

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

In the Matter of:	)	
	)	
JANICE E. PHILLIPS,	)	
	)	
Respondents	)	
	)	
	)	
	)	Case No. 3AN-12-0055 PR

**MOTION TO RESCIND QUITCLAIM DEED DATED JANUARY 6, 2012**

Conservator Janet Hansten, acting by and through her counsel, hereby files this Motion to Rescind (“Motion”) a Quitclaim Deed dated January 6, 2012 (“Deed”) executed by Janice E. Phillips and her husband, Don R. Phillips. The Phillips are the wards of Ms. Hansten and, as such, she has the authority to file this Motion to Rescind on her wards’ behalf.

The Deed purports to convey a fifty percent (50%) interest jointly owned by Jan E. Phillips and Don R. Phillips (collectively referred to as the “Couple”) to Cynthia Hatton and her partner, Suzie Klein, in the following real property located in Chugiak, Alaska (“Chugiak Property”):

**The North ½ of Lot 62, in Section 9, Township 15N, Range 1W, Seward Meridian, Anchorage Recording District, First Judicial District, State of Alaska together with all tenements, hereditaments, and appurtenances thereto.**

Prior to this transfer, Ms. Hatton and her partner had each owned a twenty-five percent (25%) interest in the Chugiak Property.

At the time that this conveyance was effected, Cynthia Hatton – the daughter of the Couple and their power of attorney (POA) -- knew she was

being investigated by Adult Protective Services (APS) and the Office of Elder Fraud and Abuse (OEFA) with regard to her handling of the Couple's assets and finances. See Exhibit 1 attached hereto and made a part hereof. As the result of a meeting held with representatives of OEFA on December 16, 2011, Ms. Hatton also knew that a petition for conservatorship was going to be filed imminently and that the Couple lacked capacity to make financial decisions<sup>1</sup>. See Exhibit 2 attached hereto and made a part hereof; see also Exhibit 1. Ms. Hatton, who was the Couple's POA and was charged with the responsibility of paying their bills, also knew that her parents owed back taxes on their properties in Anchorage and that they were several months in arrears in their rent at the Chugiak Senior Center ("Center").

Documents show that on December 23, 2011, Ms. Hatton entered into a fee agreement with attorney Kenneth Kirk to have a deed prepared which would convey the Couple's interest in the Chugiak Property to Hatton and her partner, Suzie Klein (collectively, Hatton/Klein). Hatton then took the deed over to her parents for their signatures on January 6, 2012 and the deed subsequently was recorded by Kenneth Kirk's office on January 19, 2012.

Thus, despite knowing that her parent's financial condition was dire and that assets needed to be sold to discharge their bills, Ms. Hatton arranged to have her parents transfer their fifty percent (50%) interest in a property they owned in Chugiak to Hatton/Klein **without consideration**. The Chugiak Property for tax appraisal purposes is valued at \$ 244,700 so that the Couple's interest was arguably worth as much as \$

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<sup>1</sup> Don Phillips has been diagnosed with Alzheimer's disease; Jan Phillips had a stroke some years ago and suffers from dementia.

122,350, yet they received no monetary consideration whatsoever from this transaction engineered Hatton, their daughter and POA. See Exhibit 3 attached hereto and made a part hereof.

## **BACKGROUND**

### **I. Hatton Misuses the Couples' Funds While Acting as their POA**

In September of 2011, OEFA was contacted by APS concerning possible financial exploitation of the Couple by their daughter, Cynthia Hatton, who was acting as their POA. Ms. Hatton is a chiropractor who currently resides in Chugiak, AK. Bank records that APS had received showed, *inter alia*, the following:

- A \$ 15,207.00 check executed by Hatton on 4/22/11 as the down payment on a motor vehicle about five months after the Couple moved out of their home and into the Chugiak Senior Center;
- Numerous transfers and checks written out by Hatton and payable to Cynthia Hatton or Suzie Klein;
- Plane tickets to Seattle purchased on March 23, 2011 for \$ 820.00 which were used by Ms. Hatton and/or her partner.
- Monthly payments on the motor vehicle in the amount of \$ 371 a month
- Periodic checks to Bear Mountain Chiropractic ("Business"), a clinic that Cynthia Hatton owned and operated, in amounts of \$ 1000 or more

Based on this information, Kathryn Curry of APS scheduled a meeting with Ms. Hatton and a representative of OEFA on October 24, 2011. See Exhibit 1.

