

**Matter of Ford**

2023 NY Slip Op 34713(U)

May 26, 2023

Surrogate's Court, Niagara County

Docket Number: File No. 2019-95286/B

Judge: Caroline A. Wojtaszek

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STATE OF NEW YORK :  
COUNTY OF NIAGARA  
PRESENT: HON. CAROLINE A. WOJTASZEK, SURROGATE

SURROGATE'S COURT

**FILED**

2023 MAY 26 PM 1:03

IN THE MATTER OF THE ESTATE OF

NIAGARA COUNTY  
SURROGATE'S COURT

FILE No. 2019-95286/B

CAROL E. FORD,

deceased.

**Appearances:**

Brenna Boyce PLLC  
David C. Sieling, Esq.  
For Estate of Carol E. Ford  
Christine E. Ford, Executrix  
Petitioner

Muscato Vona, LLP  
George V.C. Muscato, Esq.  
For Barbara L. Zapalowski  
and Jonathan D. Ford  
Respondents

**SCPA §2103 Discovery Proceeding  
Decision and Order**

**Background**

The decedent, Carol E. Ford, passed away on August 25, 2019. She was predeceased by her husband, Harold W. Ford, who died on May 21, 2019. Her last will and testament dated June 8, 2004, was admitted to probate and letters testamentary were issued to her daughter, Christine Ford, on April 30, 2021. The will initially devised her entire estate to her husband Harold, then alternatively, equally to their four children, Barbara L. Zapalowski, Christine E. Ford, Catherine A. Ford, and Jonathan D. Ford.

On December 21, 2021, Christine Ford, in her capacity as executrix of the estate, filed a SCPA §2103 Proceeding by fiduciary to discovery property withheld from the estate. The underlying basis for the action involved transactions involving the marital home in North Tonawanda, New York.

The following timeline and transactions are integral to the issues presented:

- November 11, 1958 – Harold and Carol Ford, husband and wife, purchase the home at 1325 Greengbrier Lane, North Tonawanda, NY (Pet. Exhibit C).
- June 8, 2004 - Harold and Carol Ford engage an attorney to prepare and execute estate planning documents, including reciprocal statutory short form *Springing* durable powers of attorney (naming each other as their respective agent) and last wills and testaments. (Pet. Exhibit D & E).
- August 27, 2018 - A letter is obtained from a physician stating that Carol “Lacks the ability to adequately manage her medical and financial affairs without the assistance of another” (Pet. Exhibit F.)
- October 25, 2018 - Harold and two of his daughters, Barbara Zapalowski and Christine Ford, met with attorney Glenn J. Speller, Esq. The purpose of the meeting was “focused on estate planning, and probate avoidance.” (Aff. of Attorney Glenn J. Speller, Para. 6, October 20, 2022). At the time of this meeting, Harold was 93 years old, and Carol was 90.
- November 12, 2018 - Harold and two of his daughters, Barbara Zapalowski and Christine Ford, returned and met with attorney Speller. At this meeting, Harold executed The Ford Revocable Living Trust Dated November 12, 2018, as Trustmaker and as Trustee. Barbara Zapalowski signed the trust document as Disability Trustee and Christine Ford signed the trust document as Disability Trustee. Schedule “A” of the trust listed 1325 Greenbrier Lane, North Tonawanda as the sole asset of the trust. (Pet. Exhibit G).

Notably, the disposition of trust assets upon the death of Harold calls for the continuation of the trust for the benefit of Carol, for her lifetime, and thereafter devises the trust estate to his “beneficiaries.” (Trust Article 9). With the term “beneficiaries” defined in Article 2 of the Trust as being Barbara L. Zapalowski, Christine E. Ford, Catherine A. Ford, and Jonathan D. Ford.

At this same meeting, Harold Ford executed a new last will and testament which, while acknowledging the existence of his wife Carol, devises his entire estate to The Ford Revocable Living Trust Dated November 12, 2018. He also executed a new Power of Attorney naming Barbara Zapalowski and Christine Ford as his agents.(Pet. Exhibit H.)

