IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
ORPHANS' COURT DIVISION

O. C. NO. 63PR of 2001

Estate of HARRY W. RUTTER, Deceased

OPINION

Facts and Procedural History

The matter before this Court is a "Petition to Show Cause Why Harry W. Hardy Should Not Be Compelled to File an Account of Actions", filed by Francis Rutter ("Petitioner"). Petitioner seeks to compel Harry W. Hardy ("Respondent") to file an accounting of his actions while he was acting as agent under the Power of Attorney of Harry W. Rutter ("Decedent") and reverse transfers of real estate and bank accounts made to himself. Respondent filed an Answer and New Matter in which he admitted that he stood in a confidential relationship with Decedent but Respondent alleged that the disputed real estate was a gift Decedent made to Respondent and Respondent signed the deed acting as power of attorney. Finally, Respondent averred that no bank accounts held by Decedent at the time of his death were in trust for the benefit of Petitioner.

Decedent died on December 11, 2000, at the age of 80, was unmarried and left no issue. Decedent was survived by one remaining brother and several nieces and nephews. The Petitioner in this matter is the sole surviving sibling of Decedent. Respondent is a nephew of both the Decedent and Petitioner. The Decedent left a will, in which he left the residue of his estate to Respondent and named

Respondent as the personal representative of the estate. The Will grants Petitioner the right to occupy the residence located at 103 Snyder Avenue, Philadelphia, Pennsylvania. In detail, the Will states:

> SECOND: (a) I give my house at 103 Snyder Avenue, Philadelphia, PA., and the contents thereof to my nephew, Harry W. Hardy, subject to the following conditions:
>
> (1) I give my brother, Francis Rutter the right and privilege to occupy and remain in my house for and during his lifetime; until he chooses to remove himself from the house; or until he is unable to maintain himself alone.
>
> (2) It shall be my brother's obligation, as a condition of his occupancy, to pay for the maintenance and upkeep, including real estate taxes, water and sewer rents, utilities and insurance, both fire, comprehensive liability. This right to occupy, granted to my brother alone, shall be a personal privilege, and it shall not be construed as a life estate.
>
> (3) In order to exercise this right, my brother must move into my home within three months after the probate of my will and notification to him in writing of this privilege. In the event he does not move into my home, or in the event that he attempts challenge this, or any other portion of my will, I direct that my home and the contents shall become part of my residuary estate.
>
> (b) I give the rest of my estate of whatever nature and whatever situate to my nephew, Harry W. Hardy. In the event he does not so survive me, I give my estate to the residuary beneficiaries named in the will of my nephew, Harry W. Hardy, or in default thereof, to his heirs in the same proportions they would share his estate if he dies intestate.

Last Will and Testament of Harry W. Rutter, Exhibit P-3.

On October 17, 1992, Petitioner executed a power of attorney and the Will. The power of

attorney gave Respondent the power to make gifts and withdraw trust assets. On October 14, 2000, the deed transferring the property located at 103 Snyder Avenue, Philadelphia, Pennsylvania, was signed by Respondent as the Attorney-in-Fact. On October 17, 2000, the deed and 1992 Power of Attorney were recorded in the Department of Records. Decedent died on December 11, 2000. Petitioner filed the instant petition on January 17, 2001. On August 28, 2001, this Court held a hearing to receive testimony in this matter.

Legal Analysis

In his request for relief, Petitioner alleges that Respondent misappropriated a) the bank accounts held by Decedent; and b) the house and property located at 103 Snyder Avenue, Philadelphia, Pennsylvania. Therefore, each claim should be broken down and analyzed separately.

It is Petitioner's position that there were certain bank accounts that were intended to pass outside the estate of Harry W. Rutter and directly to him. Instead, Petitioner alleges that, because Respondent the attorney-in-fact for Decedent's financial affairs, he transferred ownership of the accounts to himself. The two contested accounts are a money market at Mellon Bank and a certificate of deposit held at First Union Bank. It is the suggestion of Petitioner that the accounts should be treated by the Court as multiple party trust accounts. A multiple-party account, as defined by the Pennsylvania Legislature is:

> Either a joint account or a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposited

agreement.

