

2013 WL 753311 (Mass.Super.) (Trial Pleading)
Superior Court of Massachusetts.
Middlesex County

David MELLE and John Mellen, as trustees of the Martha Mellen
Trust and as Attorneys-in-Fact Under a Power of Attorney, Plaintiff,

v.

William J. BRISK, Defendant.

No. MICV2013-00411.
February 5, 2013.

Complaint and Jury Demand

[Alan S. Fanger](#), Esq., 110 Cedar Street, Suite 250, Wellesley, MA 02481, (617) 332-3456, BBO No. 549692, alan@lawfang.com.

1. Plaintiffs David Mellen (“David”) and John Mellen (“John”) and the trustees of the Martha Mellen Trust (“Trust”), a revocable trust established in 2011 for the benefit of Martha Mellen (“Martha”), a woman in her early 80s. David and John assumed control of the Trust after Martha was declared by her physician to be mentally incompetent to make decisions about her finances. David and John are also attorneys-in-fact under a power of attorney executed by Martha in 2004. The POA gives David and John the right to bring suit on Martha's behalf.

2. David Mellen lives in Litchfield, New Hampshire. John Mellen lives in Tyngsborough, Massachusetts.

3. Defendant William J. Brisk (“Brisk”) is an attorney with offices in Newton, Massachusetts. Brisk holds himself as a specialist in “**elder** law”. He regularly lectures and writes about legal issues pertaining to the medical and financial needs of the **elderly**.

4. Throughout her 70s and 80s, Martha has trusted David and John to manage her financial affairs, and David and John have done so effectively without cause for any third persons to question their integrity in doing so.

5. Martha has a third son, Stuart Mellen (“Stuart”). Unlike David and John, Stuart has historically demonstrated less capacity to manage Martha's finances, and given his employment history and personal financial history, also held the potential to **abuse** Martha financially. Therefore, throughout her later years Martha did not believe it appropriate to have Stuart appointed to any fiduciary position as to her.

5. Martha owns a vacation home at 38 Atlantic Avenue in Rockport, Massachusetts that is but a few blocks from both the attractive town center as well as the beach. At all times pertinent hereto, the house could have been rented on a weekly basis during the summer months, and could have commanded (and can still command) \$3,000 to \$3,500 per week in rent.

6. Beginning in about 2003, Stuart began occupying the 38 Atlantic Avenue property and paying Martha rent of \$1,000 per month, substantially below the market rent that could have been generated for the property.

7. Martha was the original trustee of the Trust. However, the Trust provides that David and John are to succeed her as co-trustees in the event that can no longer so serve. In June, 2012, Martha was determined by her physician, Dr. Anna Livson of Burlington Medical Associates, to be incompetent to make decision about her finances. Upon that determination, David and

John assumed control of the Trust as co-trustees, Livson stated in her June, 2012 affidavit, that Martha's deteriorated mental condition was permanent.

8. The purpose of the Trust was, and is, to preserve assets to pay for Martha's long-term care, if and when she needs it.

9. During Stuart's occupancy of 38 Atlantic Avenue, Martha, and later the Trust, paid the utilities for the property, which customarily would be paid by a tenant. Thus, the net return from the Property during Stuart's occupancy has been more like \$500 per month instead of the \$1,000 per month that he has been paying.

10. The 38 Atlantic Avenue property has been in Martha's family for several generations, and Martha made it clear years ago that she would want the property to remain in her family for generations to come. Therefore, if Martha's intentions are honored—and David and John have always been true to those intentions—the property would never be sold as a part of any Medicaid “spend-down”. This underscored the importance of increasing the rental income from that property, as Martha's other assets consist of a modest ranch home in Burlington and two accounts at financial institutions.

11. Believing that the Trust was realizing an insufficient return from the Property to support Martha's long-term care, David and John as trustees of the Trust served a notice of termination of tenancy upon Stuart in connection with his occupancy of the 38 Atlantic Avenue property. The notice of termination offered a new tenancy to Stuart at \$2,000 per month, which corresponded more with the fair rental value of the Property (though still well below the actual fair market rental value). Stuart refused the offer of the tenancy at the new rent, thus forcing David and John as trustees to initiate a summary process complaint in the Northeast Housing Court.

12. In late August, 2012, after receiving the notice of termination, Stuart contacted Brisk's office to set up an appointment. Stuart brought Martha with him to the meeting at Brisk's office, which took more than three hours and in which Brisk and his associate, Georg LaBonte, participated.

