To Be Argued By:
Janet D. Callahan
Time Requested: 10 minutes

APL No. APL-2022-00087
Appellate Division, Fourth Department Docket No. CA 20-01422
Onondaga County Clerk's Index No. SU-2018-009393

COURT OF APPEALS
of the
STATE OF NEW YORK

CORA A. ALSATE, ADMINISTRATRIX OF THE ESTATE OF FRANK MAIKA, DECEASED,

Petitioner- Appellant,

v.

ANNE MAIKA AND PHILIP MAIKA,

Respondents-Respondents,

BRIEF FOR PETITIONER-APPELLANT

Janet D. Callahan, Esq.
HANCOCK ESTABROOK, LLP
Attorneys for Petitioner-Appellant
1800 AXA Tower I,
100 Madison Street
Syracuse, NY 13202
Telephone: (315) 565-4500
jcallahan@hancocklaw.com

October 26, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

JURISDICTIONAL STATEMENT 1

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 3

STATEMENT OF FACTS AND PROCEEDINGS BELOW 4

Underlying Facts and Circumstances 4

The Proceedings in the Lower Court 6

Decision by the lower court 12

The Appellate Division 14

POINT I: THE APPELLATE DIVISION'S RULING—THAT RESPONDENTS MET THEIR BURDEN TO PRODUCE "CLEAR AND CONVINCING" EVIDENCE TO REBUT THE PRESUMPTION THAT THE SERVICES THEY RENDERED TO THEIR FATHER WERE IN CONSIDERATION OF LOVE AND AFFECTION—WAS NOT SUPPORTED BY THE RECORD 16

A. *Respondents failed to offer proof of Decedent's intent to rebut the presumption* 16

B. *Respondents' proof did not meet the required "clear and convincing" standard* 19

POINT II: THE FOURTH DEPARTMENT FAILED TO PROPERLY APPLY THE PRESUMPTION THAT WHERE PARTIES ARE RELATED, SERVICES TO A FAMLY MEMBER ARE PRESUMED TO HAVE BEEN RENDERED IN CONSIDERATION OF LOVE AND AFFECTION, WITHOUT EXPECTATION OF PAYMENT 23

POINT III: THE APPELLATE DIVISION IGNORED THE FACT THAT THE DEED TO RESPONDENTS WAS NULL AND VOID BECAUSE THE POWER OF ATTORNEY PURSUANT TO WHICH IT WAS CONVEYED DID NOT AUTHORIZE MAJOR GIFTS OR TRANSFERS OF THE DECEDENT'S PROPERTY 26

CONCLUSION.....29

TABLE OF AUTHORITIES

Page(s)

State Cases

Matter of Adams, 1 A.D.2d 259 (4th Dep't 1956), aff'd 2 N.Y.2d 796 (1956) 17

Anderson Marszal v. Anderson, supra, 9 A.D.3d 711 (3d Dep't 2004) 28

Matter of Barr, 252 A.D.2d 875 (3d Dep't 1998) 17

Borders v. Borders, 128 A.D.3d 1542 (4th Dep't 2015) 17, 26

In re Clinton, 1 Misc. 3d 913(A) 22

Estate of Curtis, 83 A.D.3d 1182 (3rd Dep't 2011) 28

Matter of Curtis, 83 AD3d 1182 [3d Dept 2011] 22

Matter of Est. of Maika, 206 A.D.3d 1563 (4th Dep't 2022) 2, 15, 21

In re Estate of Naumoff, 301 A.D.2d 802 (3d Dep't 2003) lv. dismissed 100 N.Y.2d 534 (2003) 14, 17, 22

Matter of Ferrara, 7 N.Y.3d 244 (2006) 28

Hamar v. Isachsen, 58 A.D.2d 988 (4th Dep't 1977) 22

Mantella v. Mantella, 268 A.D.2d 852 [3d Dep't 2000] 2, 13, 15, 21, 23, 24, 26

In re Matranga's Estate, 25 A.D.2d 782 (2d Dep't 1966) 22

Moglia v Moglia, 144 A.D.2d 347 (2d Dep't 1988) 26

Matter of Roth, 283 A.D.2d 504 (2d Dep't 2001) 27

Semmler v. Naples, 166 A.D.2d 751 (3d Dep't 1990) 13, 27

In re Sypian's Will, 114 N.Y.S.2d 587 (Surr. Ct. Monroe Cty. 1952) aff'd 281 App. 22

Matter of Wilson, 178 A.D.2d 996 [4th Dep't 1991] 2, 15, 17, 22, 24, 25

State Statutes

General Obligations Law § 5–1503 27

General Obligations Law § 5-1514.....13

SCPA § 2103.....1, 6, 8

Rules

CPLR 5601 (a) 1

JURISDICTIONAL STATEMENT

Jurisdiction in this Court is premised on a Memorandum and Order of the Appellate Division, Fourth Department, dated and entered June 3, 2022 which finally determined the action, and included a dissent by two justices on a question of law pursuant to CPLR 5601 (a).