At that meeting, Ms. Hatton admitted using the Couple's funds from time to time in a way that did not benefit them, which constitutes Elder Fraud pursuant to AS 44.21.415. Ms. Hatton then claimed that an attorney, Kenneth Kirk, had advised her

that she could buy the motor vehicle if she was going to use it to transport her parents to medical appointments. However, Ms. Hatton upon further questioning admitted that shortly after she bought the car, her mother stopped going to physical therapy. Ms. Hatton also admitted that she had continued using the Couple's funds to make the car payments although she was using the motor vehicle for her own use. Ms. Hatton further admitted writing checks to the Business. According to APS, approximately \$ 130,000 in funds was missing from the Couple's bank accounts by October of 2011.

Once the Couple moved into Chugiak Senior Center ("Center") in November of 2010, their monthly payments totaled \$ 5,607.76 per month<sup>2</sup>. Ms. Hatton has only made one payment – in the amount of \$ 3,000 – since October of 2011 and has not turned over the couple's social security or pension checks to the Center. Thus, as of January 31, 2012, the Couple is in arrears to the Center<sup>3</sup> in the amount of \$ 28,790.56. Consequently, Ms. Hatton knowingly used the Couple's funds in a manner which constitutes a breach of her fiduciary duty, violates the covenant of good faith and fair dealing, constitutes Elder Fraud within the meaning of AS 44.21.415, and has led to the unjust enrichment of Hatton /Klein.

## **II. The Office of Public Advocacy Files an Emergency Petition for Guardianship/Conservatorship of Don R. and Janice E. Phillips**

On January 10, 2012, the Office of Public Advocacy (OPA) filed an Emergency Petition along with a Petition for a Guardianship/Conservatorship for Don R. Phillips

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<sup>2</sup> The Center charges \$ 5,231.76 for rent plus \$ 376 for Mr. Phillips' meals.

<sup>3</sup> On December 28, 2011, two representatives from OEFA visited the Phillips at the Center. The Phillips at that time had no knowledge that they were in arrears in rent at the Center and said that Ms. Hatton, their daughter and POA, was paying their bills and taking care of everything for them. See Exhibit 2.

and Janice E. Phillips after learning that Phillips were about to be evicted from the Center for non-payment of rent. Since Ms. Hatton had previously expressed concern over what might happen to the Chugiak Property if a conservator was appointed, Petitioner's counsel by a letter dated January 10, 2012 advised Hatton that she would need to determine the fair market value of the Chugiak Property and then buy out the Couple's fifty-percent interest after an offset was taken for improvements that Hatton and her partner claimed to have made to the Chugiak Property.

A hearing on the Emergency Petition was held on January 12, 2012 and was continued until January 23, 2012, in order to allow the Couple's counsel an opportunity to meet with them. At the conclusion of the hearing held on January 23, 2012, Janet Hansten was appointed to be the conservator for the Couple.

### **III. Hatton, Behind the Scenes, Engineers a Transfer of a Valuable Asset of the Couple to Herself and Her Partner during the Pendency of the Protective Proceeding**

Shortly being appointed on January 23, 2012, the Conservator learned that Cynthia Hatton had retained Kenneth Kirk on December 23, 2011 to draft a deed conveying the Couple's interest in the Chugiak Property to Hatton and her partner. The deed was recorded on January 19, 2012.

At all times since October 24, 2011, Hatton has known that her conduct as the Couple's POA was under scrutiny and that the preliminary investigation by APS had revealed a substantial amount (\$ 130,000) that was missing from the Couple's account. See Exhibit 1. Moreover, by December 16, 2011, Hatton knew that OPA felt that a third-party conservator needed to be appointed to handle the Couple's

finances and that a petition for guardianship/conservatorship would be filled in the very near future. See Exhibit 2. Ms. Hatton also was apprised in writing on January 11, 2012 that any transfer of the Couple's interest to Hatton and her Partner would need to occur as part of a buy-out of the Couple's interest. See Exhibit 4 attached hereto and made a part hereof. Finally, Ms. Hatton also knew that her parents were at least four months in arrears in their rent at the Center by January 1, 2012.

Despite knowing that a conservator was going to be appointed imminently due to her mismanagement and exploitation of the Couple's resources, Ms. Hatton – the Couple's POA -- engineered a plan to have the Chugiak Property transferred to **herself** and her partner **without any consideration**. She said nothing of her intentions to the Court Visitor, the soon-to-be appointed Conservator, or Petitioner's Counsel even though all three of these parties spoke to Ms. Hatton from time to time before January 12, 2012. See Correction to the Report of the Court Visitor, filed on January 25, 2012. Moreover, at all times relevant to the facts which underlie this Motion, Hatton knew that the Couple was in serious danger of being evicted from the Center. Yet, even though she knew of her parents' plight, Hatton acted in a self-serving manner, engineered this transaction by hiring an attorney to prepare a deed on her behalf. Then, Hatton had the Couple – who lacked capacity<sup>4</sup> -- execute a deed conveying a valuable real estate asset to Hatton and her partner, Suzie Klein.