13. Stuart paid Brisk a retainer in the amount of \$8,000 immediately prior to the initial consultation, and Brisk considered Stuart, and not Martha, to be his client (as evidenced by the entries on a bill from Brisk dated September 12, 2012).

14. Sometime in early September, both Brisk and LaBonte reviewed the Trust as well as related documents, including the certification from Dr. Livson as well as records from Dr. Yuval Zabar, a neurologist at Lahey Clinic who had examined Martha and who, like Dr. Livson, concluded that Martha was not competent to manage her financial affairs.

15. Upon information and belief, Brisk and LaBonte investigated Martha's assets and the history of the 38 Atlantic Avenue property. They were also provided by the Trust's then-counsel, George Foote, with bank statements reflecting activity in the Trust's account during the period that David and John were managing the Trust. Neither Brisk nor LaBonte could find any material infirmity or impropriety in the manner in which David and John were managing the Trust.

16. Brisk and LaBonte also eventually learned that in late September, 2012, Stuart purchased a single-family home at 283 Granite Street in Rockport. Brisk and LaBonte learned, or with a bare amount of effort could have learned, that Stuart recorded a declaration of homestead as to the 283 Granite Street property, an act consistent with Stuart's desire to make that property his personal residence.

17. With reasonable diligence, Brisk and LaBonte could have concluded that Stuart was unreasonable in his refusal to accept the offer of \$2,000 per month that was contained in the notice of termination. However, because Brisk was caught in a conflict of interest—specifically, being initially retained by Stuart and considering him to be the client—Brisk did not counsel Stuart to accept the offer, but rather encouraged the summary process litigation to proceed, and ultimately sought to intervene on Martha's behalf in the litigation.

18. Brisk and LaBonte also failed at that time, and to this day have never arranged, to obtain their own neurological assessment of Martha. However, they eventually received from Stuart an assessment of Martha by a neurologist, Dr. Bruce Kaster, whose appointment with Martha was arranged by Stuart. Dr. Kaster's report also reflects Stuart's presence during the evaluation. Dr. Kaster actually agreed with Drs. Livson and Zabar that Martha was of "limited" mental capacity. Kaster asserted that it was Martha's intention to provide all of her three sons equal shares of her estate, and this was consistent with the dispositive provisions of the Trust.

19. Brisk and LaBonte were also made aware, after the fact, that in late November, 2012, Stuart had brought Martha to the Burlington branch of the Citizens Bank without prior notice to them, and had caused Martha to sign a purported revocation of the POA and Trust in his presence but without the presence of any attorneys.

20. LaBonte also knew, from meeting with Martha at her Burlington home on December 14, 2012, that Martha could not recall any details of her execution of the attempted revocation of the POA and Trust, an event which, standing alone, would call into question Martha's ability to manage her own financial affairs.

21. Brisk and LaBonte also failed to obtain a geriatric care assessment for Martha, something that would be routinely arranged for by them and other **elder** law attorneys in such situations. A geriatric care assessment would have dictated the care that Martha truly needed.

22. Brisk and LaBonte also learned that shortly after the termination by David and John of his tenancy, Stuart suddenly started picking Martha up and bringing her to the 38 Atlantic Avenue property to stay overnight on several consecutive nights per week, something Stuart had not done before. As an **elder** care attorney, Brisk and LaBonte should have realized that these sudden excursions represented the exertion of undue influence by Stuart over Martha. However, they made no attempt to assess or discover whether this was occurring.

23. Notwithstanding all that they had seen and learned about (a) Martha's neurological deficit; (b) the financial composition of Martha's assets; (c) a long history of Stuart taking financial advantage of Martha by renting the 38 Atlantic Avenue property for an effective nominal monthly rent; (d) Stuart's attempt to surreptitiously cause Martha to revoke the POA and Trust; (e) David and John's prudent stewardship over Martha's funds; (f) Stuart's unreasonable refusal to pay a reasonable rent for 38 Atlantic Avenue; and (g) Stuart's sudden dramatic increase in time spent with Martha, Brisk, in December, 2012, arranged for a series of documents to be prepared and executed by Martha, the effect of which was to purport to transfer control of Martha's assets from David and John to Stuart. These included substituting Stuart for David and John as trustees of the Trust; preparing a new POA for Martha in favor of Stuart; and preparing deeds for the Burlington home and 38 Atlantic Avenue property running from the Trust to Martha. These documents were all signed by Martha on December 12, 2013, at Brisk's office, with both Brisk and Stuart present. Martha was incompetent, and was laboring under Stuart's influence, when she executed all of these documents.