Harold then executed three documents which provide for the foundation of this litigation:

- a. An "Affidavit That Power of Attorney Is Activated and in Full Force." This affidavit states that Carol has been certified to be lacking the ability to adequately manage her medical and financial affairs, and affirms that "the Grantor (Carol) did, in writing, appoint Deponent (Howard) as the Grantor's true and lawful ATTORNEY-IN-FACT in the POA." (Pet. Exhibit I).
- b. A Quit-Claim Deed between Carol E. Ford (Party of the First Part) and Harold W. Ford (Party of the Second Part), transferring her interest in 1325 Greenbrier Lane to Howard. This deed was executed on behalf of Carol by Howard acting as her attorney-in-fact. This deed was recorded in the Niagara County Clerk's Office on November 21, 2018, under Instrument No. 2018-20567. (Pet. Exhibit J).
- c. A Quit-Claim Deed between Harold W. Ford (Party of the First Part) and Harold W. Ford, Trustee, under The Ford Revocable Living Trust dated November 12, 2018 (Party of the Second Part) transferring 1325 Greenbrier Lane to the trust. This deed is executed by Howard, individually and was recorded in the Niagara County Clerk's Office on November 21, 2018, under Instrument No. 2018-20568. (Pet. Exhibit J).

January 26-29, 2019 -

Harold was admitted into the hospital for three days for various medical reasons.

February 5, 2019 -

Harold executed the First Amendment to the Trust. The amendment recites an "Advance" to Barbara Zapalowski and adjusts her remainder interest in the trust by modifying Section 2.017 of the Trust. The original provisions relating to Carol and the remaining beneficiaries are restated without revision. Harold is still the trustee with Barbara Zapalowski and Christine Ford remained as the Disability Trustees. This amendment is executed by Howard at attorney Speller's office on February 5, 2019. (Pet. Exhibit M).

- February 15, 2019 - Harold executes the Second Amendment to the Trust. In this amendment Harold removes Christine Ford as a beneficiary from Section 2.017 and removes her as a Disability Trustee from Section 1.011. The original provisions relating to Carol and the remaining beneficiaries are restated without revision. Further, he reiterates Barbara Zapalowski as a Disability Trustee and names Jonathan Ford as the second Disability Trustee. Although this amendment is dated February 15, 2019, the date affixed by Howard upon his signing the document is March 8, 2019. (Pet. Exhibit N).
- March 8, 2019 - Harold executes the Third Amendment to the Trust. In this amendment Harold now also removes his other daughter, Catherine Ford, as a beneficiary from Section 2.017 and as a Disaster Trustee from Section 1.012.
- This amendment effectively disinherits Christine Ford and Catherine Ford. Leaving the remainder beneficiaries to be Barbara Zapalowski and Jonathan Ford, subject to the reduction and redistribution of \$30,000.00 from Barbara's share of the trust remainder.
- April 25, 2019 - While both Harold and Carol Ford are alive, the marital home at 1325 Greenbrier Lane, North Tonawanda was sold in an arms-length transaction to a *bona fide* third-party purchaser for the sum of One Hundred Eighty Thousand Dollars (\$180,000.00). The Bargain and Sale Deed from The Ford Revocable Trust dated November 12, 2018, was signed by Harold W. Ford, Trustee, Jonathan D. Ford, Trustee and Carol E. Ford, individually, with a designation below her signature line – “signing to indicate her consents to the conveyance of the above-described premises as set forth in this deed.” This deed was recorded in the Niagara County Clerk’s Office on May 3, 2019, under Instrument No. 2019-06775. (Pet. Exhibit P).
- The net proceeds from the sale of the real property were One Hundred Fifteen Thousand Six Hundred Sixty One Dollars and Ninety-Six Cents (\$115,661.96). (Resp. Exhibit 1).
- May 21, 2019 - Harold W. Ford died, survived by his wife Carol and their four children.
- August 25, 2019 - Carol E. Ford died, survived by her four children.

## Arguments

The petition of Christine Ford “seeks to cancel the self-dealing, illegal and illegitimate transfer of property made on November 12, 2018, out of the name of the Decedent (Carol Ford) and into the name of her husband, Harold W. Ford, using a power of attorney as detailed herein.” (Verified SCPA §2103 Petition, Para. 6, December 15, 2021). “Harold, as the Decedent’s attorney-in-fact, made a gift of the Decedent’s largest asset to himself, ostensibly for estate planning purposes, but in fact so that he could control the disposition of the property, in excess of his authority and in contravention of the Decedent’s estate plan.” (Verified SCPA §2103 Petition, Para. 7, December 15, 2021).