20 Pa.C.S. § 6301. A trust account is defined as follows:

> Trust Account means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sum on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

20 Pa.C.S. § 6301.

The two elements necessary to create a valid *inter vivos* gift are (a) an intention to make an immediate gift; and (b) actual or constructive delivery to the donee such that the donee will gain "dominion and control" of the subject matter of the gift. Estate of Eastman, 760 A.2d 16, 19 (Pa. Super. Ct. 2000).

Pennsylvania courts have established a burden shifting scheme whereby the initial burden rests with the alleged donee to prove the existence of an *inter vivos* gift by clear and convincing evidence. Hera v. McCormick, 625 A.2d 682, 686 (Pa. Super. Ct. 1993). If it can be established by prima facie evidence that a gift was created, "a presumption of validity arises and the burden shifts to the contestant to rebut this presumption by clear, precise and convincing evidence." Id. The presumption of validity can be "rebuffed by establishing that the donor and donee had a confidential relationship at the time the alleged gift was made." Id.

In the present case, Respondent, the alleged donee, admitted to having a confidential relationship with Decedent (alleged donor), as evidenced by the 1992 Power of Attorney. Answer and New Matter of Respondent, at para. 10. This type of confidential relationship fits within that defined by other courts in

this jurisdiction: "a confidential relationship exists when the circumstances make it certain that the parties do 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. In both situations an unfair advantage is possible." Weir v. Ciao, 556 A.2d 819, 825 (Pa. 1989); citing Leedom v. Palmer, 117 A. 410, 411 (Pa. 1922). The burden shifting scheme provides that the existence of a confidential relationship shifts the burden to the donee to "show that the alleged gift was free of any taint of undue influence or deception." Hera v. McCormick, 625 A.2d at 690. To this end, [s]uch a transaction will be condemned, even in the absence of evidence of actual fraud, or of mental incapacity on the part of the donor, unless there is full and satisfactory proof that it was the free and intelligent act of the donor, fully explained to him, and done with a knowledge of its consequences. Lochinger v. Hanlon, 33 A.2d 1, 4 (Pa. 1943).

During the hearing, this Court made the determination based on the argument of Petitioner and admissions of Respondent that the burden had shifted to Respondent to prove that the *inter vivos* gifts were valid within the context of the burden shifting scheme.

The basis for Petitioner's belief that he was the beneficiary of several if not all of Decedent's bank accounts was a conversation that took place between Petitioner and Decedent in 1994 or 1995. Notes of Testimony 8/28/01, at 189-90. During the conversation, Petitioner recalled that Decedent promised him the bank accounts and proceeds therefrom if Decedent pre-deceased Petitioner. Id. In fact, Petitioner presented bank statements from 1996 and 1998 that bear the designation "Harry W. Rutter ITF Francis E. Rutter." Exhibits P-1, P-2. While it is true that the "ITF" abbreviation stands for "in trust for" and represents the creation of a trust account, the evidence presented by Petitioner was not current as of the

time of Decedent's death. At least five (5) years passed from the time of the conversation between Petitioner and Decedent and Decedent's death.

Under certain circumstances, a conversation between brothers and a promise from one to the other concerning his bank accounts and assets upon his death would be a good indication of how he wanted his assets distributed. However, if one over arching theme became evident during the hearing in this matter, it was that Decedent never hesitated to change the named beneficiaries on his bank accounts. It is quite obvious from the Notes of Testimony that Decedent was a stubborn man in his later years of life and changed the beneficiaries on the bank accounts on a whim depending on whether a certain relative happened to be in his good graces at a particular moment. Every witness who testified during the hearing corroborated the notion that Decedent was difficult to deal with, especially when it came to his financial affairs.

When it came to dealing with Decedent, Respondent characterized him as "hardheaded" to the extent that if the matter did not concern you, then Decedent did not discuss it with you and did not want any advice from anyone. Notes of Testimony 8/28/01, at 29, 43. Decedent's own physician described Decedent's usual mental state as "stubborn, obstinate, determined to do things in whichever way he decide it should be done." Id. at 122. This description was repeatedly verified by those who interacted with Decedent on an occasional to regular basis. Id. at 141, 155, 175. Decedent was so particular and private when it came to his financial affairs that he would only conduct his business with two specific bank tellers when conducting his financial affairs. Id. at 47. Helen Holt, one of the two bank tellers who regularly interacted with Decedent, characterized his financial tendencies in the following way:

Q. Have you heard the characterization of Harry Rutter as stubborn, obstinate and ornery; did you hear that?

A. Yes.

Q. Would you agree with those characterizations or would you disagree?

A. I would agree.

Q. How did those characterizations, his being stubborn, obstinate, ornery, come into place vis-a-vis you being in a business relationship?