PRELIMINARY STATEMENT

This is a turnover proceeding under SCPA § 2103 brought by Petitioner-Appellant Onondaga County Deputy Public Administrator ("Appellant"), seeking the return to his estate of a house previously owned by Frank Maika (the "Decedent"). The house was conveyed during the Decedent's lifetime to Respondents-Respondents Philip Maika and Anne Maika (collectively, "Respondents"), two of the Decedent's 12 adult children, by a deed executed by three of the Maika siblings—one of whom was Philip Maika—acting as Decedent's attorneys-in-fact. Respondents alleged that the conveyance of the house to them was compensation for having cared for their father for several years prior to his death. The lower court declared the deed null and void, holding that: (1) the record was devoid of any evidence showing Decedent's intent to compensate his children for providing services to him; and (2) the conveyance was improper since the Power of Attorney executed by the Decedent specifically

precluded any authority to transfer property, and because it required three attorneys-in-fact to take any action pursuant to it and precluded Philip Maika, one of the three siblings who executed the deed, from conveying the property to himself as a gift.

The Appellate Division, Fourth Department, reversed the lower court's order on the law and dismissed the Petition. In doing so, the Fourth Department improperly gave short shrift to the presumption of law that "where parties are related, ... services were rendered in consideration of love and affection, without expectation of payment." (*Mantella v. Mantella*, 268 A.D.2d 852, 853 [3d Dep't 2000] [internal quotation marks omitted]; see *Matter of Wilson*, 178 A.D.2d 996, 997 [4th Dep't 1991]) and also improperly concluded that Respondents had met their burden of proving with "clear, convincing and satisfactory evidence[ ] that there was an agreement ... that the services would be compensated", citing *Wilson*, 178 A.D.2d at 997. *Matter of Est. of Maika*, 206 A.D.3d 1563, 1564 (4th Dep't 2022) (A.254-255). Two justices (Justice Peradotto and Justice Smith) dissented, disagreeing with the majority that the proof submitted by Respondents was sufficient to meet their burden of proving by clear and convincing evidence that there had been an agreement with their father that their services to him would be compensated by the conveyance of his house to them. The dissenting justices expressed the opinion that since Respondents failed to meet their burden of proof

by clear and convincing evidence, the lower court had properly denied their motion and *sua sponte* granted summary judgment in favor of Petitioner. The Order of the Appellate Division should be reversed for the reasons stated in the dissenting opinion.

QUESTIONS PRESENTED

Where the Appellate Division completely ignored strong evidence in the record to the contrary and concluded that Respondents had met their burden of proving by clear and convincing evidence that they had an agreement with their father that their services would be compensated, was that conclusion incorrect?

This question must be answered in the affirmative.

2. Where the record contained no evidence that the Decedent ever agreed or consented to compensate Respondents for providing services to him, did the Appellate Division improperly hold that the conveyance to Respondents of the Decedent's house pursuant to a deed executed by his attorneys-in-fact—one of whom was Respondent Philip Maika, should be characterized as such compensation?

This question must be answered in the affirmative.

3. Where the Power of Attorney pursuant to which the Decedent's house was conveyed to Respondents stated that it could not be used "to make major gifts or changes to interests in [the Decedent's] property and did not include a statutory

gifts rider, did the Appellate Division erroneously hold that the conveyance of the Decedent's house to Respondents by means of that Power of Attorney was proper?

This question must be answered in the affirmative.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Underlying Facts and Circumstances

Beginning in 1994, Respondent Philip Maika lived with his parents in a house they owned. (A.185) At all times thereafter, he had free room, board and utilities. (A.185) In addition, he had full use of his parents' vehicles and unlimited access to waterfront property they owned in Canada. (A.185) Respondent Anne Maika moved in with her parents in September of 2009, after she was fired from her job and evicted from her residence. (A.184) From that point forward, she too had free room, board and utilities, full use of her parents' furnishing and vehicles and unlimited access to their Canadian property. (A.184)

The Decedent had several strokes between 2003 and 2007, following which he began to need assistance with activities of daily living. His wife was his primary caregiver until her death in December of 2009. (A.15) At that time, Anne and Philip became more involved in their father's day-to-day care. (A.145)

On February 5, 2010, the Decedent executed a Power of Attorney naming five of his children (Philip Maika and four of his sisters—Elizabeth Archbell, Maria Damjan, Margaret Gilbert and Andrea Phaup) as attorneys-in-fact. (A.130-

131) The Power of Attorney did not include a statutory gifts rider. (A.130-138) In addition, it stated that it could not be used "to make major gifts or changes to interests in [the Decedent's] property and required a majority of the five agents to carry out any authority granted under it. (A.131) Margaret Gilbert resigned as attorney-in-fact on January 1, 2012. That left four acting agents so that subsequent to that date, three were required to act in order to carry out any authority granted by the Power of Attorney. (A.167)

In 2011, a meeting was held at Crouse Hospital to discuss the Decedent's care, and Respondents were present. The Crouse care coordinator talked to them about the fact that their father's need for help had increased, to which they replied that they did not want to apply for Medicaid "because of the potential for a lien being placed on their house."(R.356)[1] They advised that they had met with a home care agency but had not followed through because of similar concerns regarding the placement of a lien on the house where they were living. (R.356) Accordingly, they continued to care for their father on their own, with occasional services provided by home health aides. (A.97)

On March 28, 2017, three[2] of the Decedent's four attorneys-in-fact, including Philip Maika, executed a deed as agents for the Decedent conveying his house to Philip and Anne. (A.140) The Decedent passed away on July 16, 2017, less than

[1] References for these two sentences "(R.__)" are to the Record in the Appellate Division.
[2] Philip Maika, Elizabeth Archbell and Maria Damjan. (A.141-142)

three months later. (A.183) While the Decedent had executed a Last Will and Testament leaving his estate to all 12 of his children, the original could not be found so it was not offered for probate. (A.194-195) At the time of the Decedent's death, his estate consisted of his house and his property in Canada.