Through her attorney, David E. Sieling, Esq., the petitioner asserts that Harold’s attempt to convert the Decedent’s interest in the real property to himself to be controlled by his own estate plan carries the presumption of self-dealing. According to “Argument A” of attorney Sieling’s Memorandum of Law, “[t]he attempted gift of the Decedent’s interest to Harold, her agent, creates a presumption of impropriety. *Borders v. Borders*, 128 A.D.3d 1542, 8 N.Y.S.3d 845 (4<sup>th</sup> Dept. 2015). “It is beyond dispute that gifts of a principal’s assets are permissible where such gifts are in the best interests of the principal. *Goldberg v. Meyers*, 181 A.D.3d 653, 121 N.Y.S.3d 1 (2<sup>nd</sup> Dept. 2020).

The petitioner further contends that the springing power of attorney granted by the decedent did not grant Harold the authority to make a gift in excess of the amount of Ten Thousand Dollars (\$10,000.00). Arguing that “the gift was in excess of the authority granted by the power of attorney (Exhibit D) and was not in compliance with General Obligations Law §5-1502A.” *Memorandum of Law, Argument B*.

Attorney Sieling finally argues that “it is well established that where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee.” *Memorandum of Law*, Argument C; *U.S. Bank N. v Saff*, 191 A.D.3d 733, 141 N.Y.S.3d 472 (2<sup>nd</sup> Dept. 2021). “Put another way, one tenant by the entirety cannot sever the tenancy or convert it into a tenancy in common by unilateral action.” *Lawriw v. City of Rochester*, 14 A.D.2d 13, 217 N.Y.S.2d 113 (4<sup>th</sup> Dept. 1961), *affd*, 11 N.Y.2d 759, 226 N.Y.S.2d 695 (1962).

The Petitioner and attorney Sieling conclude the petition by requesting an order of the Court “declaring the November 12, 2018, attempted transfer of the real property located at 1325 Greenbrier Lane, North Tonawanda, New York from Carol E. Ford to Harold W. Ford by quitclaim deed dated November 12, 2018, *null and void*.” They further seek an order directing the respondents to remit all proceeds from the April 21, 2019, third-party sale to be paid over to the Estate of Carol E. Ford, for the administration and distribution of the proceeds pursuant to her last will and testament.

The respondents, through their attorney George V.C. Muscato, Esq., “are largely in agreement on the relevant facts surrounding this dispute, and Petitioner’s Counsel has submitted a Statement of Facts, the contents of which Respondents do not dispute.” *Memorandum of Law in Opposition*, Preliminary Statement.

With regard to the deeds involved the Ford residence, Attorney Muscato refers the Court to the Affidavit of Glenn Speller, Esq., contending the reason “[w]as to make Carol’s transfer to Harold exempt for Medicaid purposes as between spouses), and then Harold’s transfer to the trust a non-issue from a Medicaid standpoint, as he was expected to pass away in the near-term.” *Memorandum of Law in Opposition*, Pg. 1, 2.

Attorney Muscato argues that Harold was authorized to transfer the Ford residence into the Trust and that the transfer should not be viewed in a vacuum. He asserts that Carol's incapacity "caused the power of attorney to become effective, thereby allowing Harold to act as her agent." *Memorandum of Law in Opposition*, Pg. 2, and that Harold had "all authorities listed on the form, notably including the authority to act as her agent in real estate transactions, to assist with personal relationships and affairs, and in "all other matters." *Memorandum of Law in Opposition*, Pg. 3; *General Obligations Law*, Article 5, Title 15, *et seq.*

He additionally contends that, when exercising these powers, Harold must "observe the standard of care that would be observed by a prudent person dealing with the property of another." *General Obligations Law*, §5-1505[1]; *Memorandum of Law in Opposition*, Pg. 3. Further stating that, as Agent, Harold "must act according to any instructions from the principal, or if there are no instructions, in the best interest of the principal, and to avoid conflicts of interest." *General Obligations Law*, §5-1505[1][2(1)]; *Memorandum of Law in Opposition*, Pg. 3. Moreover, the Court of Appeals has further explained that, "the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing." *Memorandum of Law in Opposition*, Pg. 3, 4.

