

2006 WL 5432552 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Knox County

Helen BUNSICK and Chester Bunsick, Sr., Plaintiff,

v.

Linda BUNSICK and Chester Bunsick, Jr., Defendant.

No. CV-06-047.
August 18, 2006.

Motion for Approval of Attachment and Trustee Process

[Patrick J. Mellor](#), Esquire, Bar No. 8856, Attorney for Plaintiffs, Perkins Olson, P.A., 15 Tillson Avenue, Rockland, ME 04841.

NOW COMES Plaintiff, Helen Bunsick and Chester Bunsick, Sr. (referred to herein as “Plaintiffs” or “Mr. and Mrs. Bunsick, Sr.”), by and through counsel, and hereby moves this Honorable Court to order that attachment, including attachment on trustee process, be made against the Defendants' property in an amount of two hundred thirteen thousand seven hundred eight dollars and ninety seven cents (\$213,708.97) pursuant to [Rules 4A\(g\)](#) and [4B of the Maine Rules of Civil Procedure](#).

This Motion is based upon the grounds that:

1. It is more likely than not that Plaintiffs will recover judgment, including interest and costs, in an amount equal to or greater than \$213,708.97 against the Defendants as the judgment relates to damages resulting from Defendants actions as reflected in Count I, II and V of Plaintiffs' Complaint, respectively.
2. There is no liability insurance, bond, or other security and any property attached by other writ of attachment or trustee process known to Plaintiffs.
3. This Motion is based upon the Plaintiff's Complaint, Plaintiffs Memorandum of Law, and the affidavits of Helen Bunsick, James Brannan, Esq., Pat Rittersdorf and Patrick Mellor, Esq., submitted herewith.

NOW COMES, Helen Bunsick and Chester Bunsick, Sr. (referred to herein as “Plaintiffs” or “Mr. and Mrs. Chester Bunsick,”), by and through counsel, and hereby submits this Memorandum of Law in support of its Motion for Approval of Attachment and Trustee Process against Defendants Linda Bunsick (“Linda”) and Chester Bunsick, Jr. (“Junior”) (referred to herein collectively as “Defendants”).

I. INTRODUCTION and SUMMARY OF FACTS

The following case is a sad example of **elder abuse** in Midcoast Maine. As explained by The National Center on **Elder Abuse** (“NCEA”), one of the components of **elder abuse** is financial exploitation.

Financial or material exploitation is defined as the illegal or improper use of an **elder's** funds, property, or assets. Examples include, but are not limited to, cashing an **elderly** person's checks without authorization or permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document...

See NCEA website - www.elderabusecenter.org. The facts of this case show that the Defendants (the son and daughter in law of the Plaintiffs) financially exploited Mr. and Mrs. Chester Bunsick by cashing checks and accessing Plaintiffs' funds without permission, forging checks, misusing assets and coercing Plaintiffs into signing a document that gave up their interest in their new modular home.

First, Linda and Junior assisted Mr. and Mrs. Bunsick in moving north from Pennsylvania to live with them in rural Midcoast Maine - a place with which Plaintiffs had very little familiarity. At the outset the plan was simple: Mr. and Mrs. Bunsick would live with Junior and Linda while waiting for their modular home to be completed next door. Soon, it became apparent that the wait for the modular home would be tense - as, on various occasions, Linda isolated Mr. and Mrs. Bunsick in the Plaintiffs' bedroom (not allowing them to come downstairs) while she entertained company; prevented Mrs. Bunsick from using the telephone; and threatened to steal Mr. and Mrs. Bunsicks' money, among other objectionable actions.

Additionally, Linda and Junior soon saw fit to take over the use of Mr. and Mrs. Bunsicks' checking accounts, either taking or converting over fifty thousand dollars for their own purposes. Further, when the modular home was completed, Linda and Junior pressured Mrs. Bunsick (who was without legal counsel) into signing a Lease Agreement that gave Junior and Linda a one-half interest in the modular home that cost over \$162,000.00 to build. Further, the Lease is a life-lease, necessarily preventing Mr. and Mrs. Bunsick from transferring or borrowing against their interest, thereby rendering their "half" interest virtually worthless, except the money that they "save" in monthly rent by living in the modular home.