A. Well, he changes titles at a whim. One week it would be one person, another week it would be another person, stuff like that. Like he would just, you know, mostly his mother until she died. It was his mother.

Q. When you say his mother, who did what?

A. She was his beneficiary.

Q. And then after his mother passed away?

A. He changed accounts a lot.

Q. The accounts that he changed, was it restricted to just CDs or was it CDs and savings accounts, checking accounts?

A. You can't have a beneficiary on a checking account. It would be savings and CDs.

Q. And when you say he changed the beneficiaries a lot, would you say a lot is in reference to what most other people do or what your experience has been at Mellon?

A. I would say more than what other people did, yeah.

Notes of Testimony 8/28/01, at 156-57. Eileen Franklin, the other teller with whom Decedent exclusively conducted his financial affairs, agreed with the assessment that Decedent was "his own man as far as it

came to making changes to his own property and accounts[.]" Id. at 177.

What is readily apparent from these accounts of Decedent's conduct is that prior verbal assurances or older bank statements must be considered suspect when presented as evidence of Decedent's donative intent prior to his actual death. Respondent testified that Decedent did not tell a beneficiary when he/she was being added or subtracted from an account until Decedent wanted the person to know. Notes of Testimony 8/28/01, at 77. This pattern is consistent with the conversation Petitioner recounted that he had with Decedent. At that particular time, Decedent wanted Petitioner to know that Petitioner was the named beneficiary on a particular bank account. However, as indicated, Petitioner was only able to produce a bank statement from February 1998. Obviously, from the description of Decedent's conduct when it came to his financial affairs, it cannot be assumed that the named beneficiary on this bank statement would stay the same. Respondent presented a later bank statements (October 1999 through July 2000), from the same Mellon Bank Money Market Account (#040-585-6371) which named Petitioner as the beneficiary in February 1998. Notes of Testimony 8/28/01, at 62-65; Exhibit R-3. Several bank statements in the interim months indicate that there were no named beneficiaries on this account for an extended time period. Id. The numerous bank statements identifying different named beneficiaries on the same account would be consistent with Decedent's practice of changing beneficiaries frequently and not telling the beneficiary until Decedent was ready to tell the beneficiary of the changes. This theory is strengthened by the notion that Petitioner and Decedent got into an argument in April 1997 and did not speak to one another thereafter though living two blocks from each other. Notes of Testimony 8/28/01, at 233. It can be surmised that an argument that would lead two brothers to never speak to one another again could certainly lead one of

the brothers, who happens to be stubborn and obstinate, to remove the other brother as a beneficiary to the bank account in question.

Petitioner raises the issue of Respondent's increased involvement in the Decedent's financial affairs in latter half of 2000 to cast suspicion on certain transactions. However, Petitioner was only able to produce evidence of his name appearing on the Mellon bank statement in February 1998. Respondent was more intimately involved in Decedent's everyday financial affairs and was named with Decedent on several joint bank accounts. See, e.g., Notes of Testimony 8/28/01, at 35. There were other bank accounts that Decedent maintained and eventually turned over maintenance of these accounts to Respondent via the power of attorney. Petitioner has never alleged that he stood to benefit from these accounts and that Respondent manipulated the accounts using his Power of Attorney to change the terms of the accounts so as to deny Petitioner the benefit of the accounts. Whether the accounts were in trust for Respondent or in the name of Decedent and therefore part of the Decedent's estate, Respondent stood to take the entire amount because Respondent was the sole benefactor under the residuary clause contained in Decedent's Will. In essence, Petitioner has no standing to challenge all but the Mellon Bank account -- and Respondent has sustained his burden as to this account. Therefore, Respondent has sustained his burden as to all disputed bank accounts. Though Respondent stood in a confidential relationship with Decedent, any transfer of funds in this account were legitimate and made on Decedent's own accord, free from any undue influence.