The Proceedings in the Lower Court

On December 11, 2018, the Onondaga County Deputy Public Administrator filed a *Verified Petition to Discover Property Withheld*, pursuant to SCPA § 2103. (A.35) The Petition sought to compel Respondents to attend an inquiry regarding whether the Decedent's house had been improperly transferred to them during his lifetime by the March 28, 2017 conveyance. (A.37) The Petition asserted that since the Power of Attorney did not authorize the attorneys-in-fact to make gifts to themselves, the transfer of the house had been without proper consideration and should be returned to the Decedent's estate. (A.38)

Respondents moved for summary judgment dismissing the Petition, submitting in support their own affidavits outlining services they performed for the Decedent from the time of their mother's death in 2009 to his death in 2017 and contending that the transfer of the house to them was not a gift but, rather, compensation for those services. (A.143, 157)

In their affidavits, Respondents described conversations they had had *with their siblings* in which they stated that they wanted to be paid for caring for their

father and that it was "unreasonable and impossible" for them to continue to care for him without compensation. (A148, 163) They claimed, without identifying which ones, that "a majority of the Attorneys-in-Fact" agreed that it was unreasonable to expect them to continue to care for their father without compensation. (A.153, 163) They also claimed that starting in 2011, some of the attorneys-in-fact (again failing to identify which ones) agreed to allow Anne Maika to keep $300 per month of Decedent's monthly benefits as compensation, although no such provision was made for Philip Maika. (A.157) No evidence was submitted that this arrangement was ever discussed with or agreed to by the Decedent. No evidence was submitted that the Decedent was even aware that Anne was taking his money, let alone that he intended or agreed with that decision or that he considered the money compensation for her care of him.

Respondents also submitted affidavits of two of the sisters, Elizabeth Archbell and Maria Damjan, who were among the attorneys-in-fact. (A.166, 171) Maria Damjan, who lives in Virginia, stated in her affidavit that when the siblings first discussed the fact that Philip and Anne would continue to live in their father's house and take care of him following their mother's death, there was no mention of compensation since none of them expected him to live very long. (A.167) Maria did not assert in her affidavit that any statements she made therein were based on her personal knowledge, nor did she state how often—if at all—she visited the

Decedent and would have been able to observe Respondents. (A.166-170) Nonetheless, in her affidavit she described services she alleged they performed. (A.168-169) She also stated that "the co-Attorneys-in-Fact began discussing" in 2016 or 2017 how Philip and Anne might be compensated for caring for their father, and they decided that the way to do it was to transfer his house to them. (A.169) Those discussions among the siblings were the impetus behind the execution of the deed in March of 2017. (A.169) There was no indication in Maria's affidavit that the Decedent was ever part of—or even aware of— those discussions.

Elizabeth Archbell (who also lives in Virginia) made similar statements in her affidavit regarding care provided by Philip and Anne to their father, without providing any factual basis for those statements or personal knowledge to support them. (A.171-175) She confirmed that the siblings, including Philip, discussed conveying the Decedent's house to Philip and Anne using the Power of Attorney and that three of the four, including Philip, voted in favor. (A.174-175) Elizabeth's affidavit failed to state, as had Maria's, that the Decedent was part of or aware of those discussions or that he ever agreed or consented to the conveyance of his property to two of his 12 children, which was inconsistent with his estate plan dividing his estate equally among them.

In opposition to the motion, Petitioner submitted her affidavit stating that she had brought the SCPA § 2103 turnover proceeding at the request of several of the

other Maika siblings, who believed that the conveyance of their father's house to Philip and Anne was improper and that the property should be recovered for the estate. (A.176) She pointed out that there was no writing evidencing an agreement under which Anne and Philip agreed to perform services in exchange for a transfer of their father's house and that the Power of Attorney under which the deed was executed did not include authority to make gifts. (A.176)

Also submitted in opposition to the motion was the affidavit of another of Respondents' sisters, Katheryn Maika Roach, which painted a very different picture of the situation in the Decedent's house. (A.183-191) Katheryn confirmed that Anne had been fired from her job and evicted in 2009, and that their parents had reluctantly allowed her to move in since she had nowhere else to go. (A.184) She also stated that the relationship between Anne and their mother was very volatile, and that Anne constantly antagonized and verbally abused their mother, causing her to be upset and stressed so that her blood pressure elevated drastically. (A184) Katheryn pointed out that as well as free housing, board and utilities and $300 per month of her father's money, Anne received Social Security Disability benefits for a mental disability and public assistance, including food stamps and money to heat the house. (A.184-185)

As for Philip, Katheryn stated that he had control over Decedent's pension and social security, full access to Decedent's bank accounts, and use of his

properties and vehicles. (A.185) She stated that despite the fact that the other siblings told Respondents multiple times that they were free to leave and other arrangements would be made to care for their father, they elected to stay. (A.186) She pointed out that attempts had been made by some of the siblings on at least two occasions to retain outside help but Anne had sabotaged those efforts, behaving in a way characterized by the caregivers as "manipulative and controlling" and "hostile", which culminated in her firing them. (A.187)

