2013 WL 10094210 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Maryland.
Baltimore County

Richard Jerome DUNKERLY Mary Katherine Dunkerly, Plaintiffs,
v.
Thomas Jerome DUNKERLY, Defendant.

No. 03C12008143.
August 9, 2013.

Opposition to Defendant's Motion for Summary Judgment

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Plaintiffs, Richard Jerome Dunkerly ("Richard") and Mary Katherine Dunkerly ("Mary"), by and through their undersigned counsel, oppose the motion for summary judgment filed by their son, Defendant Thomas Jerome Dunkerly ("Tom"), which relates only to Counts I, II, and V of Plaintiffs' Complaint. Defendant has in his motion and consents to the relief contained in Counts III and IV of the Complaint, which is the subject matter of Plaintiffs' Cross-Motion for Summary Judgment being filed concurrently herewith for disposition of those uncontested Counts. The depositions of Plaintiffs and Defendant have been attached to Defendant's Motion for Summary Judgment, and so will not be recopied and attached hereto.

Introduction

This is a case in equity about a son who **abused** his confidential relationship of trust with his **elderly** parents to take for himself the ownership of their home. The parents seek to set aside the deed wrongfully obtained.

Standard of Review

The standard for review of a motion for summary judgment is a strict standard favoring the non-moving party. The Court's primary task is to determine whether any factual issues exist. *Brewer v. Meale,* 267 Md. 437, 298 A.2d 156 (1972). And in doing so, it must resolve all inferences against the moving party. *Merchants Mortgage Co. v. Lubow,* 275 Md. 208, 339 A.2d 664 (1975). Even if the underlying facts are not disputed but are susceptible of more than one reasonable inference, the party against whom the inference is sought to be drawn is entitled to the inference most favorable to his contention when the Court is considering a motion to grant a summary judgment. *Hill v. Lewis,* 21 Md. App. 121, 318 A.2d 850 (1974).

Credibility is not an issue to be decided on summary judgment. *Berkey v. Delia,* 287 Md. 302, 413 A.2d 170 (1980). Summary judgment is inappropriate in cases involving motive or intent. *DiGrazia v. County Executive,* 288 Md. 437, 418 A.2d 1191 (1980). If affidavits or other evidence show genuine conflict, the Court should deny the motion for summary judgment. The Court does not attempt to decide any issue of fact or of credibility, but only whether such issues exist. *Strickler Engineering Corp. v. Seminar, Inc.,* 210 Md. 93, 122 A.2d 563 (1956).

Genuine Disputes of Material Facts Exist to Render Summary Judgment Inappropriate

Defendant Thomas Dunkerly has conceded that the February 12, 2012 deed, which he executed under a purported power of attorney, be set aside as void. Plaintiffs' Cross-Motion for Summary Judgment provides a platform for this Court to grant such relief. As stated by Defendant, this resolves Counts III and IV relating to this second deed.

As to remaining Counts I, II, and V, which involve the **abuse** of the son's confidential relationship, this is necessarily a factual question for the trier of fact at trial. *Bell v. Bell,* 38 Md. App. 10, 379 A.2d 419 (1977). There can be no dispute that Tom's assistance was requested to help his **elderly** parents in matters to which they were unfamiliar; that Richard was unable to read, placing his entire trust in his son's allegiance; that Tom drove them to his personal injury attorney's office to sign documents they had never seen or understood; and, that he sat through the meeting without them ever being alone to discuss the matter with an independent lawyer (not also representing Tom, the grantee, on the purported deed who paid the attorney's bill). At the very least, this presents an issue of fact to further consider at trial, where the witnesses can be observed and creditability tested.

A confidential relationship may be established by subjective factors, such as the advanced age, physical debility, mental feebleness, and overall dependence of the individual of whom the dominant party has supposedly taken advantage. *Treffinger v. Sterling,* 269 Md. 356, 361, 305 A.2d 829 (1973); *Tribull v. Tribull* 208 Md. 490, 507, 119 A.2d 399 (1956); *Gaggers v. Gibson* 180 Md. 609, 612-613, 26 A.2d 395 (1942). Once established,

> "[t]he existence of the confidential relation creates a presumption of influence which imposes upon the one receiving the benefit the burden of proving an absence of undue influence by showing that the party acted upon competent and independent advice of another, or such facts as will satisfy the court that the dealing * * * was had in the most perfect good faith on his part and was equitable and just between the parties."