The respondents argue that Harold discharged his duties as Agent in accordance with the above requirements. They refer the Court to the attorney Speller Affidavit referencing Harold's contemplation of his "impending death" and the consequences that it would have upon his wife's lifestyle. They assert that Harold included his children in the employment and consultation with attorney Speller, and their collective goal was to



ensure that Carol could remain in the Ford residence for as long as possible, while remaining eligible for full Medicaid benefits.

The respondents contend that “with the advice of counsel, and in the presence of his children, Harold placed both his and Carol’s interest in the Ford residence into the Trust, which contained distribution terms that were consistent with Carol and Harold’s previous estate plan.” *Memorandum of Law in Opposition*, Pg. 4, 5. Emphasizing that the transactions involving the Ford residence were solely for Carol’s benefit, and that any of the transactions were within Harold’s authority and under the supervision of an attorney.

They object to the assertion that Harold supplanted Carol’s will by executing the subject deeds or creating the Trust. Stating, “the Trust that received title to the Ford residence reflected the same exact testamentary wishes of Carol’s then-existing estate plan.” *Memorandum of Law in Opposition*, Pg. 5. They further contend that “in this case the transfer alleged to be a ‘gift’ to Harold was ultimately a transfer made for the benefit of Carol. The inclusion of this step in the estate planning process only served to benefit Carol, and provided *no additional benefit to Harold*.” *Memorandum of Law in Opposition*, Pg. 6.

In their final contention relative to the use of the power of attorney, the respondents assert that “Harold was confronted with legal issues that required the advice of counsel, explained his goals as Carol’s fiduciary to provide benefit to her, and followed through with the recommended advice from counsel. There can be no argument that Harold acted in bad faith or with any neglect.” *In re Fensterer’s Estate*, 79

N.Y.S.2d 427 (Surrogate's Court, Bronx County 1948); *Memorandum of Law in Opposition*, Pg. 6.

In light of their assertion that Harold acted appropriately, the Respondents argue that "because the deed between Carol and her husband, Harold, is valid, the tenancy by the entirety was extinguished upon Harold receiving all title and interest in the whole of the Ford residence. *Capizzi v. Khoury*, 168 Misc. 490, 5 N.Y.S.2d 201 (2<sup>nd</sup> Dept. 1938); *Ozdoba Realty Corp. v. Goldberg*, 133 N.Y.S.2d 598, (Supreme Court, New York County 1954); *Memorandum of Law in Opposition*, Pg. 6.

## **Analysis and Conclusions of Law**

### **Transfer (Gift) by Power of Attorney**

It is well settled that "[a] power of attorney is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal, and that the relationship of an attorney-in-fact to his principal is that of agent and principal. Thus, the attorney-in-fact 'must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing.' *Borders v. Borders*, 128 A.D.3d 1542, 8 N.Y.S.3d 845 (4<sup>th</sup> Dept. 2015); *citing Semmler v. Naples*, 166 A.D.2d 751, 563 N.Y.S.2d 116 (2<sup>nd</sup> Dept. 1990), *appeal dismissed* 77 N.Y.2d 936, 572 N.E.2d 48; *Matter of Ferrara*, 7 N.Y.3d 244, 852 N.E.2d 138 (2006); *Marszal v. Anderson*, 9 A.D.2d 711, 780 N.Y.S.2d 432 (3<sup>rd</sup> Dept. 2004); *Matter of Naumoff*, 301 A.D.2d 802, 754 N.Y.S.2d 70 (3<sup>rd</sup> Dept. 2003); *Mantella v. Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 (3<sup>rd</sup> Dept. 2000); *Estate of Clinton*, 1 Misc.3d 913(A), 781 N.Y.S.2d 623 (New York County Surrogate's Court 2004).

