lines 22-24.

<sup>16</sup> Volusher, N.T. p. 25 line 20 - p. 26 line 1.

**IV. The Three Thousand Dollars (\$3,000.00) of Decedent's Monthly Trust Fund Disbursement Remaining in Respondent's Possession at Decedent's Death is an Asset of Decedent's Estate.**

Decedent as the beneficiary of a trust fund received between Eight Thousand (\$8,000.00) and Ten Thousand (\$10,000.00) per month.<sup>17</sup> During Decedent's hospitalization from 2 October 2000 through 15 November 2000, Decedent received one check from that trust.<sup>18</sup> Pursuant to Decedent's authorization and instruction, Respondent deposited that check into their jointly held account and used its funds to pay bills.<sup>19</sup> Three Thousand Dollars (\$3,000.00) remained in their joint account after Respondent made the authorized payments.<sup>20</sup> Pursuant to the terms of the Antenuptial Agreement by which each contracting party waived his or her right to claim benefit of the other's estate, that Three Thousand Dollars (\$3,000.00) correctly belongs to Petitioner.

**V. The Amendment to the Health Care Trust is Valid. The Health Care Trust therefore continued after Decedent's death for the benefit of Respondent.**

Decedent created and funded a Health Care Trust in 1996 to provide certain benefits for himself during his life.<sup>21</sup> The Trust would terminate at Decedent's death, and any

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<sup>17</sup> Volusher, N.T. p 44 lines 11-12.

<sup>18</sup> Volusher, N.T. p.44 lines 13-19.

<sup>19</sup> Volusher, N.T. p. 45 line 1-2, and p. 46 line 5-7.

<sup>20</sup> Volusher, N.T. p.46 lines 20-22.

<sup>21</sup> P-6.

remaining balance would be paid to his executor.<sup>22</sup> Respondent signed the Trust.

In 1998, Decedent's attorney prepared, and Decedent and Respondent signed an undated document entitled "Amendment to Deed of Trust."<sup>23</sup> The Amendment amended the Trust's THIRD paragraph in providing that rather than terminate at Decedent's death, the Trust would continue for the benefit of Respondent in paying Respondent's home health care and nursing home care.<sup>24</sup> Decedent died leaving approximately \$25,000.00 in the Trust.

Petitioner challenges the validity of the Amendment and seeks that the funds remaining in the Trust at Decedent's death be paid to the Estate. Petitioner avers that the original Deed of Trust was irrevocable and was therefore not amendable. Petitioner additionally avers that Respondent exercised undue influence over Decedent in securing the Amendment. During the hearing, Petitioner further averred, but without a supportive evidentiary basis, that the Decedent's signature as it appears on the Amendment was a forgery.

Petitioner is incorrect in concluding Decedent's inability to amend the Trust owing to Decedent's inability to revoke the Trust. With the agreement of the settlor and all of the

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<sup>22</sup>

P-6: Termination of Trust: THIRD: Upon the death of the settlor , trustee shall distribute the remaining principal and income of the trust to the executor under the settlor's will.

<sup>23</sup> P-7.

<sup>24</sup>

P-7: ARTICLE THIRD - TERMINATION OF TRUST: (a) Upon the death of the Settlor, if Ray Volusher shall then be living, the Trustee may distribute as much of the income and principal of the Trust as shall be needed to provide home health care for Ray Volusher or to pay the expense of nursing home care for Ray Volusher.

beneficiaries, even a revocable deed of trust can be amended.<sup>25</sup> Although the original Trust provided for distribution upon Decedent's death "to his executor," that direction is tantamount to providing for distribution "to his Estate." As such, the Decedent was the sole beneficiary and the concurrence of his executor was not required.<sup>26</sup> Decedent's Amendment was not inconsistent with the Trust's irrevocable nature.

While Petitioner raised the issue of undue influence, Petitioner failed to present evidence of undue influence. Consequent to that failing, Petitioner did not meet its burden of proving undue influence, therefore the issue fails entirely. Likewise, Petitioner's assertion at the hearing that Decedent's signature was a forgery, is completely unsubstantiated by evidence.

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<sup>25</sup>

*Restatement 2d of Trusts*, §338(1): (1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished; *see also Raiziss Estate*, 1 Phila.Co.Rptr.362, 364 (1978).

<sup>26</sup>

*Restatement 2d of Trusts*, §127, *Comment (b)*: He [the owner of property] likewise is the sole beneficiary where he transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate, or to his personal representative.