This presumption of influence by Tom imposes upon him the burden of proving an absence of undue influence. This, at trial, will involve facts which again must be analyzed by the trier of fact after an observation of the witnesses and the test of cross-examination. In particular, Tom will have the burden of proving his actions were "in the most perfect good faith", which involves a scrutinizing review by the Chancellor why for no reason the **elderly** parents would wish to be dispossessed of their home, for no consideration, and without the benefit of counsel to separately meet and discuss with them just why they would ever wish to place themselves at such risk. *Brewer v. Brewer,* 156 Md. App. 77, 846 A.2d 1 (2004) (clear and unmistakable intent by donor requires scrutiny by judge). Moreover, Tom will have the burden of proving that the transaction was equitable and just between the parties, which analyzes whether Tom was the recipient in a "self-dealing" transaction.

Only a trial will enable the trier of fact to assess the "subjective factors". Advanced age affects people differently. The Plaintiffs here are especially vulnerable, as the factfinder will be able to see and encounter. Mental feebleness can be judged by the Chancellor only in person. No one disputes the Dunkerlys' lack of sophistication, experience, or education to give them a context to independently and strongly evaluate the loss of title and ownership by deed. The heavy medications of Mary relating to physical ailments are an added subjective consideration.

And the fact that Richard could not read is quite significant. Such a challenge requires special care by the dominant party or independent counsel. Here a question of fact remains as to how Richard could possibly understand a document not read to him or explained to him. He did not even know the lawyers present at the one meeting he attended, which Tom arranged, [1] where nothing was discussed or explained to him, [2] where he thought he was there for a will, not a deed. [3] He does not even know the attorney who drafted the deed, [4] which raises questions of fact regarding the validity of the transaction for the factfinder at trial to assess. And he plainly never wanted his house to be conveyed ("go out" of his name) in the first place. [5] Mary's position is no different. Though her deposition has been attached to Tom's motion, a full reading gives context of Mary's feebleness and inability to understand not only these matters of conveyance, but to track any sophisticated level of thought. It is apparent

she did not follow or understand what was being asked. Such is the reason for testimony to be viewed and evaluated firsthand by the Chancellor in equity.

Like her husband, Mary was at the one meeting for a will, not a deed, [6] and "didn't know what a deed was". [7] She never read the deed, or had it read to her, and says she lacked the capacity to understand or sign one. [8] She explains she wasn't able to take care of herself or her husband at the time, and was mentally and physically falling apart, needing to be put away someplace, and getting old and under stress, taking Lexapro for depression, among other drugs, [9] none of which Tom denies. Indeed, these were some of the reasons he was involved with driving his parents to the meeting to take care of the matters (to his personal advantage). He told them everything was done, and he had arranged the one meeting, [10] which lasted one-half hour, if that. [11] She, like her husband, did not know who she met with, [12] and thought she was merely signing a will, [13] and that in the will she wanted her three children to inherit. [14]

While genuine disputes of material facts certainly exist between Tom and his parents as to what he was trying to accomplish for them (rather than himself), there is no dispute he was completely involved in assisting them with the task of arranging ("set it up") getting their wills ("needed to set up wills") done with his attorneys, [15] had asked (without his parents present) his own attorney, Amy Orsi, about inheritance tax if he received the house. [16] He called his own attorneys to do the documents, [17] who had represented him in four plaintiff personal injury accident cases [18] ("I was doing the suing"). Tom concedes that going to the attorneys on their own was more than his parents could handle. [19]

Factual issues and disputes certainly exist between the parties as to there being more than one meeting with attorneys. Tom has no written record of more than one meeting. He concedes his parents never took paperwork to his attorneys, [20] to supply an attorney with their information or legal needs. And, though he suggests an earlier meeting took place with Amy Orsi, he says Kevin Keene was *not* present at that purported meeting; [21] that he never left the meeting for Keene or Orsi to meet privately with his parents; [22] that there were no documents on the table; [23] that his father did not say anything to the attorney; [24] that his mother did not say anything at the meeting; [25] and, that he could not remember at a purported initial meeting what was discussed about any deed. [26] Graciously put, it is a genuine dispute of fact that if he could not remember dates, contents, or participants, it is at least a question for trial.

