To be Argued by:
DANIEL R. ROSE, ESQ.
Time Requested for Argument:
(10 Minutes)

STATE OF NEW YORK

Court of Appeals

APL-2022-00087

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

Petitioner-Appellant,

vs.

ANNE MAIKA and PHILIP MAIKA,
Respondents-Respondents.

Appellate Division Docket Number: CA 20-01422.
Onondaga County Index Number: SU-2018-009393.

BRIEF FOR RESPONDENTS-RESPONDENTS ANNE MAIKA and PHILIP MAIKA

COSTELLO, COONEY & FEARON, PLLC
DANIEL R. ROSE, ESQ., *Of Counsel*
MATTHEW W. O'NEIL, ESQ., *Of Counsel*
Attorneys for Respondents-Respondents
Anne Maika and Philip Maika
211 W. Jefferson Street
Syracuse, New York 13202
Telephone: (315) 422-1152
Email: drose@ccf-law.com
moneil@ccf-law.com

Date of Completion: December 14, 2022.

BATAVIA LEGAL PRINTING, INC.— Telephone (866) 768-2100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

OTHER AUTHORITIES:

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Q. Did the Appellate Division, Fourth Department correctly determine that real property was validly conveyed by an agreement of three of the four persons granted power of attorney (the "Attorneys-in-Fact") where a majority of the Attorneys-in-Fact, including a majority of the disinterested Attorneys-in-Fact, approved the conveyance as furthering the Decedent's express wish to not be placed in a nursing home?

A. Yes. The Appellate Division, Fourth Department correctly determined that the real property was validly conveyed.

Q. Did the Appellate Division, Fourth Department correctly determine that Respondents-Respondents' submission of affidavits of a majority of the disinterested Attorneys-in-Fact attesting that the real property was conveyed as compensation for caretaking services was sufficient to demonstrate that the intent of the transfer was to compensate Respondents-Respondents.

A. Yes. The Appellate Division, Fourth Department correctly determined that Respondents-Respondents demonstrated that the intent of the transfer was compensation.

PRELIMINARY STATEMENT

Respondents-Respondents Anne Maika and Philip Maika ("Respondents") respectfully submit this Brief in opposition to the appeal of the Petitioner-Appellant Deputy Public Administrator of the Memorandum and Order of the Appellate Division, Fourth Department, entered June 3, 2022 (the "June 3 Decision"). In the June 3 Decision, the Appellate Division reversed Supreme Court's Order entered March 20, 2020, wherein Supreme Court denied Respondents' motion for summary judgment, and *sua sponte* granted summary judgment to the Administrator.

This case arises from Respondents' long-term care of their father Frank I. Maika ("Decedent") for seven and a half years after the passing of Decedent's wife. As detailed below, Decedent required continuous round-the-clock care which prevented Respondents from being gainfully employed outside the home or engaging in any social or recreational activities. Indeed, Respondents' care of Decedent far surpassed fulltime employment. In light of the circumstances, the Attorneys-in-Fact, *including a majority of the disinterested Attorneys-in-Fact*, agreed to convey Decedent's single-family home to Respondents as compensation for their years of caregiving services. The value of the Property in no way exceeded the value of Respondents' services, but the Attorneys-in-Fact chose this *inter vivos* conveyance in light of Respondents impoverishing themselves in the care of the Decedent.

The Fourth Department's majority properly recognized that Respondents submitted affidavits from two of the three disinterested Attorneys-in-Fact averring that the transfer was intended to compensate Respondents for their continued care of the Decedent. Moreover, the Fourth Department recognized that the Attorneys-in-Fact acted within their authority to grant compensation for care of Decedent.