## Conclusion

1. Pursuant to the terms of the Antenuptial Agreement, Respondent owes Petitioner: Thirty Thousand Dollars (\$30,000) representative of Decedent's interest in the property, in exchange for Petitioner's complete release of the Estate's interest in the property. Thereafter, Respondent shall hold the Atlantic City Condominium in fee simple absolute;

2. Pursuant to the terms of the Antenuptial Agreement, Respondent owes Petitioner: Twenty-Six Hundred Dollars (\$2,600.00) representative of Decedent's contribution toward the closing costs on the Atlantic City Condominium;

3. Pursuant to the terms of the Antenuptial Agreement, Respondent owes Petitioner: Eleven Thousand Eight Hundred Eighty Dollars and 70/100 (\$11,880.70) representative of one-half of the proceeds on the sale of the Pompano Beach Condominium;

4. Pursuant to the terms of the Antenuptial Agreement, Respondent owes Petitioner: Three Thousand Dollars (\$3,000.00) representative of Decedent's trust proceeds deposited by Respondent into Decedent and Respondent's joint account;

5. Pursuant to the valid Amendment to Decedent's Health Care Trust, the Trust continues for Respondent's benefit under the terms set forth therein.

6. Consistent with Petitioner's non-pursuit at the hearing of the issue of moveable property, Petitioner's Petition to Recover Moveable Property under Orphans' Court Number 371DE of 2002 is dismissed.

**BY THE COURT:**

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**HON. JOSEPH D. O'KEEFE, A.J.**  
**ORPHANS' COURT DIVISION**

Timothy Kolman, Esq.  
225 N. Flowers Mill Road  
Langhorne, PA 19047

Steven S. Glickman, Esq  
675 Morris Avenue  
Suite 100 Springfield, NJ 07081

**COURT OF COMMON PLEAS PHILADELPHIA COUNTY  
ORPHANS' COURT DIVISION  
HON. JOSEPH D. O'KEEFE, A.J.**

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In re: Estate of Hyman Bevitiz	:	OC No. 371 DE of 2002
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**ORDER**

**AND NOW**, this 30th day of June 2003, after a full evidentiary hearing, and subsequent determination consistent with the following, this Court **ORDERS**:

Respondent, Ray Volusher, is hereby **ORDERED** to remit the following monies to the Estate of Hyman Bevitiz as directed herein within thirty (30) days of the date of this Order:

- a. Thirty Thousand Dollars (\$30,000.00) paid via check number 2322 to purchase the Atlantic City Condominium, acquired after marriage and subject to their Ante Nuptial Agreement. This amount shall be paid to the Estate of Hyman Bevitiz IN EXCHANGE FOR the Estate's complete release of its remaining interest in the Atlantic City property in favor of Respondent, Ray Volusher, who thereafter will hold said property in fee simple absolute;
- b. Twenty-Six Hundred Dollars (\$2,600.00) contributed by Decedent toward the closing costs on the Atlantic City Condominium;
- c. Eleven Thousand Eight Hundred Eighty Dollars and 70/100 (\$11,880.70) representative of one-half of the proceeds on the sale of the Pompano Beach Condominium, acquired after marriage and subject to their Ante Nuptial Agreement;
- d. Three Thousand Dollars (\$3,000.00) in Respondent's possession



remaining from the Trust disbursement payable to Decedent, which Respondent deposited into their joint account.

**FURTHER**, this Court finds that the Amendment to the Health Care Trust is valid, and that pursuant to that valid amendment, the Health Care Trust continued after Decedent's death for the benefit of his wife under the terms set forth therein.

**FURTHER**, Petitioner's Petition to Recover Moveable Property under Orphans' Court Number 371DE of 2002 is hereby **DISMISSED**.

Within thirty (30) days from the date of the Decree, counsel for Petitioner shall file an Affidavit with the Clerk of the Orphans' Court, certifying compliance with this Decree. The Affidavit shall bear the Caption of the Orphans' Court and shall contain the Orphans' Court number. Counsel shall attach to the Affidavit, a copy of this Order, and copies of all transactions relevant to this Order. Additionally, Counsel shall pay such fee as may be required by the clerk.

**BY THE COURT:**

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**HON. JOSEPH D. O'KEEFE, A.J.**  
**ORPHANS' COURT DIVISION**

Timothy Kolman, Esq.  
225 N. Flowers Mill Road  
Langhorne, PA 19047

Steven S. Glickman, Esq  
675 Morris Avenue  
Suite 100 Springfield, NJ 07081