

2009 WL 8114445 (Me.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Maine.  
Kennebec County

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

No. CV2009161.  
July 7, 2009.

**Motion Seeking Attachment and Attachment On Trustee Process with Incorporated Memorandum of Law**

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.

Plaintiff, Cora Kowlalski, through her undersigned attorney, hereby moves this Court to enter an order, pursuant to M.R. Civ. P. 4A and 4B, that attachment, including attachment on trustee process, may be made in the amount of \$39,368.43 against the real and personal property and bank accounts and other accounts and assets of Defendant Faye Lynn Genness.

This motion is supported by Plaintiff's Verified Complaint and attached exhibits and the Certificate by Plaintiff's attorney already on file with this Court submitted in support of Plaintiff's Motion for *ex parte* Attachment dated May 1, 2009 and the following memorandum of law. The attachment should issue generally, including Defendant Faye Lynn Genness' interest in real property located at 250 Kimball School House Road in Mercer, Maine, and more fully described in a Deed dated May 5, 2001 attached as Exhibit A to Plaintiff's Attorney's affidavit in support of this motion and recorded in the Somerset County Registry of Deeds at Book 2792, Page 333 (copy attached to Affidavit of Attorney Culley as Exhibit A) and against personal property of her mother's in her possession and against her bank account at Key Bank in Skowhegan, other bank accounts in Maine as well as against any other asset, real, personal or other property of the Defendant.

**ARGUMENT**

**I. STANDARD OF REVIEW**

Plaintiff is entitled to attachment of "real estate, goods and chattels and other property...for damages and costs which the Plaintiff may recover," M. R. Civ. P. 4A(a), upon "a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment." *Id.* at 4A(c). Trustee process is available in any personal action, with few exceptions not pertinent to this matter. *See*, 14 M.R.S.A. § 2601. The standard for attachment via trustee process is similar to that contained in Rule 4A, stating that an "order shall issue if the court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the trustee process and any insurance, bond or other security, or property or credits attached by writ of attachment or by other trustee process known or reasonably believed to be available to satisfy the judgment and that either (i) there is a clear danger that the defendant if notified in advance of the attachment on trustee process will withdraw the goods and credits from the hands and possession of the trustee and remove them from the state or conceal them, or otherwise make them unavailable to satisfy a judgment." M.R.Civ.P. 4B(i).

In order to satisfy the "more likely than not" standard, the Court must find by a preponderance of the evidence that the moving party will succeed on its claim and recover an amount at least equal to the sum attached. *Wilson v. DelPapa*, 634 A.2d 1252,

1255 (Me. 1993); *Trans Costal Corp. v. Curtis*, 622 A.2d 1186, 1188 (Me. 1993); *Boisvert v. Boisvert*, 672 A.2d 96 (Me. 1996); *Richardson v. McConologue*, 672 A.2d 599 (Me.1996); See also Advisory Committee Notes to Feb. 15, 1992 amendment of M.R. Civ. P. 4A (“Under the amended standard...[a] moving party must show a greater than 50% chance of prevailing.”), and Advisory Committee Notes to Feb. 15, Amendment of M. R. Civ. P. 4B (“Rule 4B is amended to conform to the simultaneous amendments of Rule 4A governing attachments.”).

To show that the moving party will meet the “reasonable likelihood of success” standard, motions for attachment must be supported by affidavits that “shall set forth specific facts sufficient to warrant the required findings.” *Wilson*, 634 A.2d at 1254 (quoting M. R. Civ. P. 4A(i)).

The trial court is given great deference in making decisions regarding whether or not to grant an attachment. The standard of review for “an order for attachment or trustee process is an abuse of discretion or clear error.” *Boisvert*, 672 A.2d at 97-98.

## II. Plaintiff is More Likely Than Not to Prevail Pursuant to the Improvident Transfer of Title Act.

This is a straightforward case of **financial** abuse of an **elder** and gross **financial exploitation** of a parent by her child. A review of the allegations contained in Plaintiff's Complaint and the Affidavit of Cora Kowalchuk in support of this motion reveal more than enough evidence to support the conclusion that it is “more likely than not” that the Plaintiff will recover her interest in the real estate at issue pursuant to the Improvident Transfer of Title Act, [Title 33 M.R.S.A. § 1021 et seq.](#), and other causes of action in her Complaint.