“Absent a specific provision in the power of attorney document authorizing gifts, an attorney-in-fact, in exercising his or her fiduciary responsibilities to the principal, may not make a gift to himself [or herself] or a third party of the money or property which is the subject of the agency relationship.” *Goldberg v. Meyers*, 181 A.D.3d 653, 121 N.Y.S.3d 1 (2<sup>nd</sup> Dept. 2020); *citing Scotti v. Barrett*, 149 A.D.3d 998, 53 N.Y.S.3d 109 (2<sup>nd</sup> Dept. 2017); *see also* General Obligations Law §§5-1505[2][a][2]; 5-1514[4][b]; 5-1503 *Matter of Curtis*, 83 A.D.3d 1182, 923 N.Y.S.2d 734 (3<sup>rd</sup> Dept.2011); *Matter of Audrey Carlson Revocable Trust*, 59 A.D.3d 538, 873 N.Y.S.2d 669 (2<sup>nd</sup> Dept. 2009); *Marszal v. Anderson*, *supra*; *Mantella v. Mantella*, *supra*.; *Semmler v. Naples*, *supra*.

Article 5, Title 15 of the New York General Obligations Law has been amended regularly since June 8, 2004, the date Carol E. Ford executed her durable general power of attorney appointing Harold W. Ford as her agent. Throughout the changes to the statute(s), courts have historically imposed a requirement on the agent to act *in the best interests of the principal*. “A power of attorney is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal.” *See GOL §5-1505, Matter of Ferrara*, *supra*.; *Goldberg v. Meyers*, *supra*.; *Borders v. Borders*, *supra*.

Here, the instrument naming Harold W. Ford as attorney-in-fact contains a gift giving provision. Subdivision (M) of the statutory power of attorney form executed (and initialed) by Carol E. Ford grants the agent the power for “making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year.” *See Petitioners Exhibit D*.

Whether the gift-giving power in a statutory short form power of attorney is limited to the authority spelled out in the lettered subdivision, or augmented by additional language in conformity with the General Obligations Law, the best interest requirement remains. *Matter of Ferrara*, supra.; GOL §5-1505.

Notwithstanding this gift-giving provision in the Carol E. Ford power of attorney, “a gift [by the agent to himself or herself] carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make a gift.” *Goldberg v. Meyers*, supra.; citing *Matter of Audrey Carlson Revocable Trust*, supra.; see also *Matter of Boarwright*, 114 A.D.3d 856, 980 N.Y.S.2d 554 (2<sup>nd</sup> Dept. 2014); *Matter of Roth*, 283 A.D.2d 504, 724 N.Y.S.2d 476 (2<sup>nd</sup> Dept. 2001).

Based upon a strict reading of subdivision (M) of the power of attorney, the initial transfer of the real property, from Carol Ford to Harold Ford, exceeded the authorized aggregate amount (\$10,000.00) of transfers allowed. *Petitioners Exhibit D*. Based upon the sale price of One Hundred Eighty Thousand Dollars of the marital home, the value of the purported gift clearly surpassed this stated aggregate gift limit. Accordingly, the agent exceeded his authority under the power of attorney.

Assuming *arguendo* that the initial transfer of the real property, from Carol E. Ford to Harold W. Ford, does not contravene a strict reading of subdivision (M) of the Carol Ford power of attorney, the transfer still qualifies as a “gift to self” by the agent. *Goldberg v. Meyers*, supra.; General Obligations Law §§5-1505[2][a][2]; 5-1514[4][b]; 5-1503; *Matter of Curtis*, supra.; *Matter of Audrey Carlson Revocable Trust*, supra.; *Marszal v. Anderson*, supra.; *Mantella v. Mantella*, supra.; *Semmler v. Naples*, supra.

“In the event such a gift is made, there is created a presumption of impropriety [that can] be rebutted [only] with a clear showing that the principal intended to make the gift” (*Borders v. Borders*, supra.; citing *Mantella v. Mantella*, supra.). Further, gifts of the principal’s assets must be in the best interest of the principal. General Obligations Law §5-1505[1][2(1)]; *Goldberg v. Meyers*, supra.; citing *Matter of Ferrara*, supra.

The respondents concur that the agent, Harold, must “observe the standard of care that would be observed by a prudent person dealing with the property of another.” *Respondent’s Memorandum of Law in Opposition*, Pg. 3; citing General Obligations Law §5-1505[1]. Further as Agent, Harold must “act according to any instructions from the principal, or if there are no instructions, in the best interest of the principal, and to avoid conflicts of interest.” *Respondent’s Memorandum of Law in Opposition*, Pg. 3; citing General Obligations Law §5-1505[1][2(1)].