Though it is unimaginable that an attorney scrivener would prepare wills without receiving documents and information from the actual clients prior to handling the assignment, any purported work regarding wills is not really relevant to this case, and the affidavit of Amy Orsi, supplied to Tom's present counsel without consulting the Dunkerlys or their undersigned attorneys, is quite suspicious, indicating the close ties she has with her four-time personal injury client, Tom. And to the extent Tom now attempts to use her affidavit against his parents, at least a healthy question of fact survives as to motivations - a matter best left to trial and cross-examination.

Tom also takes the position that the signing of the deed was at a "whole separate meeting" with Kevin Keene, even though the various purported instruments on their face are dated and purportedly notarized the same day. [27] Tom says the wills had been completed, and indeed altered by interlineation at his parents' dining room table, prior to having the deed done. [28] He further states that his parents never met with Mr. Keene about a deed, [29] but then states he drove his parents to see Mr. Keene two weeks after they had met with Ms. Orsi to sign wills, [30] and that Keene never met privately with them outside Tom's presence. [31] Mr. Keene sent Tom the bill, and Tom paid it, [32] as well as for Ms. Orsi's work, [33] because he supposedly "didn't want to be a financial burden" on them. [34] There are raised genuine factual questions about whose interests were being served, which represent trial questions to assess the confidant's burden of rebutting the presumption that such a "gift" was obtained by fraud, and Tom's burden of proving an absence of undue influence. *See e.g.* *Williams v. Robinson*, 183 Md. 117, 36 A.2d 547 (1944).

That Mr. Markey and Ms. Orsi were Tom's attorneys, not his parents, was also brought home in Tom's deposition when he was asked about conversations he has had with them, and his attorney objected based on the attorney-client privilege, [35] with Tom later thinking they were his counsel when he called them for help on the matter, [36] and later using Mr. Markey for a real estate matter. [37]

That there exists a question of fact about fraud is also revealed in Tom's unique admission that he later needed to make cash payments to his sister totaling $50,000, representing the value of a “buyout” of her, with this $50,000 being one-third of the house value at the time. [38] Just what was the scheme is a matter for further assessment by the Chancellor reviewing the entire factual panoply. At the very least it infers the parents' interests were being controlled, influenced, and manipulated -- unduly -- by their trusted son beyond their knowledge and ability to defend against under the subject criteria referenced in the legal citations cited above.

The factual inferences, weighed in favor of the non-moving party, also point to other fraudulent motives of Tom when later completing his coup de grace. Using the purported power of attorney, he signs their names to a second deed which completely divested his parents of title. That this evidence is not only dispositive of the invalidity of the second deed (now conceded), it is circumstantially relevant to show his scheme to take for himself valuable property by **abusing** his fiduciary and confidential status. Shamefully, this not only divested an **elderly** couple of their home, they were victims by acts of their own son! This reckless and wantonness may be assessed by the trier of fact in weighing the malicious elements for punitive damages. At the very least, it remains a genuine dispute of material fact, not appropriate for disposition by summary judgment determination.

Beyond all of this, in the event the purported deed was actually signed by the parents the date it was purportedly notarized (which no party to this case has confirmed by testimony), it is evident that it was altered prior to its filing in Land Records, thereby rendering it invalid. At the very least a genuine dispute of fact exists as to the altered address, which is a material alteration to a deed, and which would have required the ratification by statutory formalities with appropriate signatures and notary. Added to the fact that Mr. Keene did not ever discuss privately with Plaintiffs the ramifications of conveying away without consideration their only valuable asset and living quarters, proper discussions after this alteration of address and prior to filing the altered instrument in Land Records, would most certainly have provided Plaintiffs a possible chance to stop the inappropriate conveyance. Apparently Mr. Keene was paid by Tom to get the deed on record, despite the disastrous ramifications which have now ensued.