Finally, Katheryn stated in her affidavit that the Respondents fought with each other on numerous occasions, necessitating calls to the police, and that Anne had obtained a protective order against Philip and had reported him to Onondaga County Adult Protective Services regarding his treatment of their father. (A.187-188) Katheryn disputed that there was ever an agreement, express or implied, between the Decedent and the Respondents to pay them for their caregiving. (A.190) She stated that they were always free to leave, since alternative arrangements could be made, but chose to stay and in fact obstructed any attempts by their siblings to intercede. (A.190)

Respondents submitted two further affidavits in reply, one from their sister Margaret Gilbert, who had resigned in January 2012 as one of the five appointed attorneys-in-fact. (A.224) Margaret's one-page affidavit added little beyond a double hearsay statement that she understood from her sisters Maria and Elizabeth

that in November of 2009, their mother had verbalized that she wanted Philip compensated for his help to her and to their father. (A.224) Nothing in that affidavit stated that the Decedent had ever expressed a similar wish or intent.

The other affidavit was from a sister who was not an attorney-in-fact, Jeanette Liebeskind. (A.225-229) Jeanette stated, simply, that she saw her father once a year between 2009 and 2016, and she saw Anne and Philip caring for him during those times. (A.226-228)

Notably lacking from any of the affidavits submitted by Respondents was any assertion that the *Decedent* ever at any time indicated that it was his desire or intention to compensate Respondents for the services they were providing. Even Respondents themselves did not state in their affidavits that their father ever indicated such an intent. Maria stated that the subject came up in discussions among the siblings who were attorneys-in-fact, but not that their father had ever expressed his intention—let alone agreement—that Respondents receive compensation. (A.169) Elizabeth stated similarly that the only discussion was among the attorneys-in-fact, but not that their father had ever expressed an intention or agreement to provide compensation. (A.173-175) Margaret stated in her affidavit that she understood from Maria and Elizabeth that their mother had told them at Thanksgiving in 2009 that *she* wanted Philip compensated "for his help" but never stated that the Decedent shared that view. (A.224) Jeanette described a conversation

with their mother in which Mrs. Maika said Philip was an "immense help" and that "she didn't know what she and [the Decedent] would do without him there." (A.225-226) Once again, however, notably absent was any evidence or even suggestion that it was the Decedent's intent to compensate his children for any care they provided.

Even Respondents' own affidavits were lacking in evidence that the Decedent ever agreed, expressly or impliedly, to compensate them for services. To the contrary, Anne Maika stated clearly that *she* was the one who initiated such discussions *with her siblings,* approaching them in 2011 and advising that she needed to be paid. (A.148) Philip Maika's affidavit contained a similar statement—that Anne in 2011 approached the siblings who had been appointed as attorneys-in-fact "regarding the matter of compensation." (A.163) No one stated that compensation was discussed with the Decedent, or that he ever suggested, or agreed, or intended, to compensate his son and daughter.

Decision by the lower court

Supreme Court issued a decision from the bench, noting that it was undisputed that the Power of Attorney executed by the Decedent did not include a provision for gifts or a statutory gifts rider, and that it was further undisputed that one of the three attorneys-in-fact who executed the deed conveying the Decedent's property to Philip and Anne was Philip himself. (A.240)

Supreme Court cited *Mantella v. Mantella*, 268 A.D. 2d 852 (3d Dep't 2000), in which the Third Department upheld summary judgment setting aside an *inter vivos* transfer of real property by an attorney-in-fact to himself and other agents of the principal. The court noted that any attorney-in-fact has a "duty to act with the utmost good faith towards the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing", quoting *Semmler v. Naples*, 166 A.D.2d 751, 752 (3d Dep't 1990), app dsmd 77 N.Y.2d 936 (1991). The court held that consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship and, in the event such a gift is made, there is a ***presumption of impropriety*** which can only be rebutted ***by a clear showing that the principal intended the gift.*** (A.241) The court also noted that in *Mantella*, the Third Department held that where parties are related, it is presumed that services rendered to a family member "were rendered in consideration of love and affection, without expectation of payment." (A.242)

The lower court held that given the concession by Respondents that the Power of Attorney did not allow the agents to gift the Decedent's property, as required by General Obligations Law § 5-1514, it was incumbent upon them to demonstrate by clear and convincing evidence that the conveyance of the house "was for consideration and intended by the [D]ecedent" and they failed to meet

that burden: "[T]he record before this Court is devoid of any evidence that the decedent advanced any intention of compensating respondents for their services." (A.245)

The court acknowledged the services Respondents performed for the Decedent but cited the Appellate Division's holding in *In re Estate of Naumoff*, 301 A.D.2d 802 (3d Dep't 2003) lv. dismissed 100 N.Y.2d 534 (2003), that "evidence that petitioner deserved the money falls far short of establishing decedent's intention that she have it or that he authorized the distribution to her." (A.247)

The court went on to hold that after searching the record, it was granting summary judgment in favor of Petitioner. (A.249) The court reasoned that the viability of Respondents' claim rested on proof of the intent *of the Decedent*, not those acting under the power of attorney he had granted them. (A.249) No such proof was offered. Accordingly, the court declared the March 28, 2017 deed null and void and directed Respondents to execute a deed transferring their interest in Decedent's property back to his estate. (A.250) Respondents appealed from that order.