II. FACTS ¹

Mr. and Mrs. Bunsick are each over the age of 60 and have been over the age of 60 at all times relating to this matter. (See Affidavit of Helen Bunsick, ¶4). Neither Mr. nor Mrs. Bunsick can not drive a motor vehicle and they are completely dependent upon others for transportation. (H. Bunsick Affidavit, ¶5). Mrs. Bunsick has difficulty hearing. (H. Bunsick Affidavit, ¶6). Mr. Bunsick's health is failing. He is now in an **elder** care facility and is now suffering from significant limitation in mobility, vision, and ability to write. (H. Bunsick Affidavit, ¶7). In 2004 Mr. and Mrs. Bunsick moved to Maine at the suggestion of Linda and Junior, who promised to assist them in our transition. (H. Bunsick Affidavit, ¶8). As part of their move to Maine, Mr. and Mrs. Bunsick sold the house that they had owned in Pennsylvania. (H. Bunsick Affidavit, ¶9).

Junior and Linda told Mr. and Mrs. Bunsick that they could live with Junior and Linda. (H. Bunsick Affidavit, ¶10). Junior and Linda also promised to look after Mr. and Mrs. Bunsick while they built a modular home next door to Junior and Linda. (H. Bunsick Affidavit, ¶10). Mr. and Mrs. Bunsick trusted Junior and Linda to look after them as Junior and Linda are family and Mr. and Mrs. Bunsick would be living in rural Maine for the first time and would be without friends, support group or transportation. (H. Bunsick Affidavit, ¶11). Linda and Junior have not provided the assistance as promised and have exploited Plaintiffs' situation. (H. Bunsick Affidavit, ¶12).

On one occasion Linda forcibly removed Mrs. Bunsick from her house in rural Cushing and threatened to take Mr. and Mrs. Bunsick's money and the State Police intervened. (H. Bunsick Affidavit, ¶13).

Mr. and Mrs. Bunsick paid for the construction of their modular home next door to Junior and Linda. (H. Bunsick Affidavit, ¶14). The modular home was built upon land owned by Junior and Linda. (H. Bunsick Affidavit, ¶14). Mr. and Mrs. Bunsick paid approximately \$162,791.97 for the construction of the modular home. (H. Bunsick Affidavit, ¶15). Since the modular home was completed, Linda and Junior's counsel drafted a Lease agreement. The Lease gives Linda and Junior a one half interest in the modular home that was built with funds belonging to Mr. and Mrs. Bunsick. (H. Bunsick Affidavit, ¶16). Mrs. Bunsick signed the Lease on or about June 1, 2004. (H. Bunsick Affidavit, ¶18). Mr. and Mrs. Bunsick were not represented by counsel and did not consult with counsel at the time that the Lease was signed. (H. Bunsick Affidavit, ¶¶19, 20; James Brannan Affidavit, ¶¶2, 3). They did not consult with an attorney before signing the Lease. (H. Bunsick Affidavit, ¶¶19, 20; James Brannan Affidavit, ¶¶2, 3). They did not receive fair consideration for signing the Lease. (H. Bunsick Affidavit, ¶21);

Additionally, Mr. and Mrs. Bunsick did not consult with independent counsel March of 2004 when Linda Bunsick and Chester Bunsick, Jr. withdrew thirty-five thousand dollars (\$35,000.00) from an account belonging to Mr. and Mrs. Bunsick. (H. Bunsick Affidavit, ¶22). Junior wrote out the \$35,000.00 check and signed it with his own signature. (H. Bunsick Affidavit, ¶23). When Mrs. Bunsick asked Linda why she needed all of this money, Linda stated that it was to pay bills and intimidated Helen into being quiet about the money. (H. Bunsick Affidavit, ¶24). Mr. and Mrs. Bunsick received less than full consideration for the \$35,000.00. (H. Bunsick Affidavit, ¶25).

