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Wednesday, August 29, 2007

SURROGATE'S COURT DECISION

Queens County Surrogate's Court

CASE

Surrogate Nahman

ESTATE OF JOHN V. URBAN, a/k/a **JOHN URBAN**, Deceased — Petitioner JOAN SCHULTZ, as Limited Administrator of the decedent's estate, commenced this turnover proceeding against Respondents GLORIA MARTIN and LEONARD FINKEL, ESQ. seeking the return of the sums of \$2,188,184.71 and \$5,452,836.16, plus interest at 9 percent from the date of decedent's death on August 23, 2003, to the decedent's estate. Petitioner contends that the monies were originally owned by the decedent and that Respondent GLORIA MARTIN fraudulently induced and exerted undue influence over the decedent in inducing the decedent to create joint bank accounts with her; that the decedent did not have the requisite mental capacity at the time the assets were transferred; and that GLORIA MARTIN and LEONARD FINKEL, ESQ. fraudulently concealed GLORIA MARTIN's actions from the beneficiaries under the Will.

The Order to Show Cause signed June 4, 2007 contains a temporary restraining order which restrains Respondents GLORIA MARTIN, PRUDENTIAL SECURITIES and FIDELITY INVESTMENTS, pending the hearing of this matter, from dissipating, withdrawing, encumbering or transferring the funds on deposit with PRUDENTIAL SECURITIES and FIDELITY INVESTMENTS.

Respondent GLORIA MARTIN moves for an order vacating the temporary restraining order or, in the alternative, for an order modifying the temporary restraining order to allow the release of \$1,247,400.00 representing GLORIA MARTIN's 30 percent interest under the decedent's Last Will and Testament.

On March 12, 2007, three days after Petitioner obtained Limited Letters of Administration but prior to the Temporary Restraining Order of June 4, 2007, Respondent GLORIA MARTIN paid the sum of \$150,000.00 to 'EIBER & EIBER, As Attorneys' and the like sum to 'MEYER, SUOZZI, et al As Attorneys.' Both checks contained the word 'Retainer' in the memo.

Petitioner moves for an order restraining the law firms of MEYER, SUOZZI, ENGLISH & KLEIN, P.C. and EIBER & EIBER from disbursing any portion of the \$150,000.00 paid to each of them as attorneys for GLORIA MARTIN and an order restraining GLORIA MARTIN from authorizing the transfer of any portion of said monies paid to the attorneys.

Preliminary injunctions are drastic remedies which require a clear showing of likelihood of ultimate success on the merits, that movant will suffer irreparable injury unless relief is granted, and that a balancing of the equities lies in favor of movant. (*Doe v. Axelrod*, 73 NY 2d 748).

With regard to GLORIA MARTIN's motion to vacate the Temporary Restraining Order, the allegations contained in the Petition and the papers submitted in opposition to the motion, together with the admissions made by GLORIA MARTIN in her Answer and her Affidavit annexed to the motion, clearly indicate that Petitioner

has a likelihood of success on the merits. In her Affidavit annexed to her motion papers, GLORIA MARTIN alleges that she lived with the decedent from 1990 through 1998, when the decedent became ill and was hospitalized; that the decedent was admitted to the Chapin Home for the Aging in early 1999; that she was the sole contact with the decedent's medical providers and she helped him attend to his financial matters; and that the decedent was diagnosed with depression and dementia when he was admitted to Chapin Home.

In her Answer, GLORIA MARTIN admitted that she cohabited with the decedent from 1990 through 1998; the decedent trusted and relied upon her as both his friend and attorney-in-fact; that she was the attorney-in-fact for the decedent pursuant to Powers of Attorney dated January 27, 1998, January 13, 1999 and February 3, 1999; there was a confidential relationship between the

decedent and herself at the time of the creation of the accounts; that she procured all the necessary documents to create the joint bank accounts between the decedent and herself; that she filled out all the requisite information on said applications; decedent's bills were paid with funds from the accounts; that she used these accounts to make gifts from the decedent to herself and her family; that decedent, as early as 1998, had a history of depression and anxiety; that decedent was admitted to the Chapin Home nursing home on or about January 7, 1999; and that the decedent was suffering from mild dementia at the time of the creation of said accounts.

Although there may be questions of fact for trial on the issues of undue influence, fraud and lack of capacity, they would not preclude a court from exercising its discretion in granting an injunction ([Egan v. New York Care Plus Insurance Company, 266 AD2d 600](#)).

The Court also finds that the Petitioner will be irreparably harmed absent the temporary restraining order and that the equities balance in her favor. GLORIA MARTIN submitted no proof that she would be financially harmed by the temporary restraining order. Moreover, given the seriousness of the allegations of undue influence, fraudulent inducement, and decedent's lack of capacity, Petitioner's concern that the assets would be dissipated absent the temporary restraining order are well taken (See: [Estate of Kalichman, 31 AD3d 1066](#)).

Accordingly, GLORIA MARTIN's motion to vacate the temporary restraining order is denied. The temporary restraining order contained in the Order to Show Cause dated March 25, 2007 is continued until the determination of the this proceeding.

The branch of GLORIA MARTIN's motion requesting the alternative relief of a modification of the temporary restraining order to release \$1,247,400.00 representing GLORIA MARTIN's 30 percent interest under the decedent's Last Will and Testament is also denied. If Petitioner is successful, the Estate would be entitled to interest at 9 percent per annum from the date of decedent's death, which is now approaching four years. This interest alone may exceed GLORIA MARTIN's 30 percent interest in any distribution under the decedent's Will. Additionally, any monies paid to the attorneys for defending GLORIA MARTIN in her individual capacity against the Estate's interest would have to be borne by GLORIA MARTIN and not out of the estate assets. Finally, any release to GLORIA MARTIN would essentially be a distribution to only one of the legatees without any equal distribution to any of the other legatees.

Petitioner's motion for an order restraining the law firms of MEYER, SUOZZI, ENGLISH & KLEIN, P.C. and EIBER & EIBER from disbursing any portion of the \$150,000.00 paid to each of them as attorneys for GLORIA MARTIN and an order restraining GLORIA MARTIN from authorizing the transfer of any portion of said monies paid to the attorneys is denied.

The payment by GLORIA MARTIN of \$150,000.00 to the two law firms was made prior to the temporary restraining order. Additionally, both law firms are reputable firms whose legal fees are subject to Court approval. In the event any such fees are determined to be excessive and/or should not be paid out of estate assets, the attorneys will be directed to return funds to the Estate. Thus, there is no showing of irreparable harm to warrant a restraint on these funds.

This Is the Decision and Order of the Court.

The Clerk of the Court is directed to mail a copy of this Decision and Order to the attorneys for all parties appearing in this proceeding.
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