The Appellate Division

On appeal, the Fourth Department reversed the lower court's order and dismissed the Petition. (A.254-255) In its Memorandum and Order, the Fourth

Department paid lip service to the presumption that "where parties are related, ... services were rendered in consideration of love and affection, without expectation of payment", citing *Mantella v. Mantella* and its own decision in *Matter of Wilson*, 178 A.D.2d 996, 997, 579 N.Y.S.2d 779 [4th Dept. 1991]). The court went on to state, however, that "[e]ven assuming, arguendo, that the presumption applies" . . . Respondents supported their motion with 'clear, convincing and satisfactory evidence[ ] that there was an agreement ... that the services would be compensated', again citing *Wilson*. *Matter of Est. of Maika*, 206 A.D.3d 1563, 1564 (4th Dep't 2022).

Justices Peradotto and Smith joined in a dissenting memorandum, voting to affirm the lower court's order granting summary judgment to Petitioner. (A.255) They noted that while the majority had acknowledged the presumption that "[w]here the parties are related, ... particularly where[, as here,] the relationship is that of parent and child[ren], ... it is presumed that the services [rendered to the parent] were rendered in consideration of love and affection, without expectation of payment", their conclusion that Respondents had met their burden of producing ***clear and convincing*** evidence to overcome that presumption was incorrect. The dissent noted the fact that the proof submitted by Respondents consisted solely of

> self-serving statements in their own affidavits and after-the-fact, hearsay statements in the affidavits of two of respondents' siblings who were attorneys-in-fact recounting prior conversations among the attorneys-in-fact, without any

> contemporaneous evidence to substantiate that the property transfer—which occurred during the terminal months of decedent's illness even though his will would have passed the property equally to all of his children —was intended to compensate respondents for their care of decedent.

(A.255) Finally, the dissent noted that even assuming that Respondents met their burden, viewing the evidence in the light most favorable to Petitioner and drawing every available inference in her favor, the submissions by Petitioner, including the affidavit of another sibling, raised a triable issue of fact whether the household arrangements between the Decedent and Respondents "were for their mutual benefit and the services were rendered in consideration of love and affection, rather than with an expectation of compensation. . ." (citations omitted). Petitioner has appealed to this Court from the Memorandum and Order of the Fourth Department reversing the lower court's order and dismissing the Petition.

POINT I

THE APPELLATE DIVISION'S RULING—THAT RESPONDENTS MET THEIR BURDEN TO PRODUCE "CLEAR AND CONVINCING" EVIDENCE TO REBUT THE PRESUMPTION THAT THE SERVICES THEY RENDERED TO THEIR FATHER WERE IN CONSIDERATION OF LOVE AND AFFECTION—WAS NOT SUPPORTED BY THE RECORD

A. Respondents failed to offer proof of Decedent's intent to rebut the presumption

It is well settled in New York that where parties are related, it is presumed that services rendered by one party to another were in consideration of love and

affection, without expectation of payment. See, e.g. *In re Estate of Naumoff*, *supra*, 301 A.D.2d 802, 804 (3d Dep't 2003), lv. dismissed 100 N.Y.2d 534 (2003) (holding that "evidence that petitioner deserved the money falls far short of establishing decedent's intention that she have it or that he authorized the distributions to her"); *Matter of Barr*, 252 A.D.2d 875, 877 (3d Dep't 1998); *Borders v. Borders*, 128 A.D.3d 1542 (4th Dep't 2015) (court invalidated deed transferring real property via a power of attorney where the evidence indicated "that the intent of [the sibling attorneys-in-fact] in executing the deed was not to protect their father but, rather, to protect [their] future inheritance from their brother and his creditors."); *Matter of Wilson*, 178 A.D.2d 996, 997 (4th Dep't 1991); *Matter of Adams*, 1 A.D.2d 259 (4th Dep't 1956), aff'd 2 N.Y.2d 796 (1956) (holding that where "the household arrangements were those of mutual benefit", there was insufficient evidence to overcome the presumption that the services were rendered out of love and affection, without expectation of payment).

The evidence produced by Respondents demonstrated that while three of the attorneys-in-fact (including Respondent Philip Maika) may have approved the transfer of the Decedent's property and may have done so intending it as consideration for services rendered, the record was completely devoid of any indication that the Decedent approved, or intended, or was even aware of, the transfer. As the lower court properly found, proof of the intent of the attorneys-in-

fact cannot substitute for proof of the intent of the Decedent, particularly under the circumstances of this case. The Appellate Division's ruling in favor of Respondents ignored this lack of proof.

In the Appellate Division, Respondents argued that the record contained "copious unrefuted evidence that the conveyance of the property was intended to be compensation for [their] long-term care services." Respondents' Brief, p. 18. To support their argument, Respondents submitted their own affidavits and the affidavits of two of the siblings who had been named attorneys-in-fact, Elizabeth Archbell and Maria Damjan. (A.171, 176). Subsequently Respondents submitted reply papers that included an affidavit from Margaret Gilbert, their sister who had resigned as attorney-in-fact years earlier. Even taken collectively, however, those affidavits fail to warrant the Appellate Division's conclusion that Respondents established *by clear and convincing evidence* that the transfer of the Decedent's house to them was not a gift. That conclusion was simply erroneous.