In addition to the \$35,000.00 that was removed from their checking accounts, at least fifteen thousand nine hundred seventeen dollars (\$15,917.00) worth of additional withdrawals have been made by Linda and Junior on accounts holding funds belonging to Mr. and Mrs. Bunsick. (H. Bunsick Affidavit, ¶26). Linda Bunsick and Chester Bunsick Jr. signed checks and withdrew funds without the permission or knowledge of Mr. and Mrs. Bunsick and against their wishes. (H. Bunsick Affidavit, ¶28). When Mrs. Bunsick asked where the funds were going, Linda Bunsick would not answer and intimidated Mrs. Bunsick into being quiet about the money. (H. Bunsick Affidavit, ¶30). Mr. and Mrs. Bunsick received less than full consideration for the \$50,917.00. (H. Bunsick Affidavit, ¶¶25, 31). The transfers reflected above constitute more than 10% of Mr. Bunsick's estate. (H. Bunsick Affidavit, ¶32; P. Rittersdorf Affidavit ¶5). The transfers reflected above constitute more than 10% of Mrs. Bunsick's estate. (H. Bunsick Affidavit, ¶33; P Rittersdorf Affidavit ¶6). Mr. and Mrs. Bunsick have demanded the return of the \$50,917.00 and the entire interest in the modular home - both demands have been denied by Junior and Linda. (H. Bunsick Affidavit, ¶34). Oddly, despite demands made by Plaintiff, Defendants have refused to return \$9,500 that they are holding in account - ostensibly to improve sidewalks and driveways between the houses of the disputing parties. (Patrick Mellor Affidavit, ¶3). The amount that is being sought in the Motion for Attachment is two hundred thirteen thousand seven hundred eight dollars and ninety seven cents (\$213,708.97), which represents the amount that was misappropriated by the Defendants through the "Lease Agreement" of the modular home as well as the funds that were misappropriated through the unauthorized taking of funds from Plaintiffs' accounts.

III. ARGUMENT

A. THIS COURT SHOULD ISSUE AN ORDER FOR ATTACHMENT AGAINST DEFENDANTS MR. CHESTER BUNSICK JR. AND MRS. LINDA BUNSICK.

With regard to a motion seeking attachment, [Rule 4A of the Maine Rules of Civil Procedure](#) provides, in pertinent part, as follows:

[T]he order of approval may be entered only after notice to the defendant and hearing and 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 and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

M.R.Civ.P. 4A(c); accord, [Plourde v. Plourde](#), 678 A.2d 1032 (Me. 1996) ("Attachment and trustee process of property may be made if such attachment [is] for a specified amount and if there is a finding by the court that it is more likely than not that plaintiff will recover judgment ... in an amount equal to or greater than the aggregate sum of the attachment.").

The "more likely than not" standard requires only that the moving party show a greater than 50% chance of prevailing. See M.R.Civ.P. 4A(c), 1992 Advisory Committee Notes. The moving party has sustained his burden if the evidence produced on his behalf exceeds "equilibrium as to facts essential to a recovery." See [30 Am. Jur. 2d Evidence § 1164 \(1967\)](#).

Lastly, the Rule on attachment requires a showing as to the likelihood of recovery in an amount at least equal to the sum attached. See [Wilson v. DelPapa](#), 634 A.2d 1252 (Me. 1993).

In the present case, the Bunsick Affidavit, the Brannan Affidavit, the Rittersdorf Affidavit, the Complaint, and the Argument below clearly demonstrate that it is more likely than not that Plaintiffs will recover judgment against Defendants in an amount at least equal to the sum sought in the Motion for Attachment.

B. IT IS MORE LIKELY THAN NOT THAT THIS COURT WILL FIND THAT DEFENDANTS CONVERTED PLAINTIFFS' PROPERTY.

The first issue to be determined by this Court is whether it is “more than likely than not” that it will find that the Defendants' converted Plaintiffs' property.

The necessary elements to make out a claim for conversion are: (1) a showing that there is a property interest by the person claiming the property was converted; (2) that person had a right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for a return, which was refused by the holder.

Leighton v. Fleet Bank of Me., 634 A.2d 453, 457 (Me. 1993). For a conversion claim, the “traditional measure of damages is the “full value of the property at the time of the unlawful conversion.” *Newbury v. Virgin*, 2002 ME 119, P16.

i. Conversion of Checking Accounts.

A review of the affidavits and accompanying exhibits shows that almost \$51,000.00 was transferred from Mr. and Mrs. Bunsicks' accounts to Linda and Junior or to benefit Linda and Junior. To wit: the \$35,000.00 check in question was signed by Chester Bunsick, Jr. for the benefit of Chester Bunsick Jr. A \$5,000.00 check was also signed by Junior for the “reserve \$ for driveway.” No fewer than 15 of the unauthorized checks were made out to the benefit of Junior or Linda. One other check (#1009) was made out in the amount of \$2,500 for cash. An additional withdrawal was made by Linda for \$1000. All of the checks that were referenced in *Exhibit C* to the Affidavit of Helen Bunsick were unauthorized and did not benefit the Plaintiffs.

ii. Conversion of Modular Home.

The affidavit of Helen Bunsick also establishes that she signed a document that purports to give up her interest in an investment of \$162,791.97, without fair consideration in exchange therefore. Despite demand, Defendants have refused to turn over the assets belonging to Plaintiffs.