Appellant and the dissenting Justices of the Fourth Department overlooked the role of the disinterested Attorneys-in-Fact in the transfer. The dissent relied upon inapplicable cases *involving pure self-dealing* in reasoning that Respondents must proffer evidence of Decedent's intent. In addition to the uncontroverted evidence that Decedent had been mostly unable to speak since 2007, the Record demonstrates Decedent's clear wish expressed to his children throughout his lifetime was to avoid nursing home care. The Record further demonstrates the transfer was in furtherance of this express intent, and as such, the presumption against compensation was successfully rebutted by the sworn affidavits of the disinterested Attorneys-in-Fact and the complete absence of any contrary evidence of intent on the part of Decedent.

For the reasons set forth herein, Respondents respectfully request the June 3 Decision be affirmed.

COUNTERSTATEMENT OF FACTS

A. Decedent's Health Condition

Respondents are two of Decedent's twelve children. [R. 143, 157]. Between 2003 and 2007, Decedent sustained at least three strokes, following which he began

to decline in his ability to perform daily tasks. The 2003 strokes left him without the ability to communicate clearly, and his Parkinson's Disease steadily decreased his ability to chew and swallow. [R. 143, 157, 166–67, 171–72]. After the 2007 stroke, Decedent lost nearly all ability to speak and began to lose the ability to ambulate without assistance or support. [R. 143, 157]. These strokes also left Decedent with generalized muscular weakness and paralysis. These effects continued and his abilities diminished over the ensuing years. [R. 143, 157, 166–67, 171–72].

As a result of these conditions, Decedent had to be monitored regularly for skin conditions, and moved and turned in different positions to avoid the development of bedsores. [R. 143, 157, 166–67, 171–72]. In addition, Decedent had bladder cancer, gallbladder disease, lost the ability to use both of his hands, was wheelchair bound, and needed assistance with all daily activities of living, including but not limited to dressing, toileting, bathing, eating, ambulating, and attending doctor's and other appointments. [R. 144, 158, 166-67, 171–72].

Due to his multiple disabilities and paralysis, Decedent was unable to assist with any personal hygiene. He was also unable to prepare any food for himself, feed himself or even use any utensils, or administer any medication to himself. [R. 144, 158, 166-67, 171–72]. Decedent also did not have the ability to fully control his bodily functions and was relegated to wearing adult diapers, which frequently

required changing. These changes often required not only a clean adult diaper, but also clean clothing items. [R. 144, 158, 166-67, 171–72]. In turn, his bedsheets and other laundry had to be washed, dried, and folded daily. Often, furniture would also need to be cleaned, too. Clean bedsheets were replaced on decedent's bed each day in preparation for his night's sleep. [R. 144, 158, 166–67, 171–72]. His condition was extreme, and his care was overwhelming and would be impossible and inconceivable for most people who are not trained professionals to undertake. [R. 144, 158, 166–67, 171–72].

B. Decedent's Care

Prior to her sudden and unexpected death in December 2009, Decedent's wife, Frances Maika, served as Decedent's primary caregiver. Philip Maika frequently assisted Mrs. Maika with Decedent's care following his 2003 strokes. [R. 144, 158, 166–67, 171–72]. In or about September 2009, Mrs. Maika fell down the stairs and injured her shoulder. She had surgery on her shoulder and was thereafter unable to help Philip with much of decedent's care. [R. 166–67, 171–72]. At approximately that same time, Anne Maika moved out of her condominium in McLean, Virginia (where she had been working in the sales division of a property management company), and moved to Manlius to help Philip Maika and Mrs. Maika to care for decedent. [R. 144, 166–67, 171–72].

Following Mrs. Maika's death, Decedent's twelve children discussed how to care for him. [R. 144, 158, 166–67, 171–72]. Mrs. Maika and Decedent always made it clear to each of their twelve children they did not want to live out their final years in a nursing home. [R. 144, 158, 166–67, 171–72]. Given Decedent's condition, none of the siblings believed he would live longer than a year. [R. 144–45, 158–59, 166–67, 171–72]. On February 5, 2010, approximately the same time as this discussion among the siblings, Decedent appointed five of them to serve as his co-Attorneys-in-Fact: Elizabeth Archbell, Maria Damjan, Andrea Phaup, Philip Maika and Margaret Gilbert. [R. 130–35].[1] Decedent's twelve children all recognized and fully acknowledged that placing Decedent in a nursing home would result in the depletion of his assets, including his residence in New York and his cottage in Canada, and that being confined to a nursing home facility would significantly diminish his quality of life and potentially shorten his life expectancy. [R. 145, 159].

