

7/15/2009 N.Y.L.J. 44, (col. 6)

New York Law Journal
Volume 242
Copyright 2009 Incisive Media US Properties, LLC

Wednesday, July 15, 2009

Court Decisions
Decisions
Queens County
Second Judicial Department
Surrogate's Court

ESTATE OF **GRACE O'MALLEY**, DECEASED (3604/F/05)

Surrogate Nahman

ESTATE OF **GRACE O'MALLEY**, Deceased (3604/F/05)—In this proceeding, the Petitioner, Kathleen O'Malley a/k/a Kacey O'Malley seeks the imposition of a constructive trust over real property located at 54-05 Junction Boulevard, Elmhurst, Queens County, New York, which was transferred to the Respondent, John O'Malley by Grace and Edward O'Malley on June 7, 2002.

In order for the Court to impose a constructive trust, there must be: '(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment' ([Sharp v. Kosmalski](#), 40 N.Y.2d 119). These factors are flexible considerations for the Court to apply in determining whether a constructive trust should be imposed ([Tordai v. Tordai](#), 109 A.D.2d 996).

After a trial, the Court finds the following: Grace and Edward O'Malley executed powers of attorney on August 23, 2001 making John O'Malley their attorney-in-fact. A power of attorney creates a fiduciary relationship between the principal and agent (See [Matter of Roth](#), 283 A.D.2d 504). These powers of attorney were used by John O'Malley to take care of Grace and Edward O'Malley's banking needs. Furthermore, it is plainly evident, based upon the evidence, that John O'Malley held a position of trust with his parents. Accordingly, the Court finds that on June 7, 2002, the date of the transfer of the deed, a confidential relationship existed between John O'Malley and Grace and Edward O'Malley. In order to satisfy the second element of constructive trust there must be a promise. Where proof of an express promise is absent, the Court can imply a promise where the property has been transferred in reliance upon a confidential relationship. Such a promise 'may be implied or inferred from the very transaction itself' ([Sharp v. Kosmalski](#), supra). There is no question that the property known as 54-05 Junction Boulevard, Elmhurst, Queens County, New York was transferred to John O'Malley by Grace and Edward O'Malley, on June 7, 2002.

On October 2, 2001, M. Joseph Levin, Esq., sent a letter to Grace and Edward O'Malley that purported to contain enclosures including 'Last Will and Testament and other documents' as well as a deed transferring the subject property 'to you and your son subject to your life estate'. On the bottom of a copy of that letter, there appears another handwritten note by M. Joseph Levin, Esq. dated October 8, 2001 that states that the entire residue should be divided one (1) share forty (40) percent to son, one (1) share sixty (60) percent to 'others'. The note explicitly states 'no transfer of house'.

Thereafter, on February 21, 2002, Grace and Edward O'Malley executed general powers of attorney, health care

proxies and wills at their home located at 54-05 Junction Boulevard, Queens County, New York, prepared by M. Joseph Levin, Esq. The wills left forty (40) percent of the residuary estate to John O'Malley, and the remaining sixty (60) percent to their three daughters, Kathleen O'Malley, Susan Harkins, and Mary Ann Schaeffer. There was no mention of Grace and Edward O'Malley's fifth child Edward O'Malley in their wills.

On April 30, 2002, John O'Malley met privately with M. Joseph Levin, Esq. to discuss a deed and wills. M. Joseph Levin, Esq., testified that since John O'Malley was his client on that date, the conversation was confidential and he could not disclose it to Grace and Edward O'Malley. M. Joseph Levin, Esq. did indicate, however, that John O'Malley said that he and his family were doing some medicaid planning.

Thereafter, on May 16, 2002, M. Joseph Levin, Esq. met with Grace, Edward, and John O'Malley and they discussed medicaid planning as evidenced by the notes of M. Joseph Levin, Esq. that state 'medicaid qualif'. The notes from the meeting that day also indicate 'general POA for both', despite the fact that general powers of attorney were executed by Grace and Edward O'Malley in February of 2002. M. Joseph Levin, Esq.'s notes further state 'wants 20% to each-check wills 5 ways' (emphasis in original). The note further includes the names 'Edward O'M, Kacey

O'Malley, Susan Harkins, Mary Ann O'M and John O'Malley'-the five children of Grace and Edward O'Malley. At this meeting, M. Joseph Levin, Esq. also obtained the names, addresses and social security numbers of Grace, Edward and John O'Malley.

On June 7, 2002, less than four months after the execution of wills and powers of attorney on February 21, 2002, Grace and Edward O'Malley executed a deed transferring the real property to John O'Malley subject to a life estate. Moreover, the deed transfer documents state that M. Joseph Levin represented both Grace and Edward O'Malley as well as John O'Malley. Grace and Edward O'Malley also executed new wills on that date that left the residuary estate to all five children equally. **Grace O'Malley** also signed a new power of attorney.

Just a few days after the transfer of the real property, John O'Malley told Kathleen O'Malley, after Kathleen O'Malley discovered the transfer of her parents real property, that she was reading the documents incorrectly and that the property was for all of Grace and Edward O'Malley's children and was transferred for medicaid purposes. In addition, **Grace O'Malley** told Kathleen O'Malley that John O'Malley told his mother 'we don't have to worry about this, it will be OK'. In March of 2005, John O'Malley again told Kathleen O'Malley that the house was for all of the children.

Moreover, John O'Malley told Susan Harkins in June of 2002, that the deed was transferred 'in case they ever applied for medicaid'. John O'Malley also assured Susan Harkins that he would honor **Grace O'Malley's** wishes and divide the house equally among the children. Thereafter, in 2005, before **Grace O'Malley** passed away, Susan Harkins, John O'Malley and **Grace O'Malley** had a conversation during which John O'Malley acknowledged in front of his mother that the deed was transferred to him for medicaid purposes and that the proceeds would be split among the five children.

John O'Malley admits that he told his sister Kathleen in front of their mother during Easter 2005 that when he sold the property, he would give Kathleen O'Malley and the other siblings 'something'. In addition, the transfer of the property to John O'Malley, just one of Grace and Edward O'Malley's five children, was contrary to **Grace O'Malley's** express wish from the time her own mother passed away in 1975 that **Grace O'Malley's** estate would be divided equally among her children. **Grace O'Malley** would physically and verbally express this desire by holding up her hand showing all five fingers and say 'five fingers, five children, five ways'. Indeed, M. Joseph Levin, Esq.'s note from May 16, 2002 explicitly states '5 ways' (emphasis in original).

Furthermore, it appears that during this period of time, Edward O'Malley was disoriented, confused, had impaired mental ability and was treated for early dementia with medication. The evidence further establishes that Edward O'Malley was not capable of handling simple banking transactions alone.

Accordingly, the Court finds that the transfer of the property to John O'Malley was made in reliance of a prom-

ise to Grace and Edward O'Malley that the property would be held by John O'Malley for the benefit of all five of Grace and Edward O'Malley's children.

The final element of the constructive trust remedy is unjust enrichment. A person may be unjustly enriched if he has received a benefit, the retention of which would be unjust (*Sharp v. Kosmalski*, *supra*). Considering the circumstances surrounding the transfer of the property itself, the purpose being to shelter it from a potential liability for Medicaid, the Court finds that John O'Malley would be unjustly enriched and thus, the retention of the property would be inequitable.

Accordingly, the Court imposes a constructive trust for the benefit of Grace and Edward O'Malley's five children over the property known as 54-05 Junction Boulevard, Elmhurst, Queens County, New York.

Settle Decree.

7/15/2009 NYLJ 44, (col. 6)

END OF DOCUMENT