

## Defeating Summary Judgment in an SCPA Turnover Proceeding

*Men would live exceedingly quiet if these two words, mine and thine, were taken away.*

-Anaxagoras

By: Gary E. Bashian, Esq.\*

Successful Motions for Summary Judgment in an SCPA Turnover Proceeding – or any Proceeding for that matter –require independent, objective, and verifiable proof in support of the Movant’s Position. However, in SCPA Turnover Proceedings involving Gifts and/or transfers of real property with little or no consideration, a Movant is often hard pressed to present evidence that can afford them Judgment as a matter of law – making any such Motion for Summary Judgment ripe for defeat when and if the Opposition can identify and point out the weaknesses in a Movant’s papers. To that end, understanding and appreciating the basic Burdens of Proof and Standards of Proof to which a Movant is held remains key to defeating a Motion for Summary Judgment in an SCPA Turnover Proceeding, and is explored in detail herein.

A typical fact pattern in many SCPA Turnover Proceedings involves a dispute over a Gift and/or transfer of real property with little or no consideration allegedly made by the Decedent to either a fiduciary, or another individual – usually a family member, close friend, or even caretaker.

More often than not, these Gifts and/or transfers have rendered the Estate insolvent, or with significantly fewer Probate assets than would have been available for distribution had the Gift(s) not been made. Almost invariably, the consideration for any transfer of real property involved – if any is listed – is simply “love and affection,” or some such vague and non –specific language that makes clear there was no payment made to the Decedent by the recipient.

Concerned that these Gift(s) and/or transfers were the result of Fraud, Duress, Undue Influence, or other improper acts, the Estate fiduciary<sup>1</sup>, or an interested party with standing<sup>2</sup>, seeks to have the assets returned to the Estate so that they can then be distributed – usually to them – pursuant to a Will or under the rules of Intestacy.

Although there are any number of other, nuanced facts that underlie these types of SCPA Turnover Proceedings, this general framework remains remarkably consistent.

To that end, after CPLR Discovery is concluded and the parties are in the best position to determine if they have reasonable grounds to seek an Accelerated Judgment<sup>3</sup>, very often the Donee will seek Summary Judgment if they believe they have sufficient evidence to prove the validity of the Gift(s) and/or transfer.

As with any Motion for Summary Judgment, the Movant in an SCPA Turnover Proceeding has the Burden of Proof to establish a *prima facie* case for entitlement to Judgment as a matter of law. Moreover, a Movant must show that there are no triable issues of fact which would need to be determined at Trial<sup>4</sup>. Given that Summary Judgment is the procedural equivalent of a Trial, “any doubt of the existence of a triable issue, or where a material issue of fact is arguable, the motion should be denied.”<sup>5</sup>

If the Movant can establish this *prima facie* case, the Burden of Proof then shifts to the party opposing the Motion to produce evidence which establishes the existence of a material issue of fact which would require a Trial<sup>6</sup>.

As the validity of a Gift, or series of Gifts, forms the core of these types of SCPA Turnover Proceedings, it is important to note that for a Gift to be deemed legally valid, the Donee has the Burden of establishing, by clear and convincing evidence, the three basic gifting elements, including:

1. The Donative Intent of the Donor;
2. Delivery to the Donee (constructive or actual); and
3. Acceptance by the Donee<sup>7</sup>.

However, this is not the end of the gifting analysis as “where there is a confidential relationship between the beneficiary and the grantor, ‘[a]n inference of undue influence’ arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction.”<sup>8</sup>

A Confidential Relationship can be established where the Donee assists the Donor with their daily living needs, finances, healthcare, provides food, medication, transportation, etc. The question is generally one of dependence, and if the Donee has been in a position to exert Undue Influence as a result of this dependent relationship<sup>9</sup>.

Alternatively, a Fiduciary Relationship might exist between the Donor and Donee which is distinct from a Confidential Relationship and is created either by circumstances or a Power of Attorney. In such a Fiduciary Relationship, a presumption of impropriety attaches to the Gift, increasing the Donee’s burden to prove that any transfers between the two parties were free of Fraud and/or Undue Influence<sup>10</sup>. In the presence of a Fiduciary Relationship, the Donee’s duty to the Donor to act in good faith and for the benefit of the Donor even exists even when transactions between the parties are not made under the authority of the Power of Attorney<sup>11</sup>.