What the record demonstrated is that some—although clearly not all—of the Maika siblings, and perhaps their mother, approved of the transfer of the Decedent's house to Respondents. Under the law, however, their intent was immaterial. Rather, it was the intent of the Decedent, the owner of the property that had to be demonstrated by clear and convincing evidence. The record is devoid of

any proof of his intent. Thus, the Appellate Division's conclusion that Respondents had met their burden was clearly incorrect and should be reversed by this Court.

B. Respondents' proof did not meet the required "clear and convincing" standard

Pattern Jury Instruction 1:64 defines "clear and convincing" evidence as "evidence that satisfies you that there is a high degree of probability" as opposed to a preponderance of evidence in one party's favor. According to the PJI, "a party who must establish (his, her) case by clear and convincing evidence must satisfy you that the evidence makes it ***highly probable*** that what (he, she) claims is what actually happened." (Emphasis added).

Here, the Fourth Department majority held, "we conclude that respondents supported their motion with 'clear, convincing and satisfactory evidence[ ] ***that there was an agreement*** ... that the services would be compensated'." (Emphasis added) (A.255) As the dissent properly noted, however, the evidence submitted by Respondents was far from what was required to rise to the level of "clear and convincing" evidence of the existence of such an agreement. In fact, there was no proof in the record of any agreement, let alone clear and convincing proof.

None of the five affidavits submitted by Respondents contained any evidence that the March 28, 2017 transfer was for consideration and intended by the Decedent. Maria Damjan stated in her affidavit that the subject of compensating the Respondents came up in discussions among the siblings who

were attorneys-in-fact, but not that their father had ever expressed his intention—let alone agreement—that such compensation be provided. (A.169) Elizabeth Archbell stated similarly in her affidavit that the only discussion was among the attorneys-in-fact, but not that their father had ever expressed an intention or agreement to provide compensation. (A.173-175) Margaret Gilbert offered a hearsay statement in her affidavit that she understood from Maria and Elizabeth that their mother had told them at Thanksgiving in 2009 that *she* wanted Philip compensated "for his help" but not that the Decedent shared that view. (A.224)

Even the Respondents' own affidavits did not state that the Decedent at any time agreed, either expressly or impliedly, that they should be compensated for the services they were providing. To the contrary, in Anne Maika's affidavit, she stated clearly that she initiated such discussions with her siblings who had been appointed as the Decedent's attorneys-in-fact, approaching them in 2011 and advising that she needed to be paid. (A.148) Philip Maika's affidavit stated similarly that it was Anne who approached their siblings "regarding the matter of compensation." (A.163) No one stated that compensation was ever discussed with the Decedent or that he suggested or agreed to compensate his son and daughter for the care they were providing by conveying his home to them. This is particularly significant in view of the fact that such a conveyance was contrary to the

Decedent's intent as expressed in his Last Will and Testament, in which he left his estate to all 12 of his children in equal shares.

The last sibling affidavit submitted by Respondents was that of Jeanette Liebeskind, who stated that she, too, had had a conversation with their mother in 2009, at which time Mrs. Maika said Philip was an "immense help" and that "she didn't know what she and [the Decedent] would do without him there." (A.225-226) Once again, however, notably absent from Ms. Liebeskind's affidavit was any proof or even suggestion that it was the Decedent's wish or intent to compensate his children.

As the dissent properly noted, the proof submitted by Respondents consisted solely of "self-serving statements in their own affidavits and after-the-fact, hearsay statements in the affidavits of two of respondents' siblings who were attorneys-in-fact recounting prior conversations among the attorneys-in-fact, without any contemporaneous evidence to substantiate that the property transfer—which occurred during the terminal months of decedent's illness even though his will would have passed the property equally to all of his children—was intended to compensate respondents for their care of decedent." *Matter of Est. of Maika*, 206 A.D.3d 1563, 1564 (4th Dep't 2022)

In *Mantella*, 268 A.D.2d 852 (3d Dep't 2000), similar evidence was rejected by the Third Department as meeting the "clear and convincing" standard. See, also,

Matter of Curtis, 83 AD3d 1182, 1183 [3d Dept 2011]; *Matter of Naumoff*, 301 A.D.2d 802, 804 [3d Dept 2003], *Iv dismissed* 100 NY2d 534 [2003]); *Matter of Wilson, supra; In re Adams' Estate, supra; In re Matranga's Estate,* 25 A.D.2d 782 (2d Dep't 1966); *In re Clinton*, 1 Misc. 3d 913(A), Surr. Ct. New York Cty., 2004); cf *Hamar v. Isachsen*, 58 A.D.2d 988 (4th Dep't 1977), where the court held that "a letter executed by decedent when she first came to live with petitioner provided ample support for the finding that decedent did intend to pay for the care she received from her daughter and that an implied contractual relationship existed between them.").