Cases cited by Defendant do not support summary judgment on these genuine disputes of fact. *Li v. Lee*, 210 Md. App. 73, 62 A.3d 212 (2013), is a divorce case relating to the attorney-client relationship, and has nothing to do with the **abusive** confidential relationship involved in the instant case, where the proof of the confidential relationship shifts the burden of proving an absence of undue influence to the dominant party. *Gaggers v. Gibson*, 180 Md. 609, 26 A.2d 395 (1942). As argued above, the issue of whether there exists a confidential relationship is a question of fact (not law) to be determined by the trier of fact at trial. *See, e.g., Bell v. Bell*, 38 Md. App. 10, 379 A.2d 419 (1977). Here, there is at a very minimum a question of fact as to whether a confidential relationship might exist between Tom and his parents. Hence, summary judgment is inappropriate.

The point Defendant wishes this Court to overlook is that when a confidential relationship has been shown to exist, the burden is upon the dominant party to establish that the agreement *was fair in all respects. Blum v. Blum*, 59 Md. App. 584, 477 A.2d 289, 294 (1984). Here, the full view of facts at trial will show that the deed was *not* fair in *any* respect. That there is no legal presumption of such a relationship between parent and child misses the point, since proving the factual existence of the confidential relationship (a question of fact) nonetheless shifts the burden to the dominant son.

In equity a Chancellor scrutinizes closely factors which are suspicious of undue influence, including “the parent's advanced age, physical debility, and metal feebleness ... each having weight” in such deliberation. *Masius v. Wilson*, 213 Md. 259, 264, 131 A.2d 484, 486 and cases cited; *Wenger, Adm. v. Rosinsky*, 222 Md. 43, 48, 192 A.2d 82. These factors, along with the

Dunkerlys' dependence on Tom, due to their lack of education, and in Richard's case, being illiterate, are especially pertinent. *See e.g. Treffinger v. Sterling,* 269 Md. 356, 361, 305 A.2d 829 (1979). The instant case cries out for the protection of equity, where the Chancellor sits for that reason to oversee fairness and justice in such transactions, and to hear firsthand Tom's required explanation why this deed was "fair in all respects".

No facts set forth by Defendant prove that the Dunkerlys even knew they were signing a deed. Even Tom's version does not suggest Mr. Keene ever described the purported deed to the Dunkerlys or explained its significance, in or outside of Tom's presence. They went to get wills to have their three children inherit their house and assets, and unbeknownst to them they end up with their son owning full title to their house, ready to kick them out, prepared by an attorney they did not know, arranged by their son through his own attorney.

It is hornbook law that in order to make a valid *inter vivos* gift, there must be a clear intention by the donor to gratuitously transfer title to the property, a delivery by the donor, and acceptance by the done. *See* M.L.E. Gifts, §10, and cases cited therein. A clear and unmistakable intention by the donor to make a gift of his or her property is an essential requisite. *Schilling v Walter,* 243 Md. 271, 220 A.2d 580 (1966). Delivery of property without such intent, as, for instance, by inadvertence or mistake, will not constitute an *inter vivos* gift. *Hutson v. Hutson,* 168 Md. 182, 177 A.177 (1935). This requisite is certainly not satisfied if donors (parents) were not even aware that they were signing a deed, believing instead they were preparing wills. Again, a question of fact for trial, not summary judgment.

Defendant cites *Starke v. Starke,* 134 Md. App. 663, 761 A.2d 355 (2000), to try to show *a fortiori* that a confidential relationship cannot exist here. But not only does *Starke* confirm that the issue is one of fact for the trier of fact, *Starke* further explains: Had the appellant, on the other hand, succeeded in persuading Judge Smith that a confidential relationship did, indeed, exist, then the law with respect to the gift would have tilted in the appellant's favor. *Williams v. Robinson,* 183 Md. at 120, 36 A.2d 547, further explained:

[W]here the child acts as a guardian for the parent, ... *if there is an improvident gift from, the parent to the child the court presumes that it was obtained by fraud, and will hold the conveyance void, unless the child shows such facts as will satisfy the court* that he understood the effect of his act and there was no imposition.