The testimony and evidence with the respect to the transfer of the house at 103 Snyder Avenue casts significant doubt on the legitimacy of this transaction. The testimony of Respondent and Decedent's

physician, Dr. Jeffrey Maron clearly reveal that Decedent was in failing health during the latter months of 2000. Dr. Maron testified that "[t]he last couple of times I saw Mr. Rutter it was obvious that he was physically detiorating . . . ." Notes of Testimony 8/28/01, at 117. Both Dr. Maron and Respondent agreed that they would renew their efforts to put Decedent in an assisted living facility, though Decedent had consistently refused to be placed in an assisted living facility. Id. at 65, 95, 125. Respondent testified that he was under the impression if that Decedent was placed in an assisted living facility, any assets in Decedent's name could be used by the facility to pay for the care. Id. at 65.

Whatever Respondent's "impressions" happened to be, it is apparent that he was not only thoroughly advised of the potential adverse affects the transfer would have on the estate, but that the transfer was in and of itself unnecessary even if Decedent was placed in an assisted living facility. As was adequately briefed by Petitioner, Respondent himself conceded that there was about $160,000.00 on hand to pay for the assisted living facility, if it became necessary. Id. at 95. Considering that the home was valued at only $30,732.00, it is doubtful that the sale of the home under any circumstance would have been required to help pay for an assisted living facility. Exhibit P-4. Furthermore, Respondent never investigated the possibility that Decedent could receive free care at the veterans home. Id. at 95-96. As a matter of law, Respondent was advised that if Decedent died within one year of the transfer, there were be inheritance and transfer tax consequences that would have adverse affects on the estate -- especially considering that Decedent was admittedly in failing health and may not have lived another full year Id. at 137. Finally, as a primary residence, the house at 103 Snyder Avenue could have been excluded as a source of payment for Medicaid purposes. Petitioner's Brief, at 12 (citing 55 Pa.C.S.A. §178.62).

As a result, the actions of Respondent in transferring title of the house and his conduct following Decedent's death must be viewed skeptically. Respondent recounted that he sought the advice of Mel Starker as to how to change the title on the deed legitimately. Notes of Testimony 8/28/01, at 66. It was Respondent's opinion that Decedent would neither leave the house nor allow any visitors into the house, making it impossible for Decedent himself to execute the change in title. Id. Therefore, that left the execution of the power of attorney as the only viable way of changing the title on the deed. Id.

Respondent consulted Mr. Starker and attorney William Labkoff, both of whom had assisted Decedent in drafting his original Will and drafting the power of attorney, for advice on transferring the deed. Notes of Testimony 8/28/01, at 66-67. During these discussions, it was acknowledged that the transfer of the deed would be counter to the donative intent of Decedent, as expressed in his Will. Id. at 139. The terms of the Will, as outlined above, provided Petitioner with a right of occupancy in the house at 103 Snyder Avenue until Petitioner's own death. According to Mr. Labkoff, after discussing the terms of the Will, Respondent agreed to "take care of Francis" in order to abide by the terms of the Will Id. at 140. Though the transfer was counter to the terms of the Will, the approval of Decedent was never sought. Instead, Respondent testified that he discussed with Decedent "what had to be done", though Respondent never testified as to whether Decedent understood what, as a practical consequence, this meant. Id. at 69. In other words, Respondent never told Decedent point blank that he would need to execute the power of attorney in order to transfer the deed of the house from Harry Rutter to Harry Hardy. Respondent, on his own determination, decided that, not only was the transfer was in the best interests of the estate, but that the transfer had "nothing" to do with Francis Rutter because "[h]e don't come around for, like, eight years

and all of a sudden, you know, something has to do with him." Id. at 68-69. Respondent seems to have resolved on his own to take action counter to the contents of the Will. Even though Respondent assured Mr. Labkoff that he would adhere to the terms of the Will, the statements of Respondent indicate that he harbored some animosity toward Petitioner and never intended to "take care of" Petitioner as he originally promised.

