

2010 WL 6648766 (Me.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Maine.  
Kennebec County

Cora KOWALCHUCK, Plaintiff,  
v.  
Faye Lynn GENNESS, Defendant.

No. CV2009161.  
May 12, 2010.

### **Closing Statement**

Denis Culley, Esq. (Bar # 9609), Attorney for the Plaintiff, Legal Services for the **Elderly**, Inc., 5 Wabon Street, Augusta, ME 04330-7040, Tel: (207) 621-0087.

In the fall of 2008, Plaintiff Cora Kowalchuk (“Cora”) was a widow in poor health living alone in Bristol, Connecticut on a fixed income. Both her own testimony and that of her daughter, Defendant, Faye Lynn Genness (“Faye”), established that Cora was dependent on the kindness of neighbors and the occasional visit from Faye to get her medications, shop and do errands, assist with cooking and cleaning and attend to the other personal needs her physical, mental and medical conditions made difficult. Uncontroverted testimony by Cora's physician, Dr. Daniel Gibbons, and her medical records, **PL Exhibit 1**, establishes that she suffered (and still suffers from) major illnesses.<sup>1</sup> See, 33 M.R.S.A. § 1021(1). Cora had little beyond seven rooms of furniture, personal possessions, appliances and her keepsakes - the “clutter” described by defense witnesses - including those like Robin Heiser who absconded - with the permission and encouragement of the Defendant - with an entire truck full of the “clutter” back to Maryland. What she did have was an unencumbered house that had never had a mortgage. A house valued, according to Cora, at \$100,000 by Coldwater Realty and sold by her daughter, quickly and without Cora's knowledge, for \$59,000. Today, Cora Kowalchuk lives alone in a small tenement apartment in the south end of Waterville, defrauded of the proceeds of her home which was sold without her knowledge and stripped of all of her personal possessions.

#### **I. Testimonial and Documentary Evidence Directs Finding for Plaintiff on Improvident Transfer of Title.**

Evidence, documentary and testimonial, introduced at trial establishes that the Defendant, an adult daughter of a dependent, see, 33 M.R.S.A. § 1021(1), **elderly**, see 33 M.R.S.A. § 1021(2), widow, and her agent pursuant to a Power of Attorney had *both* a confidential *and* a *fiduciary* relationship (by the very terms of the POA used to sell the house) with her mother at the time of the sale of their jointly owned home. See, 33 M.R.S.A. § 1022(2). Defendant sold the unadvertised home to a “bottom feeder”/ cash sale outfit and transferred to herself all of the equity in the home after paying the tax bill and inflated expenses<sup>2</sup> to ship her mother off to live in the living room of her other daughter's extraordinarily troubled family (where she was required to pay \$350.00 per month rent to sleep in a living room). The Defendant relied on her authority pursuant to her power of attorney and her status as joint owner of her mother's home to sign the December 30, 2008 deed twice, **PL Exhibit 3** and the HUD statement, twice, **PL Exhibit 8**, and according to Defendant's testimony, to endorse the check she deposited into her own account in TD Banknorth, **PL Exhibit 9**. The Defendant also took possession of all of her mother's possessions (without compensation to her mother), parceling out some to Robin Heiser and the rest to her sister Kathleen or to one Mr. White or to herself. This sale, seizure of the proceeds of the sale and seizure and control of all of Cora's possessions clearly constitute an improvident transfer of title for less than value. See, 33 M.R.S.A. § 1021 (4, 5, 6).

The Defendant's TD Banknorth account establishes that all of the proceeds from the sale of the house - except for \$5,000 taken “off the top” by Defendant, were in the Defendant's possession and control. Plaintiff's bank account records, on the other hand,

Pl. *Exhibits 6 & 7*, evidence no deposits during the relevant period or thereafter to her accounts resulting from the sale of her home. Robin Heiser, testifying for the Defendant, asserted that the Defendant paid Robin Heiser 10% interest - plus paid toward her expenses for hauling off Cora's possessions - for a loan that lasted approximately one month. The probity of a fiduciary paying 1,200% annual interest - without consulting the Principal she was serving as agent - should give this Court pause.