The facts of this case will show a *very* improvident gift, where the Dunkerlys have lost their house and may have no place to live. A gift they never intended to give. And, under this confidential relationship, where the confidant receives the improvident gift, the court *presumes* that it was obtained by fraud. Again, equity is designed to set aside such purported conveyances to correct the impropriety, the simple solution in this case where there is no reason for Tom to gain a windfall by his less than transparent maneuvers and tomfoolery.

Defendant miscites inapplicable cases of misrepresentation, and fails to recognize equitable fraud, more pertinent to these situations, and as described in the cases referenced above. He twists the meaning of mental capacity to try to fit a medical sanity, rather than the undue influence exerted on the aged, feeble, and unsophisticated. Equity will enter where less than good faith and fair dealing indicate the parties to a transaction were fooled about signing something they did not know they were signing, as the numerous cases in Maryland on point reiterate.

This is such a case, which needs to go before the Chancellor to review all the facts, which in this matter remain in genuine dispute, to determine if the transaction needs to be set aside. Summary judgment is inappropriate.

WHEREFORE, Plaintiffs Richard Jerome and Mary Katherine Dunkerly respectfully request this Court to *deny* Defendant Thomas Jerome Dunkerly's Motion for Summary Judgment.

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Footnotes

1 *See* Richard Dunkerly Deposition, p. 13-14.
2 *See* Richard Dunkerly Deposition, p. 14.
3 *See* Richard Dunkerly Deposition, p. 14.
4 *See* Richard Dunkerly Deposition, p. 28.
5 *See* Richard Dunkerly Deposition, p. 7.
6 *See* Mary Dunkerly Deposition, p.
7 *See* Mary Dunkerly Deposition, p. 11.
8 *See* Mary Dunkerly Deposition, p. 12.
9 *See* Mary Dunkerly Deposition, p. 16-18, 38-39.
10 *See* Mary Dunkerly Deposition, p. 21-22.
11 *See* Mary Dunkerly Deposition, p. 25.
12 *See* Mary Dunkerly Deposition, p. 22-23.
13 *See* Mary Dunkerly Deposition, p. 25-26.
14 *See* Mary Dunkerly Deposition, p. 34.

15 *See* Thomas Dunkerly Deposition, p. 5-8, 12, 18-19.
16 *See* Thomas Dunkerly Deposition, p. 10, 20.
17 *See* Thomas Dunkerly Deposition, p. 13.
18 *See* Thomas Dunkerly Deposition, p. 18.
19 *See* Thomas Dunkerly Deposition, p. 23-24.
20 *See* Thomas Dunkerly Deposition, p. 24.
21 *See* Thomas Dunkerly Deposition, p. 30.
22 *See* Thomas Dunkerly Deposition, p. 31.
23 *See* Thomas Dunkerly Deposition, p. 32.
24 *See* Thomas Dunkerly Deposition, p. 32.
25 *See* Thomas Dunkerly Deposition, p. 33.
26 *See* Thomas Dunkerly Deposition, p. 34.
27 *See* Thomas Dunkerly Deposition, p. 44-45.
28 *See* Thomas Dunkerly Deposition, p. 55.
29 *See* Thomas Dunkerly Deposition, p. 56.
30 *See* Thomas Dunkerly Deposition, p. 57.
31 *See* Thomas Dunkerly Deposition, p. 58.
32 *See* Thomas Dunkerly Deposition, p. 62.
33 *See* Thomas Dunkerly Deposition, p. 63.
34 *See* Thomas Dunkerly Deposition, p. 63.
35 *See* Thomas Dunkerly Deposition, p. 65.
36 *See* Thomas Dunkerly Deposition, p. 66.
37 *See* Thomas Dunkerly Deposition, p. 67.
38 *See* Thomas Dunkerly Deposition, p. 81-83.

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