Plaintiff, Cora Kowalchuck, is sixty - three years old and hence an “**elderly** person” as defined by [33 M.R.S.A. § 1021\(2\)](#). (See, Verified Complaint at ¶ 5). During a time when the Plaintiff was suffering from **depression** and very poor health and clearly a “dependent person” pursuant to [33 M.R.S.A. § 1021\(1\)](#), her daughter, the Defendant, convinced the Plaintiff to agree to the sale of her home in Connecticut with promises of lifelong support based on the proceeds of that sale. (Verified Complaint at ¶ 9, 10). In the capacity of both Plaintiff's daughter and as agent under a Power of Attorney, (Verified Complaint ¶ 8), the Defendant had *both* a confidential and fiduciary relationship with the Plaintiff as defined in [33 M.R.S.A. § 1022\(2\)](#). The Defendant, acting as an agent of the Plaintiff, conferred upon herself Plaintiff's half of the proceeds of the sale of Plaintiff's home, (\$ 29,735.23), (Plaintiff's Verified Complaint ¶ 14, 17), the value of the contents of that home, (\$10,000.00) (*Id.* at ¶ 22), the value of the funds in Plaintiff's Webster bank account (\$364.00) (*Id.* at ¶ 19) and the value of two ¶14.44 pension checks (\$228.88) (*Id.* at ¶ 23). The Plaintiff was not represented by counsel at any stage in the discussions or transfers that led to the sale of her home and land in Connecticut and the transfer of all of the proceeds of that sale to the Defendant. (Verified Complaint ¶ 29). The unauthorized seizure by Defendant of all of the proceeds of the sale of Plaintiff's home for no value beyond payment of one month's rent in a tenement and a security deposit for an apartment in the south end of Waterville, (Verified Complaint ¶ 17, 26), coupled with the seizure of the contents of Plaintiff's bank account and retirement checks, (Verified Complaint ¶ 19, 23), and the seizure of the contents of Plaintiff's home, (Verified Complaint ¶¶ 21, 22) is a “major transfer” pursuant to [33 M.R.S.A. § 1021\(5\)](#) for less than full consideration as defined by [§ 1021\(4\)](#).

Defendant's actions constitute an improvident transfer of title within the meaning of [33 M.R.S.A. § 1021 et seq.](#) The Act creates a presumption of undue influence in any major transfer for less than full consideration, by an **elderly** person to an individual with whom the **elderly** person has a confidential or fiduciary relationship. [33 M.R.S.A. § 1022\(1\)](#).<sup>1</sup> Furthermore, the Act defines a “confidential or fiduciary relationship” to include: a family relationship between the **elderly** dependent person and the transferee, [33 M.R.S.A. § 1022\(2\)\(A\)](#). The relationship of the Defendant with the Plaintiff clearly falls within this category of relationship and, therefore, qualifies as a “confidential or fiduciary relationship” under the Act.

Accordingly, the Defendant cannot overcome the presumption of undue influence, and should be found liable for improvident transfer of title.

### III. Plaintiff is More Likely Than Not to Prevail Pursuant to Her Claim for Abuse of a Confidential Relationship.

Abuse of a confidential relationship has occurred when there is an actual placing of trust and confidence, there is a great disparity of position and influence, and there is an abuse of that relationship. *See, generally, Ruebsaman v. Maddocks*, 340 A.2d 31 (Me. 1975). If all three of the above elements are satisfied, there is a presumption of undue influence in the transaction. *Id.* at 36. In this case, Plaintiff placed great trust and confidence in Defendant by appointing her as her agent under power of attorney, by agreeing to the sale of her home in return for promises of lifelong care, and pursuant to the natural bond of trust between a mother and a daughter. (Verified Complaint ¶¶ 8,12). Due to Plaintiff's age, diminished health, and physical and depression there was a great disparity in position between Plaintiff and Defendant, which created a confidential relationship. (Verified Complaint ¶¶ 5, 10, 12). Defendant gained a benefit by transfers of at least \$40,328.11,<sup>2</sup> as described above in section II, from Plaintiff to herself. (Verified Complaint ¶¶ 13, 19, 22, 23 ). Therefore, under Maine law, it is presumed that these transfers were the product of undue influence, and based on Defendant's abuse of a confidential relationship with Plaintiff, Plaintiff has more than a fifty percent chance of recovering the requested amount.

### IV. Plaintiff is More Likely Than Not to Prevail Pursuant to Her Claim for Constructive Fraud.

In order to prevail on a claim for constructive fraud, Plaintiff must prove that the Defendant has obtained a benefit, and that the benefit was obtained by reliance on a relationship of trust founded in moral, social or personal duty. *See, generally, Gaulin v. Jones*, 481 A.2d 166 (Me. 1984). Defendant here has obtained a benefit in the amount of at least \$40,328.43, as described above in Section II, through the abuse of a confidential and fiduciary relationship. (Verified Complaint ¶¶ 8, 13, 19, 22, 23). Defendant relied on her close relationship with Plaintiff to persuade her to sell her home, handle Plaintiff's assets, and put herself in a position to seize Plaintiff's possessions, bank account and pension checks, benefiting thereby. (Verified Complaint ¶¶ 8, 12, 13, 17, 18, 19, 21, 22, 23). Defendant owed fiduciary duties to Plaintiff based on her role as her agent under a power of attorney, and the Defendant had moral, social and personal duties to Plaintiff created by their mother - daughter relationship and the Defendant's promise to act as caregiver. (Verified Complaint ¶¶ 8, 12). Therefore, based on Defendant's actions constituting constructive fraud, the Plaintiff has more than a fifty percent chance of recovering the requested amount.