The actual transfer and recording of both the power of attorney and deed was done by Mr. Starker. Notes of Testimony 8/28/01, at 137, 144. Mr. Starker recounted that during the conversation he had with Respondent concerning the transfer of the deed, Respondents' reasons for wanting the transfer and the implications of the terms of Decedent's Will were discussed. Id. at 148. However, Mr. Starker testified that he did not specifically learn of the reasons for the transfer, and, even though the general terms of the Will were discussed, Mr. Starker "never really read the Will." Id. After the conversation, Respondent signed a statement declaring that he was the sole beneficiary of Decedent's estate. Id. at 151. The statement obviously compromised the right of occupancy created by the Will. The transfer, conversation and signing of the statement occurred on or around October 14, 2000. Decedent died on December 11, 2000.

Following Decedent's death, Respondent continued to act counter to the intent expressed in the Will. When approached by Petitioner about the right of occupancy of which both Petitioner and Respondent were aware, Respondent told Petitioner that "there ain't nothing in there for you." Notes of Testimony 8/28/01, at 112. Instead, Respondent testified that he planned to move into the house at 103 Snyder Avenue and not abide by the terms of the Will which granted Petitioner a right of occupancy. Id.

at 109.

Recalling the applicable law, it has been stated that "[t]ransactions by which a decedent shortly before his death practically strips himself of all available property are naturally regarded with suspicion, and are to be scrutinized with a keen and somewhat incredulous eye." Hera v. McCormick, 625 A.2d at 691 (quoting Keiper v. Moll, 454 A.2d 31, 34 (Pa. Super. Ct. 1982)). Respondent was granted a power of attorney, which creates a fiduciary relationship with the principal. 20 Pa.C.S. § 5601.1(e). The duties established by this relationship include:

(1) Exercise the powers for the benefit of the principal.
(2) Keep separate the assets of the principal from those of the agent.
(3) Exercise reasonable caution and prudence.
(4) Keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Id.

Applying this standard and the burden shifting scheme outlined above, this Court is unpersuaded that Respondent has sustained his burden that the transfer of the deed from Harry Rutter to Harry Hardy was done free of any undue influence or deception. Respondent undertook to transfer title on the deed without the knowing and intelligent approval of Decedent and the transfer was completed only short time before Decedent's death, when his health was admittedly "going down." Notes of Testimony 8/28/01, at 65. Based on this analysis, this Court concludes that the deed conveying the premises at 103 Snyder Avenue, Philadelphia, Pennsylvania, from Harry W. Rutter to Harry W. Hardy, dated October 14, 2000, and recorded October 17, 2000, should be set aside and declared null and void.

Conclusion

Petitioner has raised several different claims. As a result of the confidential relationship, both admitted by Respondent and legally established by the Power of Attorney, that existed between Respondent and Decedent, this Court determined that the burden shifted to Respondent to demonstrate, by clear and convincing evidence, that any transfers were made without the taint of undue influence or deception. This Court finds that Respondent sustained his burden as to the two bank accounts at issue but that Respondent has failed to sustain his burden as to the transfer of 103 Snyder Avenue. Therefore, this Court holds that all requests for relief as to the bank accounts are denied. However, this Court holds that the deed conveying 103 Snyder Avenue shall be set aside and declared null and void. An appropriate decree will follow.

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O'Keefe, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
ORPHANS' COURT DIVISION

O. C. NO. 63PR of 2001

Estate of HARRY W. RUTTER, Deceased

D E C R E E

AND NOW, this _________ day of _______________, 2001, upon consideration of the Petition for Citation to Show Cause Why Harry W. Hardy Should Not Be Compelled to File and Account of His Actions and Answer thereto it is hereby ORDERED and DECREED that, consideration of the Petition, Answer and subsequent Post-Hearing Briefs and pursuant to the accompanying Opinion:

(1) All requests for relief concerning certain bank accounts at Mellon Bank and First Union National Bank are DENIED.

(2) The Deed conveying premises 103 Snyder Avenue, Philadelphia, Pennsylvania, from Harry W. Rutter to Harry W. Hardy, dated October 14, 2000, and recorded October 17, 2000, in the Philadelphia Department of Records, should be set aside and declared NULL and VOID.

(3) All other requests for relief are DENIED.

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

Mary Jane Barrett, Esquire
George W. Berkelbach, III, Esquire