24. Shortly after the commencement of the summary process action, Stuart, who had refused to pay rent to the Trust during pendency of the action, was ordered by the court to pay the monthly rent into escrow.

24. During this same period, Brisk and LaBonte were also working cooperatively with Richard Connors, Stuart's attorney in the summary process action, to devise a strategy for ensuring that Stuart could take control of Martha's assets. They came up with the idea of Brisk's office bringing a motion for Martha to intervene as a third party. Then, upon entering the case, Brisk would move for the escrow funds to be paid to Martha. The strategy worked: On January 23, 2013, the court allowed Martha's motion to intervene; and on January 30, 2013, the court allowed Martha's motion to have Stuart pay the interim rent for 38 Atlantic Avenue directly to Martha (LaBonte served David and John's counsel with that motion at approximately 2:30 a.m. on the morning of the 30th, and insisted on going forward with the motion on less than seven hours notice despite the objection of David and John's counsel).

25. The day after the motion to pay rent to Martha directly was allowed, LaBonte caused to be recorded in both the Middlesex and Essex County registries of deeds the substitution of Stuart as trustee of the Trust, and a deed from the Trust back to Martha, which instruments had been prepared and executed some seven weeks earlier.

26. In colloquies with the court on both January 23 and January 30, neither LaBonte or Connors disclosed to the court (which had an extensive colloquy on both occasions concerning the management of Martha's finances) the existence of the instruments described in Paragraph 23.

27. At the January 23 hearing, Judge Kerman of the Northeast Housing Court admonished the parties that Stuart should pay a "fair rent" for the 38 Atlantic Avenue property. Immediately following this admonition, LaBonte conferred with Connors and came up with an idea to reduce the rent that Stuart would have to pay to either the Trust or Martha: LaBonte would prepare a "caregiver agreement" whereby Stuart would be employed by Martha to perform certain tasks for her.

28. Martha presently does not need regular medical care, nor does she have mobility issues. She can bathe herself and use the bathroom without any assistance.

29. Shortly after the January 23 hearing, LaBonte prepared a "Caregiver Employment Agreement" which contained an inflated hourly rate for Stuart's services-- \$20.00 per hour, meaningfully higher than the rate recognized by the state in reimbursement for similar services by a non-family member—and described services (such as cooking meals for Martha and cleaning the 38 Atlantic Avenue house) that are normally not worthy of compensation for two major reasons: (a) they are not necessary for Martha's care; and (b) they are not provided on a daily basis to Martha, but rather only during the period that Stuart has Martha in his custody, which is roughly one-half of the entire week.

30. LaBonte took the position that Stuart's rent should be reduced by approximately \$1,000 per month to reflect services that nearly all children would provide to their parents free of charge because they do not involve necessary "care". This position was taken against Martha's financial interest.

31. Brisk and LaBonte have committed the following breaches of the standard of care as to Martha:

- a. They have allowed themselves to effectively represent both Stuart and Martha, while giving the appearance to the court that they represent only Martha, but under circumstances when they know that such dual representation is a conflict of interest, particularly when one of the clients is cognitively compromised;
- b. They have failed to properly and independently assess Martha's neurological and cognitive functioning;
- c. They have failed to properly and independently assess Martha's vulnerability to undue influence by Stuart;
- d. They have taken affirmative steps to leave Martha vulnerable to financial **abuse** by Stuart, who they know has made attempts to manipulate Martha's finances in an underhanded manner.
- e. They have taken affirmative steps to attempt to change the control over Martha's assets from John and David to Stuart, notwithstanding John and David's demonstration of prudent management of Martha's finances.
- f. They have left open to scrutiny by the Commonwealth's Division of Medical Assistance (DMA) a phony rent-reducing arrangement in Stuart's favor, which could adversely affect the conditions under which Martha could be eligible for Medicaid benefits.

g. They have disregarded the importance of maximizing the return that could be generated from 38 Atlantic Avenue, particularly where Stuart owns another house in Rockport which sits empty, and for which he has claimed an intention to use as his principal residence.

32. As a direct and proximate result of these breaches of care, Martha's assets have been caused to be depleted, and will be further depleted by litigation that will be necessary to void the unlawful transfers that were placed on record by LaBonte on January 31.

33. Brisk and LaBonte's errors and omissions, as described herein, constitute malpractice, for which Brisk is liable, both directly and vicariously as LaBonte's employer.

WHEREFORE, David and John request that judgment be entered in their favor on the complaint, in an amount to be determined at trial, together with costs and pre-judgment interest, and such other and further relief as the court may deem just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES TO TRIABLE.

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