### V. Plaintiff is More Likely Than Not to Prevail Pursuant to Her Claim for Actual Fraud.

“[A] party commits fraud if [she] “(1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the [other] justifiably relies on the representation as true and acts upon it to his damage.” *Glynn v. Atlantic Seaboard Corp.*, 1999 ME 53, ¶10, 728 A.2d 117, 119.

In order to prevail on a claim for actual fraud, Plaintiff must prove that Defendant made a false representation, of a material fact, with knowledge of its falsity or a reckless disregard for the truth, for the purpose of inducing another to act or refrain from acting, and that Plaintiff justifiably relied on that statement and was damaged thereby. In this case, Defendant falsely represented that Plaintiff could live with her or under her care for the rest of her life and that she was acting responsibly as a daughter, a fiduciary and an agent under a power of attorney. (Verified Complaint ¶ 8, 9, 12). The powers and duties of an agent to a principal under a general durable power of attorney are far-reaching and relate to important issues such as the principal's **finances** and health care decisions, and are therefore clearly material. Defendant knew, or should have known that her statements were false, and she made these statements for the purpose of inducing Plaintiff to trust the Defendant to sell her home. Plaintiff relied on Defendant's assurances, and was justified in doing so because of the close relationship between the two parties and Defendant's role as daughter, caregiver and agent under power of attorney. Plaintiff was thereby damaged in the amount of at least \$39,368.43, as described above in Section II. (Verified Complaint ¶ 8, 12, 13). Therefore, under Maine law, the Plaintiff has more than a fifty percent chance of recovering the requested amount on her claim for fraud.

## **VI. Plaintiff is More Likely Than Not to Prevail Pursuant to Her Claim for Unjust Enrichment.**

To establish unjust enrichment, the complaining party must show that: (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.

*Me. Eye Care Assocs., P.A. v. Gorman*, 2008 ME 36, ¶17, 942 A.2d 707, 712.

In this matter the Defendant, acting as an agent of the Plaintiff, conferred upon herself half of the proceeds of the sale of Plaintiff's home, (\$ 29,735.23),<sup>3</sup> the value of the contents of that home, (\$10,000.00),<sup>4</sup> the value of the funds in Plaintiff's Webster bank account (\$364.00)<sup>5</sup> and the value of two \$14.44 pension checks (\$228.88).<sup>6</sup> As the only person who signed the deed, (Verified Complaint ¶¶ 15, 16 seized and kept the contents of her mother's home, (Verified Complaint ¶ 22), and as the person who affirmatively emptied her mother's bank account (Verified Complaint ¶19) and seized her pensions checks, (Verified Complaint ¶23), the Plaintiff certainly had both knowledge and appreciation of the benefit.

Retention of money and property obtained by Defendant through subterfuge, emotional manipulation and in clear violation of the Improvident Transfer of Title Act would be wholly inequitable under the circumstances and would clearly constitute unjust enrichment.

## **VI. There is a Clear Danger That the Defendant if Notified in Advance of Attachment of the Property Will Make it Unavailable Through Sale, Disposal, Mortgage or Other Encumbrance to Satisfy a Judgment.**

Given the Defendant's actions of absconding with all of the proceeds of the sale of Plaintiffs home, seizing \$10,000.00 worth of Plaintiff's possessions, the contents of Plaintiff's bank account and Plaintiffs retirement checks, and of abandoning Plaintiff, it is more likely than not that if attachment and trustee process is not approved attaching Defendant's interest in her real property, house, bank account and other property the Defendant will either immediately encumber her property, expedite its sale, sell and/or remove the building, or lease the land and/or building or otherwise dispose of her property and other assets. Plaintiffs fears and concerns regarding sale, disposal or encumbrance are based upon her course of dealings with Defendant described in the Complaint and above, including her daughter's seizure of all of Plaintiff's possessions, her bank account and her pension checks and her refusal to return them.

### **Conclusion**

Given that there is a real risk of hiding, transfer or expenditure of the proceeds of the sale of Plaintiff's home, its contents and other assets and that the Plaintiff is more likely than not to prevail pursuant to the Improvident Transfer of Title Act and other causes of action, as described above, this Court should find that Plaintiff is entitled to an Order for Attachment and Trustee Process.

Dated this 6th day of July 2009.

#### Footnotes

- 1 "At the heart of the Improvident Transfers of Title Act is a presumption of undue influence." *First Union Nat'l Bank v. Curtis*, 2005 ME 108, ¶ 4, n2, 882 A.2d 796.
- 2 Plaintiff, in her Motion for Attachment has credited Defendant with \$960.00 paid toward rent and deposit for the Waterville apartment into which Plaintiff was deposited, hence request for \$39,368.43 attachment not \$40,328.43.
- 3 Verified Complaint at ¶ 14, 17.

- 4 *Id.* at ¶22.
- 5 *Id.* at ¶ 19.
- 6 *Id.* ¶23.

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