This surreptitious conveyance operated to the detriment of the Couple since it deprived them of a valuable asset. The Chugiak Property is worth \$ 244,700 according to the Municipality of Anchorage's 2012 tax assessment. In other words,

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<sup>4</sup> The Petitions for Guardianship/Conservatorship that were filed with the Court on January 10, 2012 were predicated on the fact that both of the Phillips lacked capacity to manage their financial affairs and their health and well-being.

Hatton and Klein diverted \$ 122,350 of the Couple's assets to themselves without consideration and this conveyance was done at a time when Hatton knew her parents were seriously in arrears at the Center.

Hatton has claimed that she and her partner erected the dwelling ("House") on the Chugiak Property using her own funds. However, the documents pertinent to the Chugiak Property suggest otherwise. The Chugiak Property was purchased by the Phillips in 1993 and was subject to a mortgage recorded on February 25, 1993. At the time the Couple acquired the Chugiak Property, there was 608 square foot Quonset Building ("Hut") on Chugiak Property. The mortgage on the Chugiak Property was paid off and the property reconveyed by the mortgagee to the Phillips by a deed of reconveyance dated **December 14, 2005**. According to tax records, a 1.5 story three-room dwelling consisting of 800 square feet was present on the property in **2005** in addition to the Hut. Consequently, a dwelling of some substance was on the premises **prior to** the time that Ms. Hatton and Ms. Klein became co-owners of the Chugiak Property along with the Couple.

On April 3, 2006, the Couple deeded a 25% interest in the Chugiak Property and the House to Ms. Hatton and a 25% interest to Ms. Klein. Since Hatton/Klein have been co-owners, a detached garage<sup>5</sup> and a second floor consisting of 504 square feet have been added to the Chugiak Property. Municipality of Anchorage records show that a garage was erected on the Chugiak Property in 2009 and 504 square feet of living space were added to the second floor of the House in 2009. Whether these 2009 improvements were done solely at the expense of Hatton and Klein is

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<sup>5</sup> The detached garage is 672 square feet in size.

questionable because, on May 30, 2006, there was a home equity loan taken out on the Chugiak Property by all four co-owners.

Ms. Hatton has always had the option of buying out the Couple's fifty percent (50%) interest in the Chugiak Property. Instead, she unjustly enriched herself and her partner at the Couple's expense by transferring an asset worth \$ 122,350 to Hatton/Klein without the Couple receiving any consideration. If the Deed is rescinded, Ms. Hatton and her partner will need to establish whether they paid for these improvements entirely with their own money, assuming Hatton/Klein decides to buy out the Couple's interest in the Chugiak Property.

## **ARGUMENT**

### **I. Hatton's Conveyance is a Breach of her Fiduciary Duty as the Couple's POA**

A fiduciary duty is considered the "highest standard of duty implied by law." Enders v. Parker, 66 P. 3d 11, 16 (Alaska 2003). Accordingly, courts have deemed loyalty and disavowal of self-interest to be the hallmarks of a fiduciary's role. See Wagner v. Key Bank of Alaska, 846 P. 2d 112, 117 (Alaska 1993), *reh'g den.* As the Alaska Supreme Court has observed:

A fiduciary relationship exists when one imposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.

Paskvan v. Mesich, 455 P.2d 229, 232 (Alaska 1969); see *also* Twelve Hundred 'L' Street Corp., v. Inlet Co., Inc., 438 P. 2d 708, 709 (Alaska 1968).

Thus, as the POA for the Couple, Ms. Hatton was obligated to disavow any self-interest and act in the best interests of the Couple. By transferring a valuable



interest in real estate worth over \$ 122,000 to herself and her partner for **no consideration** when her parents were seriously in arrears in their rent at the Center, Ms. Hatton was clearly acting in her own self-interest and not in the best interests of the Couple.

**II. Hatton and Her Partner Were Unjustly Enriched By The Conveyance of the Couple's Interest in the Chugiak Property and, Therefore, Must Compensate the Couple**

Unjust enrichment occurs when a defendant, such as Hatton and her partner, has received a benefit from plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff for its value. Sparks v. Gustafson, 750 P. 2d 338, 342 (Alaska 1988). In order to establish unjust enrichment, the party seeking to prove that claim has the burden of showing:

- (1) that a benefit was conferred on the defendant;
- (2) that the defendant appreciated the benefit; and
- (3) that the defendant accepted and retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without paying the plaintiff the value thereof.

In addition, the plaintiff also has the burden of proving the value of the benefits conferred on the defendant. See Bennett v. Artus, 20 P. 3d 560, 563(Alaska 2001).