In re Sypian's Will, 114 N.Y.S.2d 587 (Surr. Ct. Monroe Cty. 1952) aff'd 281 App. Div. 1072 (4th Dep't 1953), relied on by Respondents in the Appellate Division, is easily distinguishable. There, the undisputed proof demonstrated that the decedent's daughter relocated from California to New York at her mother's request, gave up her career and disrupted her life to care for her mother. Here, the situation was more like that in *Wilson, supra*, where the "claimant benefited as much as his mother from their living arrangement" and his services were "regarded as having been rendered in lieu of a monetary contribution toward household expenses, not in consideration of an implied obligation by his mother to reimburse him." 178 A.D. 2d at 997.

It was undisputed in this case that Philip Maika had been living in his parents' house at no cost for more than a decade before he began to care for his father. (A.122-123) Anne Maika had moved home because she lost her job and was evicted from her residence, not to care for her father. It was she who asked to return home, not the Decedent or Mrs. Maika who asked her to return. (A.184) In the face of such proof, the majority's holding that Respondents had met their burden of overcoming the presumption with clear and convincing evidence was error and should be reversed by this Court.

POINT II

THE FOURTH DEPARTMENT FAILED TO PROPERLY APPLY THE PRESUMPTION THAT WHERE PARTIES ARE RELATED, SERVICES TO A FAMLY MEMBER ARE PRESUMED TO HAVE BEEN RENDERED IN CONSIDERATION OF LOVE AND AFFECTION, WITHOUT EXPECTATION OF PAYMENT

While the Fourth Department majority cited *Mantella* v. Mantella, 268 A.D.2d 852 (3d Dep't 2000) for the presumption that services by a related party are presumed to have been rendered out of love and affection without expectation of payment, it then intimated that *Mantella* is distinguishable from the situation at bar, implying without providing the reasoning behind its differentiation that the presumption of *Mantella* does not apply to this case: "Even assuming, arguendo, that the presumption applies to the inter vivos transfer at issue here . . .". This

caveat was unwarranted, and not supported by either *Mantella* or *Wilson*, the two cases it cited.

The decedent in *Mantella* executed a power of attorney in favor of one of her two sons, the defendant, which the defendant used to convey real property to himself and his wife. The decedent left a last will and testament providing that her estate was to be divided equally between defendant and her other son, who became the plaintiff. The plaintiff brought an action alleging that the defendant was not authorized to transfer the property and seeking to have the deed declared null and void. The plaintiff's motion for summary judgment was granted by the lower court, vesting the subject property in the decedent's estate, and the Third Department affirmed, holding that the defendant had failed to overcome the presumption that the transfer of the property to him and his wife was a gift.

The facts of this case are strikingly similar. Philip Maika, acting with two siblings, transferred the Decedent's real property to himself using a power of attorney which did not include a statutory gifts rider, and the transfer was contrary to the Decedent's will, which left his estate to his 12 children in equal shares. The lower court in this case properly applied the presumption, placing the burden on Respondents to establish by clear and convincing evidence that their father had intended to convey his house to them as compensation for services.

Wilson, compared by the majority of the Fourth Department in this case, did not involve a transfer of property from a deceased parent to a child. Rather, in *Wilson*, the decedent's son filed a claim against her estate following her death, asserting his entitlement to compensation for caring for his mother for 4 ½ years prior to her death. The Fourth Department in *Wilson* applied the presumption and noted that "[i]t [was] incumbent upon the claimant to demonstrate, by clear, convincing and satisfactory evidence, that there was an agreement, express or implied, that the services would be compensated." It noted that the proof produced by the claimant in a hearing did not meet that burden. As in this case, the proof offered by the claimant in *Wilson* consisted of conversations between other members of the family regarding compensating the claimant but was devoid of any indication that the decedent had agreed to pay him. Here, Respondents offered proof that some of their siblings had discussed compensating them for caring for their father, and that their mother had been in agreement, but the record was devoid of any indication that the Decedent was aware of those discussions, let alone that he expressed his consent or intent to compensate Respondents. Under the circumstances, and based on the proof in the record, the conclusion is compelled that Respondents failed to meet their burden and the decision of the Fourth Department should be reversed.

POINT III

THE APPELLATE DIVISION IGNORED THE FACT THAT THE DEED TO RESPONDENTS WAS NULL AND VOID BECAUSE THE POWER OF ATTORNEY PURSUANT TO WHICH IT WAS CONVEYED DID NOT AUTHORIZE MAJOR GIFTS OR TRANSFERS OF THE DECEDENT'S PROPERTY

Having determined that Respondents met their burden of proving by clear and convincing evidence that the conveyance of their father's house was intended to compensate them for their care, the majority of the Appellate Division went on to hold that "[R]espondents established that the attorneys-in-fact acted within the authority delegated to them by decedent to transfer real property for his benefit, i.e., as compensation for the services that permitted him to remain in the home in accordance with his expressed wishes", citing *Borders v. Borders*, 128 A.D.3d 1542, 1543 (4th Dept. 2015). It is respectfully submitted that this holding was erroneous and that the majority's reliance on Borders to support its holding was misplaced.

As noted by the lower court, "[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." *Mantella v. Mantella, supra*, 268 A.D.2d 852 (3d Dep't 2000) quoting *Moglia v Moglia*, 144 A.D.2d 347, 348 (2d Dep't 1988). The relationship between an attorney-in-fact and his principal imposes on the attorney-in-fact "a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity,

loyalty and fair dealing." *Semmler v Naples, supra,* 166 A.D.2d 751, 752 (3d Dep't 1990), app. dsmd. 77 N.Y.2d 936 (1991). As a result, an attorney-in-fact may not make a valid gift of the principal's property unless there is a clear showing that the principal intended to make the gift. See *Mantella,* 268 A.D.2d 852, (3d Dep't 2000); *Matter of Roth,* 283 A.D.2d 504 (2d Dep't 2001).