Clearly then, Plaintiffs have shown that

there is a property interest by the person claiming the property was converted; (2) that person had a right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for a return, which was refused by the holder.

Therefore, at this time, it is appropriate for this Court to grant Plaintiffs' Motion for Attachment based upon Plaintiffs' claim of conversion.

C. IT IS MORE LIKELY THAN NOT THAT THIS COURT WILL FIND THAT DEFENDANTS VIOLATED THE IMPROVIDENT TRANSFER STATUTE.

Next, this Court must analyze the facts presented in order to determine whether it is more likely than not that the Defendants violated the Improvident Transfer Act. “The Improvident Transfer Act... protects **elderly** individuals against making transfers

of property as a result of undue influence.” *Estate of Sylvester v. Benjamin*, 2001 ME 48 ¶ 11. “It establishes a statutory presumption of undue influence when an **elderly** dependent person transfers property to another person in the context of a confidential or fiduciary relationship for less than full consideration.” *Id.*, (citing 33 M.R.S.A. § 1022). Section 1022 reads, in pertinent part, as follows:

Presumption. In any transfer of real estate or major transfer² of personal property or money for less than full consideration or execution of a guaranty by an **elderly** person who is dependent on others to a person with whom the **elderly** dependent³ person has a confidential or fiduciary relationship, it is presumed that the transfer or execution was the result of undue influence, unless the **elderly** dependent person was represented in the transfer or execution by independent counsel. When the **elderly** dependent person successfully raises the presumption of undue influence by a preponderance of the evidence and when the transferee or person who benefits from the execution of a guaranty fails to rebut the presumption, the **elderly** dependent person is entitled to avoid the transfer or execution and entitled to the relief set forth in section 1024.

33 M.R.S.A. § 1022(1). Plaintiffs have satisfied the requirements of the Improvident transfer Act in that they are over 60 years old, were dependent upon the Defendants, were not represented by counsel at the time of the transfers in question and, as described below, had a confidential and/or fiduciary relationship with Defendants. To wit, section 1022 establishes the definition of a confidential and/or fiduciary relationship as follows:

Confidential or fiduciary relationship. For the purpose of this section, the transfer of property or execution of a guaranty is deemed to have been made in the context of a confidential or fiduciary relationship if the transferee or person who benefits from the execution of a guaranty had a close relationship with the **elderly** dependent person prior to the transfer or execution. Confidential or fiduciary relationships include the following:

A. A family relationship between the **elderly** dependent person and the transferee or person who benefits from the execution of a guaranty, including relationships by marriage and adoption.

33 M.R.S.A. § 1022(2). There is no question that the Defendants were family members who benefited from the transfers in question and that the transfers came from the **elderly** Plaintiffs who were dependent upon them.

The initial burden under the Improvident Transfer Act has been shouldered by the Plaintiffs. This Court should grant Plaintiff's request for attachment and trustee process in the amount of \$213,708.97.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to an attachment and trustee process against Defendants' property. At this stage of the proceedings, Plaintiffs are requesting an attachment in the amount of two hundred thirteen thousand seven hundred eight dollars and ninety seven cents (\$213,708.97). The amount Plaintiff is currently requesting as part of this Motion for Approval of Attachment Trustee Process does not include compensatory damages and punitive damages which will be part of Plaintiffs' case at trial.

Dated: August 16, 2006

Footnotes

¹ The facts as set forth herein are based on the accompanying affidavits of Helen Bunsick, James Brannan, Esq., Pat Rittersdorf, and Patrick J. Mellor, Esq. as well as the Complaint in this matter. By reference to the preceding documents, the facts found in each are incorporated herein.

- 2 “Major transfer of personal property or money” means a transfer of money or items of personal property which represent 10% or more of the **elderly** dependent person's estate. See 33 M.R.S.A. § 1021(5). Again, Plaintiffs' affidavits establish that the transfers in question reflect greater than 10% of the **elderly's** Plaintiffs' estates.
- 3 Section 1021 (1) defines “dependent” as follows: with respect to an **elderly** person, means wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, because the **elderly** person either “suffers from a significant limitation in mobility, vision, hearing, emotional or mental functioning or the ability to read or write.” Plaintiffs affidavit establishes that Mrs. Bunsick is both limited in mobility and has difficulty hearing, and that Mr. Bunsick is severely limited in his physical motor skills.

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