

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Estate of

File No. 335603

MARGARET MOZER,

Dec. No. 68

Deceased.

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This action to vacate a deed or, in the alternative, impress a constructive trust, was originally commenced by the executor in Supreme Court, Nassau County, and was transferred to this court by order of Hon. Thomas P. Phelan dated October 21, 2005. Robert Mozer, executor of the estate of Margaret Mozer, now moves for summary judgment. The respondent, Catherine Stalarow, has cross-moved for summary judgment for a declaration that the transfer was a valid gift.

Margaret Mozer died on July 12, 2004 leaving a will dated May 29, 1987 which was admitted to probate by decree dated March 14, 2005. Letters testamentary issued to Robert Mozer, the petitioner herein. In addition to Robert and Catherine, Margaret was survived by three other children, Thomas, James and William.

Prior to entering an assisted living facility, the decedent resided at 18 Marden Avenue, Sea Cliff, New York (hereinafter "the premises"). Pursuant to the subject October 28, 1998 deed, Margaret purportedly transferred her interest in the premises to Catherine and reserved a life estate. In addition, the deed provided as follows:

The grantor reserves the power to appoint the premises, or any portion thereof, outright or upon trusts, conditions and limitations, to any one or more of the children of the grantor. This power shall be exercisable only during the grantor's lifetime by a deed making express reference to this power and executed and recorded within two months of execution. No exercise of this power shall be

deemed to release any other interest of the grantor, including any reserved life estates, unless a release is explicitly made. The exercise of this power shall not exhaust it and the deed recorded last shall control as to any ambiguities or inconsistencies. If the Office of the County Clerk does not have a recorded deed reflecting an exercise of this special power of appointment on record within three (3) months after the death of the grantor, it shall be conclusively presumed that this power was not exercised by the grantor during his/her lifetime. No exercise of this power of appointment shall be effective against or constitute notice to any bona fide purchaser or mortgagee unless the deed purporting to effect such exercise of this power is executed and recorded as provided for herein. This power shall not be exercisable by the grantor to appoint her remainder interest in the premises, or any portion thereof, to herself, her estate, her creditors or the creditors of her estate, under any circumstances.

Robert has moved for summary judgment on the grounds that the transfer was revocable due to Margaret's retention of a limited power of appointment and, therefore, an invalid gift as a matter of law. As a result, Robert claims that the premises should be an asset of Margaret's estate and divided among Margaret's five children equally pursuant to the terms of her will.

Catherine has cross-moved for summary judgment for an order denying the motion for summary judgment and instead declaring that the transfer was a valid inter vivos gift. Catherine alleges the following with respect to the transfer. Margaret intended to make a gift of the premises to Catherine to compensate her for losses she had suffered in connection with a failed business venture by her brothers. Catherine's brothers entered into a business venture in 1991. The start-up funds for that venture were obtained from mortgages taken on two properties owned by Margaret. One of the properties was the premises and the other was commercial property located in Locust Valley. Sometime in March of 1993, Margaret transferred title to the Locust Valley property to herself and her five children. At some point in 1995, the business venture failed and the business was closed. The mortgages on the two properties were still outstanding,

and in 1997, foreclosure proceedings were commenced against Margaret and the five children as the owners of the Locust Valley property. Also, in April 1997, Robert and William petitioned for the appointment of a guardian for Margaret. Ultimately, the guardianship proceeding was discontinued. Thereafter, the Locust Valley property was sold to avoid a foreclosure sale. Catherine, James and Thomas used the proceeds from that sale to pay down the mortgage on the premises. Sometime in September 1998, Catherine and Margaret met with Peter Vollmer, a lawyer, to discuss estate planning issues. At that time, Margaret was living in an assisted living facility in Glen Cove. Peter Vollmer met with Margaret at the assisted living facility outside the presence of Catherine. He returned to see Margaret on October 12, 1998 at which time she executed the deed.

Peter Vollmer has submitted an affidavit in which he avers that the first time he visited Margaret was in September 1998. Although Catherine was also present, Mr. Vollmer met with Margaret privately. Margaret expressed concern about the costs of her ongoing medical care. She was concerned about protecting her assets, particularly, the premises. Mr. Vollmer explained that one option was to make a gift of the premises while retaining a life estate. Margaret advised Mr. Vollmer that she wanted to gift the premises to Catherine. Mr. Vollmer states that Margaret understood that, by signing the deed, title and sole ownership of the premises would be vested in Catherine to the exclusion of her other children. At the time the deed was executed, Mr. Vollmer again explained the consequences of the transaction and Margaret acknowledged that she understood. The special power of appointment language was used by Mr. Vollmer as a means of avoiding the payment of gift tax when the deed was recorded.

James Mozer has submitted an affidavit wherein he states that it was his understanding

that Margaret wanted Catherine to have the premises to compensate for the financial losses she suffered because of her brothers' failed business venture. Thomas has submitted an affidavit wherein he adopts James' affidavit.