Furthermore, availability of nursing facilities was very limited due to the severity of Decedent's disabilities. Although the children, including the co-Attorneys-in-Fact, investigated the possibility of hiring home health aides to care for and/or help care for Decedent, it quickly became apparent that there were not

[1] Ms. Gilbert resigned as an Attorney-in-Fact effective January 1, 2012, leaving only the remaining four (4) to serve. [R. 167, 172].

sufficient funds to hire full-time health aides earning fair market wages for their services. [R. 145, 159]. Since hiring home health aides was not an option and the children agreed that Decedent absolutely did not want to go into a nursing home, some of his children would need to care for Decedent in his home. [R. 145, 159].

Respondents agreed to continue living with Decedent as full-time co-caregivers. [R. 144–45, 158–59, 166–67, 1171–72]. Due to Decedent's multitude of serious health issues, he required care around the clock, every day of the year and could never be left alone. Respondents were doing the work of far more than just two people to meet Decedent's needs. [R. 144–45, 158–59, 166–67, 1171–72]. Respondents received training in January 2010 on how to care for Decedent from the Visiting Nurses of America.2 [R. 144–45, 158–59].

Together, Respondents provided all the care Decedent needed to survive and continue living in his home (where Ms. Archbell's mother-in-law had six aides), with only very limited help from others. Respondents frequently had to work together, and worked in shifts for the remainder of Decedent's care. [R. 146, 160, 173]. Due to the profound caregiving workload, Respondents were unable to seek any other gainful employment or other source of any significant income during the

2 In fact, the mother-in-law of Elizabeth Archbell (one of Decedent's daughters) was also suffering a medical condition at that time which required six home health aides working in shifts twenty-four hours per day to care for her, at an hourly wage of $12. Ms. Archbell's mother-in-law was in a significantly better condition than Decedent, since she was able to toilet on her own, only needed some assistance walking, weighed significantly less than Decedent, did not have paralysis of her hands and was not combative at times. [R. 173].

time they provided in-home care for Decedent (7½ years). [R. 146, 160]. During the time when Decedent still had the ability to ambulate with assistance, Respondents helped him to walk as much as possible, through the use of a walking gait belt and a "conga line" configuration to prevent Decedent from falling either forward or backward while ambulating, which was necessary due to his instability while walking and size and weight. [R. 146, 160]. Inasmuch as Decedent was unable to use a walker, he had to rely upon a wheelchair propelled by others any time he was outside of his home. [R. 146, 160, 168, 172]. As a result of all of these mobility challenges, and so both Respondents could stay apprised of necessary care for Decedent, they both accompanied him to all doctor's appointments. [R. 146, 160].

Respondents were also responsible for preparing three meals per day and assisting Decedent to eat those meals, as well as cleaning up after the meal. [R. 146, 160]. Due to Decedent's difficulties in chewing and swallowing, he could take up to two hours to eat a meal. By the time he was finished eating, his bib, chair, and the floor area around him usually required cleaning, due to these chewing and swallowing difficulties. [R. 146, 160]. In the last several years of his life, the difficulties in swallowing had progressed to a level where all foods had to be of a soft texture and drinks thickened to avoid aspiration. [R. 146, 161]. During the final four months of Decedent's life, he required a feeding tube. Respondents had to properly dose the appropriate nutrition and other medications. To do so, they kept

detailed logs tracking what nutrition and medication were administered to Decedent during this period. [R. 147, 161].