Here, all the elements of unjust enrichment have been satisfied:

- (1) The Couple conferred a benefit in the form of a valuable asset worth over \$ 122,350 on Hatton and her partner, Suzie Klein (collectively referred to as Hatton/Klein);
- (2) Hatton/Klein received that benefit; and

(3) Hatton/Klein accepted and retained this valuable asset and retained this benefit under circumstances making it inequitable for them to retain the benefit without paying the Couple the value thereof<sup>6</sup>.

According to the Alaska Supreme Court, the general principle of the doctrine of unjust enrichment is that a person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated. Old Harbor Native Corp., v. Afognak Joint Venture, 30 P. 3d 101, 107 (Alaska 2001). In other words, the doctrine of unjust enrichment is predicated on the theory of restitution.

Consequently, the party who unjustly receives, retains or appropriates property or a benefit, must repay the source of the property or benefit. Id. In this case, it means that Hatton/Klein need to compensate the Couple for the fair market value of the benefit they received – an interest in real property worth \$ 122,350, according to the Municipality of Anchorage.

### **III. Hatton Breached the Covenant of Good Faith and Fair Dealing Implied in the POA That the Couple Gave Her**

A POA is a contract that creates an agency relationship between the grantor of a POA and the person who, as the POA, is then able to act on behalf of the grantor. Since the covenant of good faith and fair dealing is implied in all contracts in Alaska, this covenant is inherent in a POA relationship. See Casey v. Semco Energy, Inc.,

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<sup>6</sup> It was inequitable for them to retain the benefit because Hatton/Klein knew the Couple lacked capacity to make this conveyance. See Exhibits 1 and 2. Since Hatton and, presumably Klein, knew that the Couple was four months in arrears in rent to the Center in January of 2012 and would be evicted if the bill was not paid shortly, it is inequitable for Hatton/Klein to retain this valuable asset without paying the Couple for the fair market value of their interest in

92 P. 3d 379, 384 (Alaska 2004). Moreover, this covenant of good faith and fair dealing means that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. See Munn v. Thornton, 956 P.2d 1214, 1220 (Alaska 1998).

Because the POA creates a fiduciary relationship, the covenant of good faith and fair dealing in this context requires that the person serving as a POA act in a manner that disavows self-interest and furthers the interests of the grantor of the POA. If the person who serves as a POA fails to act in that manner, the POA inures the right of the grantor of that POA to receive the benefits of the POA. As the Alaska Supreme Court has noted:

The covenant [of good faith and fair dealing] includes subjective and objective elements, both of which must be satisfied. The subjective element “prohibits one party from acting to deprive the other of the benefit of the contract”. The objective element “requires each party to act ‘in a manner that a reasonable person would regard as fair”.

Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corp., 221 P.3d 997, 992(2009)(*quoting* McConnell v. State, Dep’t of Health & Soc. Serv., 991 P. 2d 178, 184 (Alaska 1999).

In this case, neither the objector nor the subjective element of the covenant of good faith and fair dealing has been met. Hatton acted so as to deprive the Couple of the benefit of the contract – *i.e.*, loyalty to the Couple and the disavowal of self-interest – and thus the subjective element of the covenant is not met. Moreover, Hatton/Klein did not act in a manner that a reasonable person would regard as fair – to the contrary, Hatton/Klein exploited the Couple, who have diminished capacity. Consequently, the objective element also is not satisfied.

#### **IV. Rescission of the Quitclaim Deed is the Appropriate Remedy**

Rescission is an equitable remedy that allows a Court to restore, to the extent possible, the parties to the position they were in before they entered into the contract. See Kazan v. DoughBoys, Inc., 201 P.3d 508, 515. In this instance, rescission will allow Hatton/Klein to purchase the Couple's half interest and will provide much needed funds to the Couple, who are facing imminent eviction.

#### **CONCLUSION**

This Motion to Rescind the Quitclaim Deed should be granted in order to protect the assets of the Couple during the pendency of the protective proceedings and to prevent Hatton/Klein from being unjustly enriched at the Couple's expense.

State of Alaska, Office of Public Advocacy  
Office of Elder Fraud & Assistance  
Counsel for Conservator of Janice E. Phillips

By: \_\_\_\_\_  
Kathleen A. Frederick  
AK Bar No. 9903003

#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served by (fax) (delivery) (mail) on the \_\_\_\_\_ day of February, 2012 upon:

Melinda Miles, Esq.  
634 S. Bailey Street, Ste. 105  
Palmer, AK 99645  
Counsel for Cynthia Hatton

Chad Holt, Esq.  
Office of Public Advocacy (Adult & Juvenile Representation Section)  
900 W. 5<sup>th</sup> Ave., Ste. 702  
Anchorage, AK 99501  
Attorney for Don R. and Janice E. Phillips

By: \_\_\_\_\_