Here, there has been no indication, or assertion, that Carol E. Ford provided instructions to Harold W. Ford to engage in any of the transactions that were completed by him. To the contrary, it has been presented that Carol E. Ford “lacks the ability to adequately manage her medical or financial affairs without the assistance of another.” See *Petitioner’s Exhibit F*, Letter from Kenneth Garbarino, MD, dated August 27, 2018.

Further, the utilization of the Dr. Garbarino letter to implement the springing of the powers contained in the Carol E. Ford power of attorney indicates that she lacked the cognitive ability to form the *intent* to authorize the initial transfer, or gift, to Howard.

Accordingly, the *gift* of Carol's interest to Harold is presumed to be improper and self-dealing, which can be overcome only by proving that it was in the best interests of the principal. *Marszal v. Anderson*, supra.; *Matter of DeBelardino*, 77 Misc.2d 253, 352 N.Y.S.2d 858 (Surrogate's Court, Monroe County 1974), *affirmed* 47 A.D.2d 589 (1975); *Mantella v. Mantella*, supra.; *Matter of Naumoff*, supra., *General Obligations Law* §5-1505[2][a][1].

The respondents proffer assertions which include the specter of Medicaid liens against the real property, the impending death of Harold, and the future care of Carol. Respondents argue that the reason "two (2) deeds were used to transfer the Ford residence into a trust rather than a single deed was to make Carol's transfer to Harold exempt for Medicaid purposes (as between spouses), and then Harold's transfer to the trust a non-issue from a Medicaid standpoint, as he was expected to pass away in the near-term." *Respondent's Memorandum of Law in Opposition*, Pg. 1-2; citing *Affidavit of Attorney Glenn J. Speller*, para 13.

Upon an examination of the affidavit of Glenn J. Speller, Esq., both Carol and Harold had long-term care insurance, and their principal asset was held as tenants by the entirety. Attorney Speller states, "I cannot state this any more clearly: the prevailing intention of my client, Harold, was to set up his affairs so that his wife would have a place where she could live safely and be taken care of by someone who knew her (Barbara), and that probate of Harold's estate would be avoided if he passed away. He also desired to be able to live safely and with minimal discomfort with his wife Carol for his few remaining days, weeks, or months." *Affidavit of Attorney Glenn J. Speller*, para 16. His affidavit further states, "As the court will note, the initial iteration of the Trust

provided for the use of the assets of the Trust, i.e., the real property at 1325 Greenbrier Lane, for Carol's benefit if Harold predeceased her, and equally to the Ford Children. This distribution was unquestionably consistent with Carol (sic) existing will, a copy of which I had been provided by Harold, and Harold's prior estate planning."<sup>1</sup> *Affidavit of Attorney Glenn J. Speller*, para 17.

The respondent's assert that, assuming Harold would die before Carol, it was in Carol's best interest to engage in a sophisticated plan to avoid the probate of Harold's estate. The respondent's reason that, although the fee interest in 1325 Greenbrier Lane would have automatically passed to either spouse upon the death of the other, it was in Carol's best interest for her agent (Harold) to disgorge her of her interest in the property, so that his estate would avoid probate.

The respondents additionally contend that, although she had long-term care insurance, it was in Carol's best interest to impoverish her, for purposes of Medicaid eligibility, so that she could reside in a safe environment for her remaining years.

Upon the analysis of the respondent's evidence, and legal arguments, this Court finds that they have failed to make the required showing that (1) the principal intended for the agent to make the gift to himself, or that (2) the actions of the agent (Harold) were in the best interests of the principal (Carol). The respondents have not rebutted the impropriety of the gift by a clear showing that the principal intended to make the gift. *Matter of Ferrara*, supra.; *Borders v. Borders*, supra.; *Mantella v. Mantella*, supra.; *Goldberg v. Meyers*, supra.; *General Obligations Law §5-1505[2][a][1]*.

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<sup>1</sup> Notably, attorney Speller's affidavit concludes by only addressing the initial, or original, estate and trust planning documents. His affidavit fails to address the three amendments to the Trust which were prepared by his office and executed in his presence, which ultimately disinherited two of the children and are the genesis of this litigation.