Summary judgment is often termed a drastic remedy, used sparingly as it is the procedural equivalent of a trial, and should not be granted if there is any doubt as to the existence of a triable issue of fact (Siegel, New York Practice §278 [2d ed]). The moving party must make a *prima facie* showing of entitlement to summary relief as a matter of law, producing sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (*Lynn G. V Hugo*, 96 NY2d 306, 310 [2001]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 326-327 [1986]). When the moving party makes out a *prima facie* case, the burden shifts to the opposing party to produce evidence, in admissible form, demonstrating that material issues of fact exist (*Gonzalez v. 8 Mag Leasing Corp.*, 95 NY2d 124 [2000]; *Winegrad v New York University Medical Ctr.*, 64 NY2d 851, 853 [1985]). Failure of the moving party to make out a *prima facie* case requires denial of the motion regardless of the possible insufficiency of the opposing paper (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

To establish a gift, the donee must establish donative intent, delivery and acceptance by clear and convincing evidence (*Gruen v Gruen*, 68 NY2d 48 [1986]). A donor may make a valid gift of property with the right of enjoyment postponed until after death, as long as her intention is to presently transfer an enforceable interest in that property to the donee (*McCarthy v Pieret*, 281 NY 407 [1939]; *Gruen v Gruen*, 68 NY2d 48 [1986]; *Matter of Bassin*, NYLJ, May 2, 2002, at 27, col 1 [Sur Ct, Nassau County]).

By its terms the deed conveys the premises to Catherine retaining a life estate with a

limited power of appointment of the remainder in Margaret in favor of her children. Robert maintains that since the transfer was revocable by virtue of the limited power of appointment, the transfer does not constitute a valid gift. The court disagrees. As this court noted in *Matter of Bassin* (NYLJ, May 2, 2002, at 27, col 1 [Sur Ct, Nassau County]), a life estate and power of appointment are commonly used Medicaid planning devices to avoid gift taxes by making an incomplete gift but still maintaining Medicaid eligibility. In *Matter of Bassin*, (NYLJ, May 2, 2002, at 27, col 1 [Sur Ct, Nassau County]), this court held that the transfer by deed of a remainder interest in real property subject to divestment under a limited power of appointment could constitute a valid gift so long as the donor had the requisite donative intent and capacity to make a gift. Similarly, this court has held that a valid remainder may be created subject to being divested by a reserved power of appointment (*Matter of Levitt*, NYLJ, Mar. 13, 1998, at 32, col 4 [Sur Ct, Nassau County]).

Petitioner incorrectly concludes that if a transfer is an incomplete gift for gift tax purposes, it does not constitute a valid gift. The primary element of a completed gift for gift tax purpose is the abandonment of dominion and control over the property (26 CFR §25.2511-2). A completed gift does not occur if the grantor retains a power of appointment because he has the right to change beneficial enjoyment. Section 25.2511-2(b) of the Gift Tax Regulations (26 CFR 25.2511-2) provides as follows:

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

For example, if a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants, no portion of the transfer is a completed gift.

Petitioner confuses the issue of whether a transfer is a valid gift under state law (i.e. whether the elements of a gift are established) with the issue of whether a transfer is a complete gift for federal gift tax purposes. Accordingly, the motion for summary judgment is denied. The transfer does not constitute an invalid gift as a matter of law.

Concerning the cross-motion, Catherine's testimony although admissible to defeat the motion for summary judgment where it would be otherwise barred by CPLR 4519 (*Matter of Cavallo*, 6 AD3d 434 [2d Dept 2004]), is inadmissible in support of her cross-motion (*Philips v Joseph Kantor & Co.*, 31 NY2d 307, 313-314 [1972]). Robert opposes the cross-motion for summary judgment on the basis that Catherine had a confidential relationship with Margaret as her attorney-in-fact under a durable power of attorney which requires her to establish by clear and convincing evidence that the transfer was free of coercion or undue influence (*Matter of Van Alstyne*, 207 NY 298 [1913]). He claims Catherine has failed to meet her heightened burden of proof. Where the parties to a gift transaction are close family members, the existence of a confidential relationship is a question of fact (*Matter of Bassin*, NYLJ, May 2, 2002, at 27, col 1 [Sur Ct, Nassau County]). Even assuming a confidential relationship between Margaret and Catherine as petitioner asserts, Catherine has met her heightened burden that the transfer was free from any undue influence (*Matter of Puckett*, 2005 NY Slip Op 51568[U], 9 Misc 3d 1116A [Sur Ct, Nassau County 2005]). The affidavit of the attorney clearly demonstrates that the execution of the deed was not subject to the exertion of any undue influence. Moreover, the testimony shows that Margaret clearly intended to transfer the premises to Catherine. With the

attorney's affidavit coupled with the recording of the deed and the presumption of delivery arising therefrom (*Matter of Romano*, 8 Misc 3d 1010[A] [Sur Ct, Nassau County 2005]), the respondent established her entitlement to summary judgment. Since petitioner has failed to raise any issue of fact as to Margaret's capacity, the cross-motion is granted.

Settle decree.

Dated: March 30, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