Defendant's transfer of everything in the world that Cora owned (well beyond the minimum 10% standard contained in [33 M.R.S.A. 1021\(5\)](#)) to her own possession and control was accomplished - according to testimony by both Defendant and Plaintiff-without independent representation of counsel. See, [33 M.R.S.A. § 1021\(3\)](#). No credible evidence accounting for the depositing of the proceeds from the sale of the home - beyond paying the Town of Bristol tax bill,<sup>3</sup> improbable moving expenses, and one month's rent and security deposit for a tiny tenement apartment, has been offered by the Defendant. The \$18,722.95 used pick-up truck (with standard transmission), whatever is left from the proceeds of the sale and all of Cora Kowalchuk's possessions remain in the Defendant's name, possession or control. In summation, every single element of a cause of action for Improvident Transfer of Title has been proven in this matter through documentary and testimonial evidence. This statute, designed for exactly this sort of situation, directs this Court to find the transfers at issue the result of undue influence, [33 M.R.S.A. 33 § 1022\(1\)](#), and to "grant appropriate relief enabling the **elderly** dependent person to avoid the transfer or execution, including the rescission or reformation of a deed or other instrument, the imposition of a constructive trust on property or an order enjoining use of or entry on property or commanding the return of property." [33 M.R.S.A. § 1023\(2\)](#).

## II. Testimonial and Documentary Evidence Supports Finding Unjust Enrichment of Defendant.

To establish a claim for unjust enrichment, three elements must be proven:

[One] a benefit conferred upon the defendant by the plaintiff; [two] an appreciation or knowledge by the defendant of the benefit; and [three] the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

*Aladdin Electric Associates v. Town of Old Orchard Beach*, 645 A.2d 1142, 1144 (Me. 1994).

The testimonial and documentary evidence establishes that Defendant received, controlled and continues to control the entirety<sup>4</sup> of the proceeds of the sale of the home (and its contents) she owned jointly with her mother. Defendant testified that she received the check for the entirety of the proceeds of the sale of the home she owned jointly with her mother. Defendant offered an unsupportable contention that she turned over \$22,000 of the proceeds, in cash, to her mother, with no witnesses, in envelopes, on four occasions, and added undocumented and incredible assertions that thousands of dollars were spent in dollar stores and elsewhere for her mother's benefit. The Defendant does admit that she has retained a four year old pick-up truck for which she asserts she paid \$18,722.95: that she paid her cousin and financier 10% interest for a one-month loan; that she dispersed or retained virtually every personal possession her mother owned in the world, and that she spent thousands of dollars on her own behalf from the proceeds of the sale of her mother's home. Retention of these proceeds - and her mother's possessions - under the circumstances described above is inequitable and should support judgment for Plaintiff for unjust enrichment and an order for Defendant to pay half of the proceeds of the sale - minus reasonable, documented, expenses - and return Plaintiff's possessions or the established value thereof. See, Appendix A, Pl. Exhibit 4.

## III. Testimonial and Documentary Evidence Supports Finding **Abuse** of a Confidential Relationship.

"[T]he salient elements of a confidential relationship are the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation." *Estate of Mary Campbell*, 1997 ME 212, 704 A.2d 329, 331 (1997). The fact that the parties are family members will not, without more establish a confidential relationship. *Id.*

*Moulton v. Moulton*, 1998 Me 31, ¶5, 707 A.2d 74, 75.

That Plaintiff placed actual trust in her daughter is clearly demonstrated by her transfer to her of a joint ownership in her home, **Pl. Exhibit 2**, on the same day she made her daughter agent pursuant to a Power of Attorney. The disparity of position between Plaintiff, an **elderly**, ill and dependent widow, and her young daughter in the prime of life is obvious from the medical records and testimony of Dr. Gibbons, the testimony of both Plaintiff and Defendant regarding the nature of the dependent relationship before the sale of Plaintiff's home, and the ease with which Plaintiff was put into a position wherein her only perceived option to improve her situation in Waterville was to move into a homeless shelter.