Accordingly, the initial deed transferring title from Carol E. Ford to Harold W. Ford is deemed *void ad initio*.

### **Title to 1325 Greenbrier Lane, North Tonawanda**

In conjunction with the findings above, the Court is mindful of the public policy favoring certainty in title to real property, both to protect *bona fide* purchasers and to avoid conflict of ownership which may engender needless litigation. *Matter of Violi*, 65 N.Y.2d 392, 482 N.E.2d 29 (1985). Therefore, the sale to the third-party purchaser, and the Bargain and Sale Deed dated April 25, 2019, transferring title to 1325 Greenbrier Lane, North Tonawanda must be addressed.

Considering the deed from Carol to Harold, by power of attorney, being declared *void ab initio*, the title to the real property remained as it was in 1958, with Harold and Carol Ford, husband and wife. Such title evincing a tenancy by the entirety. *Matter of Violi*, supra.; *Hiles v. Fisher*, 99 Sickels 306, 144 N.Y. 306 (1895); *Lawriw v. City of Rochester*, 14 A.D.2d 13, 217 N.Y.S.2d 113 (4<sup>th</sup> Dept. 1961), *affirmed* 11 N.Y.2d 759, 181 N.E.2d 631 (1962); *U.S. Bank v. Saff*, 191 A.D.3d 733, 141 N.Y.S.3d (2<sup>nd</sup> Dept. 2021).

Where property is held in a tenancy by the entirety – in which a husband and wife own real property as if they were one person-and one spouse dies, the surviving spouse takes the entire estate, not because of any right of survivorship, but because that spouse remains seized of the whole. *Matter of Violi*, supra. [*internal citations omitted*]. The “salient characteristic [of a tenancy by the entirety] is the unique relationship



between a husband and his wife, each of whom is seized of the whole and not of any undivided portion of the estate.” *Gosier v. Aubertine*, 71 A.D.3d 76, 891 N.Y.S.2d 788 (4<sup>th</sup> Dept. 2009), *citing Stelz v. Shreck*, 128 N.Y. 263, 28 N.E. 510 (1891).

Fortuitously, the attorney for the third-party purchaser, or their title insurance company, identified the potential chain of title issues presented by the transactions engaged in by Harold W. Ford. To address this issue, the deed contains the signature of Carol E. Ford with a designation “signing to indicate her consents (sic) to the conveyance of the above-described premises as set forth in this deed.” *See Petitioners Exhibit P.*

Nevertheless, the deed to the third-party purchaser was signed by Harold W. Ford, in his capacity as “Trustee of the Ford Revocable Living Trust, u/d 11.12.2018.” Not as an individual. Therefore, the Quit Claim Deed dated November 12, 2018, from Harold W. Ford to Harold W. Ford, Trustee of the Ford Revocable Living Trust Dated November 12, 2018, must also be addressed for chain of title purposes.

“The rules of law governing tenancies by the entirety are of ancient origin and have remained unchanged up to the present time. One tenant by the entirety cannot sever the tenancy or convert it into a tenancy in common by unilateral action. A tenancy by the entirety can be terminated by partition of the property or converted into a tenancy in common, only by the consent of both tenants. When one tenant by the entirety conveys his interest in the property, the characteristics of the tenancy, including the right of the survivor to take the whole fee, remain unimpaired. The grantee becomes a tenant in common with the spouse of the grantor, so far as the right of possession and

the right to share in rents and profits are concerned, but the title is still deemed to be held by the entirety.” *Lawriw v. City of Rochester*, supra.

Consequently, the Quit Claim Deed dated November 12, 2018, from Howard W. Ford (individually) to Harold W. Ford (trustee) had no legal effect on the tenancy. The tenancy by the entirety held by both Harold W. Ford and Carol E. Ford remained unimpaired since Harold W. Ford acted alone in executing this deed. *Lawriw v. City of Rochester*, supra.

Accordingly, this Court finds that, since both Harold and Carol were alive at the time of the conveyance to the third-party purchaser, although it is clear to this Court that Harold intended to convey his interest in the real property, he did not sign the deed as an individual. It would be prudent, to ensure certainty in the chain of title to the real property, that Harold’s individual (now estate) interest in the property be conveyed to the third-party purchaser.