In summary, when a Donee moves for Summary Judgment - i.e.: requesting that the Court declares the Gift(s) and/or transfers at issue to be valid and that the SCPA Turnover Proceeding be Dismissed - they must offer evidence which not only establishes the Donative Intent of the Decedent (Delivery and Acceptance are rarely, if ever, the issue in controversy), but in the event they enjoyed a Confidential and/or Fiduciary relationship

with the Decedent, they will have the heightened Burden to prove that the transfer at issue was free from Fraud and/or Undue Influence, etc.

Clearly, understanding these Burdens and Standards of Proof are critical when considering how to Oppose a Motion for Summary Judgment in an SCPA Turnover Proceeding, and must be closely observed when analyzing the proof Movant offers in support of their case.

Indeed, the Movant/Donee will often submit their own Affidavit in support of Summary Judgment that details statements allegedly made by the Decedent regarding their intent to make the Gifts, as well as describing the support and assistance the Donee allegedly provided the Decedent in an effort to explain why “love and affection” was the only consideration needed effect any transfer at issue.

When available, the Movant/Donee will often also submit supporting Affidavits from non-parties that describe the relationship the Decedent had with the Movant and/or the party seeking Turnover, as well as what they know about the Decedent’s intent to make the alleged Gift(s) and/or transfers.

Commonly, all of these Affidavits will assert that the Decedent and the Movant/Donee had a mutual and long-standing relationship of trust, love, and admiration; that the Movant provided financial, medical, and other forms of support for the Decedent during their lifetime; that the Affiant is “certain” that the Decedent had the Donative Intent to gift all or most of their assets to the Movant - even though these very same assets would have been distributed differently under the Decedent’s Will; and that the Decedent and the party seeking Turnover had a tense relationship punctuated with strife and acrimony.

Admittedly, when confronted with proof of this nature even the most jaded litigator can second guess the strength of their case, and become concerned that the Court will grant Summary Judgment in light of any such evidence.

However, all is not lost as all of the applicable Burdens of Proof strongly favor the non-Moving party. Accordingly, first and foremost the Opposition to Summary Judgment should highlight the ways in which Movant’s papers do not meet these Burdens, and therefore cannot establish a *prima facie* case for judgment as a matter of law.

Most, if not all of the facts alleged in the Movant/Donee’s Affidavit regarding conversations that they had with the Decedent will be barred by the Dead Man’s Statute as testimony of an interested witness concerning a personal transaction or communication between themselves and a deceased person must be excluded when at trial or when offered in support of a Motion for Summary Judgment<sup>12</sup>. This rule alone can often be determinative in establishing that the Movant has not established their *prima facie* case as the Decedent’s Donative Intent cannot be established based on the Movant’s testimony alone – and remember, if the Movant has not established a *prima facie* case, the Motion must be denied.

Conversely, as there is no such bar on the use of such testimony in Opposition to a Motion for Summary Judgment<sup>13</sup>, questions of fact can be raised regarding the Decedent's Donative Intent based on conversations they had with the Party seeking turnover which contradict Movant's presentation of the facts – creating even more grounds for denial of the Motion.

Furthermore, Movant's own offering of proof usually confirms that they enjoyed a Confidential and/or Fiduciary relationship with the Decedent as they will either personally describe, or include descriptions in the other supporting Affidavits, the ways in which they assisted the Decedent with their finances, medical care, personal hygiene, food shopping, etc. As indicated above, once a Confidential and/or Fiduciary relationship is established the Movant is subject to an even higher Burden of Proof, and in the unenviable position of having to prove that the Gift at issue was not the product of Fraud, Undue Influence, Duress or other improper acts – a Burden that only makes entitlement to Judgment as a matter of law even more difficult to establish.