#### **IV. Testimonial and Documentary Evidence Supports Findings of Fraud and Constructive Fraud.**

Cora, reasonably trusting her daughter and agent under a POA, followed Faye's directions, left her possessions behind including her refrigerator and freezer filled with food (not knowing she would never see them again) - possessions to be picked over by Robin and Faye and others - and wound up without money, without her possessions and without her family in a tenement in the South End of Waterville living on her Social Security and tiny pension - and paying rent for the first time since her youth.

#### **Conclusion**

As noted in Plaintiff's opening statement, there is an understandable, natural, urge to try to find some sort of innocent explanation for the sort of behavior evidenced in this sort of case - or even to discount the allegations of the **elder** victim as confused or senile. Certainly that has been urged on the Court by the Defendant.

In this case, however, this Court would have to believe that Cora Kowalchuk agreed to suddenly and precipitously sell her home in Connecticut for a song. That she willingly parted with virtually every possession she had in the world. That she was handed tens of thousands of dollars in envelopes by a daughter who drove 100 miles every few days to deliver the cash.<sup>5</sup> That she willingly decided to move into the living room of a squalid and extraordinarily troubled home on Moor Street - at \$350.00 per month rent - and then light out for a homeless shelter on New Years Eve 2008. That she then, willingly, chose to spend the last two years in penury in a tenement in the South End of Waterville. All of this while in possession of the tens of thousands of dollars of cash her daughter alleges she gave her mother? Is that - in any part - believable?

Defendant's only defense regarding the money amounts to - "I turned over the money in cash, in envelopes, without witnesses." Regarding what happened to Cora Kowalchuk's possessions, keepsakes and chattels there is no coherent narrative besides "I don't know" to support Defendant's assertions. Evidence presented shows that the Defendant basically distributed her mother's possessions to herself and to those who she put to work carrying out her plan.

That the Plaintiff was a confused and confusing witness is undeniable. Cora's assertions at deposition that she suffered from no medical or psychological issues during the relevant period (clearly damaging to her own case) and her reversal of that position at trial (fully supported by the medical evidence) is an example of this confusion. Nevertheless, Cora's explanation that she feared any admission of mental or physical deficiency being turned against her - with the goal of "putting her in a home" makes sense from a vulnerable and **abused elder's** perspective. It is exactly that thing that makes **elders** like Cora susceptible to exploitation of this kind that also makes them poor witnesses and advocates for their cause. It is not the other side of the coin. It is the same side of the same coin. It is for this reason that we have laws like the Improvident Transfer of Title statute.

Plaintiff requests that the Court find in her favor on all counts and order payment of half of the proceeds of the sale of her home (minus half of the back taxes actually paid and other reasonable expenses) and order the return of her possessions (including, but not limited to all of those listed on Exhibit A, **Pl. Exhibit 4**) or the establishment of a constructive trust regarding those possessions and the proceeds due her from the sale of her home. Further, Plaintiff requests that the Court grant all other compensatory and punitive relief it deems proper given the nature of this matter.

This 12th day of May 2010.

Footnotes

- 1 Plaintiff submits the social work notes contained in those records, that were noted by the Court are inadmissible pursuant to [title 16 M.R.S.A. § 357](#) which provides that medical records “shall be admissible, as evidence in the courts of this State so far as such records relate to the treatment and medical history of such cases and the court shall admit copies of such records, if certified by the persons in custody thereof to be true and complete, but nothing therein contained shall be admissible as evidence which has reference to the question of liability.” Plaintiff also notes that the references contained in the social worker notes predate the date of the acts complained of.
- 2 Defendant's testimony on moving expenses was muddled but claims of costs somewhere between \$5\*,000 and \*\$10,000 are not credible for three u-hauls.
- 3 Which, it should be noted, was at least as much the Defendants responsibility - as joint owner- as the Plaintiff's.
- 4 Except for one month's rent and security deposit on the tenement apartment and some moving expenses and payment toward back taxes owed by both Plaintiff and Defendant.
- 5 Defendant's assertions that she made withdrawals of less than \$10,000 each in order not to affect her mother's Social Security are unsupported in logic or law. Social Security is not a needs tested public benefit and any “papers” that a bank would fill out would be in Defendant's name and accrue to Defendant's records - not to the Plaintiff's.

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