To make certain that no questions of title occur in the future, a new, or correcting deed from both, the Estate of Harold W. Ford, *and* the Estate of Carol E. Ford, to the *bona fide* third-party purchaser must be recorded. The expenses and costs associated with the preparation and recording of such deed shall be borne by the Estate of Harold W. Ford.

### **The Sale Proceeds of 1325 Greenbrier Lane**

In their pleadings, the petitioner has requested an order directing the respondents to turn over any, and all, proceeds from the April 21, 2019, sale/transfer of

the real property, to the petitioner for the purpose of distribution pursuant to the terms of Carol E. Ford's last will and testament. Notably, the petitioner does not allege that the sale to the third-party was fraudulent, or for lack of consideration, and has not sought to disaffirm the sale. Likewise, the purchaser is not aggrieved as she has received the real property in exchange for the consideration paid by her. Hence, this Court need only address the distribution of the sale proceeds.

Besides the pleadings stating that the property was sold to the third-party purchaser, there is sparse evidence in the record indicating where the net proceeds of the sale were delivered after sale. According to the real estate closing statement, net proceeds were delivered to attorney Glenn Speller's attorney trust account. *Response to Verified Petition, Respondent's Exhibit 1*. There is no indication as to where, or to whom, any of the proceeds were delivered thereafter. It can be concluded, solely based upon the fact that the petitioner is demanding that the respondent's "turn-over" the proceeds of sale, that such proceeds were not delivered to Carol E. Ford in any fashion. Therefore, the proceeds in question were likely *delivered* to Harold W. Ford, either individually or as trustee of the Ford Revocable Living Trust Dated November 11, 2018.

It is well settled that, when parties sell real estate to which they held title as tenants by the entirety, the presumption is that each became entitled to one-half of the proceeds of the sale, as tenants in common in the proceeds. *Secrist v. Secrist*, 284 A.D. 331, 132 N.Y.S.2d 412 (4<sup>th</sup> Dept. 1954), *citing Matter of Blumenthal's Estate*, 236 N.Y. 448, 141 N.E. 911 (1923); *Matysek v. Matysek*, 274 A.D. 847, 80 N.Y.S.2d 659 (4<sup>th</sup> Dept. 1948), *citing Villone v. Villone*, 135 Misc. 512, 239 N.Y.S. 49 (Supreme Court, Niagara County 1930), *affirmed* 228 A.D. 884, 240 N.Y.S. 927 (4<sup>th</sup> Dept. 1930).

There is a presumption that tenants in common hold in equal shares. This presumption may be rebutted when the facts show that they hold in different shares. *Secrist v. Sercist*, supra., (*internal citations omitted*). The burden to overcome this presumption is on the party claiming more than their tenancy in common in the proceeds, as to why they should be entitled to more than one-half of the proceeds. *Matysek v. Matysek*, supra. Thus, the presumption here is that the net proceeds of the sale of 1325 Greenbrier Lane were held one-half each by Harold W. Ford and Carol E. Ford, as tenants in common.

Based upon an examination of the court record, this Court finds that the Estate of Carol E. Ford has not submitted sufficient proof to overcome this presumption, and therefore it is not entitled to more than one-half of the net sale proceeds. Likewise, neither the Estate of Harold W. Ford, nor the Ford Revocable Living Trust Dated November 11, 2018, has defeated this presumption, and too is not entitled to more than one-half of the net sale proceeds.

Accordingly, one-half of the net sale proceeds of 1325 Greenbrier Lane shall be paid to the Estate of Carol E. Ford. The respondents shall deliver such proceeds within sixty days of the entry of this decision and order.

With regards to Howard W. Ford's one-half of the net proceeds, with the voiding of the first deed, coupled with the primacy of the tenancy by the entirety, the transfer of the real property to the Ford Revocable Trust was also a nullity. Therefore, for purposes of the proceeds only, his one-half share of the net sale proceeds shall be payable to his estate. It is further ordered that an estate for Howard W. Ford be opened for the

purpose of administering the one-half of the net proceeds, and to complete the correcting deed process.

This decision shall constitute the Order of this Court and no further Order shall be required.

The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule regarding to filing, entry or Notice of Entry.

Dated: Lockport, New York  
May 26, 2023

  
Hon. Caroline A. Wojtaszek  
Surrogate