Absent a specific provision authorizing gifts (see General Obligations Law § 5–1503), an attorney-in-fact exercising his or her fiduciary responsibilities to the principal "may not make a gift to himself or to a third party of the money or property which is the subject of the agency relationship." *Semmler v. Naples, supra,* 166 A.D.2d at 752 (holding that unrefuted testimony that the decedent had expressly agreed to pay for home care services was sufficient to overcome the presumption that the services were rendered in consideration of love and affection, without expectation of payment).

Here, the Power of Attorney executed by the Decedent did not authorize gifts or permit the attorneys-in-fact to transfer property belonging to the Decedent. (A.132) Further, Respondents failed to offer evidence sufficient to meet the heavy burden of rebutting the presumption of impropriety by demonstrating "the clearest showing of intent" on the Decedent's part. See *Semmler v. Naples, supra* at 752. In fact, the record is devoid not only of evidence of any intention on the Decedent's part to compensate his children for services, but also of evidence that the Decedent

was aware of the transfer of his house by the attorneys-in-fact to Respondents. See, also, *Anderson Marszal v. Anderson, supra*, 9 A.D.3d 711, 712–713 (3d Dep't 2004) (granting summary judgment setting aside a transfer where power of attorney had no gifting powers); *Estate of Curtis*, 83 A.D.3d 1182 (3rd Dep't 2011).

Further, an agent acting under a power of attorney must act *in the best interests of the principal and must carry out the principal's financial, estate or tax plans. Matter of Ferrara,* 7 N.Y.3d 244 (2006) There is no evidence in this record to support a finding that transferring the Decedent's house to Respondents a mere three months before the Decedent's death was in his best interests or that it carried out his financial, estate, or tax plans. In fact, the transfer was contrary to the Decedent's estate plan, since he had executed a Last Will and Testament leaving his estate to all 12 of his children. By conveying the Decedent's house to Respondents, thereby depriving the rest of the siblings of a share of their inheritance, the attorneys-in-fact were acting in a way that was contrary to their father's estate plan and, therefore, cannot be said to have been in his best interests. See *Matter of Ferrara*, 7 N.Y. 3d 244 (2006), where this Court explained that an attorney-in-fact's claim that he made gifts "[i]n furtherance of [decedent's] wishes" to give him "all of his assets to do with [it] as [he] pleased" was not enough to meet the "best interest" requirement: "[t]he term 'best interest' does not include such unqualified generosity to the holder of the power of attorney." 7 N.Y.3d at 254.

Nor is there support in the record for the claim by Respondents in the Appellate Division that it was in the Decedent's best financial interest to remain at home rather than incurring nursing home costs. There is no indication in the record that any attempt was made to do Medicaid planning for the Decedent, despite the fact that the attorneys-in-fact had the requisite authority for seven years. The transfer of the Decedent's house only a few months before his death benefitted no one but Respondents. Further, while there were references in the record that the Decedent's children and his wife wanted him to remain at home rather than going to a nursing home, the record is again totally devoid of any evidence that the Decedent ever voiced a wish to receive around-the-clock care at home as opposed to living out his days in a skilled nursing facility. (See, e.g. A.227-228, expressing wishes *of Mrs. Maika and the children* to "keep our father in his home").

CONCLUSION

In order to establish their entitlement to their father's real property as compensation for the services they had provided him, Respondents had to produce clear and convincing evidence sufficient to overcome the presumption arising from the family relationship that the services they provided were out of love and affection. The lower court properly held that they failed to produce such evidence, since the record contained only evidence that the attorneys-in-fact thought it appropriate to compensate their siblings, not that the Decedent had agreed to do so.

The Fourth Department's reversal of that order based on its conclusion that Respondents had met their burden as a matter of law was not supported by the record.

As had been noted by the lower court, the fact that Respondents might have deserved compensation for the care they provided to their father in his last years did not substitute for proof that it was the Decedent's intention that they have it or that he authorized the transfer of his house to them. Based on the record, the holding by the majority that Respondents met their burden by clear and convincing evidence was incorrect and should be reversed for the reasons stated in the dissenting opinion at the Appellate Division.

Dated: October 26, 2022

HANCOCK ESTABROOK, LLP

By: _____

Janet D. Callahan, Esq.
Attorneys for Petitioner-Appellant
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202
315-565-4500

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using microsoft word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 7144 words.

Dated: October 26, 2022

Janet D. Callahan, Esq.
HANCOCK ESTABROOK, LLP
Attorneys for Petitioner-Appellant
1800 AXA Tower I, 100 Madison Street
Syracuse, New York 13202
Tel: (315) 565-4500
jcallahan@hancocklaw.com

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On October 28, 2022

deponent served the within: **Brief for Petitioner-Appellant**

upon:

Costello, Cooney & Fearon, PLLC
Daniel R. Rose Esq.
211 West Jefferson Street
Syracuse NY 13202-2455
Phone: (315) 422-1152
Attorneys for Respondent Anne Maika

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on October 28, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 511766