Moreover, all of the Supporting Affidavits offered in support of Summary Judgment must establish the alleged Gift(s) by "Clear and Convincing" evidence, a relatively high Standard of Proof that the Draftsperson of the Affidavit - or the Affiant themselves – might overlook.

Absent very specific language establishing the elements of a Gift and comprehensive details about when, where, and why the Decedent communicated this information to them, the "Clear and Convincing" standard will not be met. Neither conclusory allegations, hope, belief, nor assumptions are enough to grant Summary Judgment. Given that it is the exception - and from the rule - that an individual will tell even a close friend the intimate details, motivations, and/or financial reasons that they chose to Gift away most, if not all, of their assets, it is rare that an Affidavit in support of Summary Judgment will be able to present "Clear and Convincing" Evidence of a Decedent's Donative Intent - especially if subject to the heightened burdens imposed in the presence of a Confidential and/or Fiduciary relationship.

As I have written about in previous Trust and Estate Section Newsletter articles, Motions for Summary Judgment have been on the rise in Surrogate's Courts for the past several years, and what was once a tool used only sparingly, is now commonplace. Similarly, although relegated to Article 21 as a "Miscellaneous Proceeding," SCPA Discovery Proceedings – or Turnover Proceedings as they are more frequently referred to – are an increasingly common Proceeding before the Surrogate's Courts. Given this confluence, it is imperative that Trust and Estate litigators familiarize themselves with these basic Burdens and Standards of Proof as they pertain to Motions for Summary Judgment in SCPA Turnover Proceedings.

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<sup>1</sup> SCPA 2103

<sup>2</sup> SCPA 2102

<sup>3</sup> *see generally* CPLR 3212

<sup>4</sup> *see* Erikson v JIB Realty Corp, 12 AD3d 344 [2<sup>nd</sup> Dept 2004]; Taub v Balkany, 286 AD2d 491 [2<sup>nd</sup> Dept 2001]

<sup>5</sup> Peerless Ins. Co. v Allied Building Prods. Corp., 15 AD3d 373 [2<sup>nd</sup> Dept 2005]

<sup>6</sup> *see* Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Boz v Berger, 268 AD2d 453 [2<sup>nd</sup> Dept 2000]

<sup>7</sup> *see* Gruen v. Gruen, 68 N.Y.2d 48 [1986]; In the Matter of Parisi, 34 Misc.3d 1204(A) [Queens Cnty Surr Ct 2011]; Matter of Kaminsky, 17 A.D.2d 690 [3<sup>rd</sup> Dept 1962]

<sup>8</sup> Juliano v. Juliano, 42 Misc.3d 1226(A) [Kings Cnty Sup 2014] [emphasis added]; *citing* Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim, 45 N.Y.2d 692 [1978]; Matter of DelGatto, 98 AD3d 975 [2<sup>nd</sup> Dept 2012]; Matter of Neenan, 35 AD3d 475 [2<sup>nd</sup> Dept 2006]

<sup>9</sup> *see generally* In re Boatwright, 114 A.D.3d 856 [2<sup>nd</sup> Dept 2014], *citing* Matter of Connelly, 193 A.D.2d 602 [2<sup>nd</sup> Dept 1993]; Hennessey v. Ecker, 170 A.D.2d 650 [2<sup>nd</sup> Dept 1991])

<sup>10</sup> *see* In re Boatwright, *supra.*; *citing* Mantella v. Mantella, 268 A.D.2d 852 [3<sup>rd</sup> Dept 2000]; Matter of Roth, 283 A.D.2d 504 [2<sup>nd</sup> Dept 2001])

<sup>11</sup> *see* Matter of Cooper, 6 Misc.3d 1001(A) [Nass Cnty Surr 2004]; *citing* Matter of Mazak, 288 AD2d 682 [3<sup>rd</sup> Dept 2001]; Matter of Camarda, 63 AD2d 837 [4<sup>th</sup> Dept 1978])

<sup>12</sup> *see* CPLR 4519; Beyer v. Melgar, 16 A.D.3d 532 [2<sup>nd</sup> Dept 2005]

<sup>13</sup> Lauriello v. Gallotta, 59 A.D.3d 497 [2<sup>nd</sup> Dept 2009]