In addition to all of the above responsibilities, Anne Maika also had to alter clothing to accommodate Decedent's disabilities and repair/sew clothing; clean toileting stations; do outdoor landscaping; read to Decedent; handle any and all correspondence on Decedent's behalf; and shovel snow from sidewalks. [R. 147, 161, 168, 172]. For his part, Philip Maika was responsible for other various chores and errands, including: mowing the lawn; removing ice dams from the roof; cleaning the chimney in both the subject property and the Canada cottage; cleaning the outdoor waterfront area of the Canada cottage for Decedent's use and enjoyment; maintaining the Canada cottage, including repairing a crack in the foundation pillar; patching leaks in the roof; painting the exterior of the house every four (4) years, cutting up and removing fallen trees from the Property; replacing a skylight, and all other home maintenance; maintaining both of Respondents' respective vehicles, including changing the oil, replacing the brakes and maintaining the engines; splitting thirteen cords of firewood each year to heat the Property; and buying and installing new hot water heaters when they required replacement. [R. 161–62, 168, 172].

Respondents also shared various tasks, such as: cleaning Decedent's house; doing other outdoor yardwork; accompanying Decedent to religious services;

engaging in games and other mentally stimulating activities to keep Decedent's mind active; assisting Decedent with physical therapy exercise or other workouts, based upon his abilities; helping Decedent practice speech-encouraging activities; and opening, maintaining, and closing Decedent's Canada cottage every season. [R. 147, 161]. Whenever possible, and weather permitting, Respondents also took Decedent on outings in the neighborhood and to local parks as often as possible. [R. 147, 161]. Additionally, Respondents took Decedent to his wilderness cabin in Canada every summer and fall. That endeavor involved packing all of Decedent's medical equipment necessary for his care and mobility, transporting him and everything necessary to his daily living, accompanying him to the cabin, and caregiving for him in this remote location. [R. 147, 161].

Above and beyond all of the above activities, Respondents also were responsible for all errands, including shopping for groceries (or picking them up from a local food pantry), dropping off and picking up dry-cleaning, and picking up prescriptions. Respondents also worked together to research and order all medical equipment necessary for Decedent's care. [R. 147, 162]. Decedent and all of his children, including Decedent's co-Attorneys-in-Fact were aware that Anne Maika was working approximately 10–12 hours per day and Philip Maika was working 14–16 hours per day, seven days per week, to care for Decedent during the 7½ year period. Any day involving a doctor's appointment necessarily involved additional

hours beyond their typical workdays. [R. 147, 162]. Philip Maika was responsible for morning shifts and assumed the tasks of getting Decedent out of bed, toileting, showering and dressing him for the day, and making and feeding him breakfast before beginning on other household chores and errands for the day. [R. 161–63].

As the caregiver responsible for later shifts, Anne Maika took care of Decedent's nighttime care, including assisting him with any needs throughout the night. [R. 148]. Based on the above daily schedules, Anne Maika worked approximately 75–78 hours per week caring for Decedent. By April 2012 and continuing through July 2017, this increased to approximately 84 hours per week. [R. 148]. In turn, Philip Maika worked over 100 hours per week caring for Decedent, running his errands, and maintaining his properties. [R. 162]. By their uncontroverted calculation, Anne Maika worked in excess of 31,800 hours, and Philip Maika worked in excess of 38,000 hours providing caregiving services to Decedent. [R. 147, 162].

C. Demands for Compensation

In 2011, Anne Maika approached Decedent's Attorneys-in-Fact regarding the matter of compensation. After over a year of providing caregiving services to Decedent, to the exclusion of any other source of income, Respondents needed to be paid for costs of daily living because it was unreasonable and impossible to continue providing these services without some compensation. [R. 147, 162]. A majority of

the Attorneys-in-Fact agreed that it was unreasonable to expect Respondents to work without compensation and the Attorneys-in-Fact agreed to partially compensate Anne Maika $300 per month (the equivalent of less than $1.00 per hour for the services she was providing), which came from government funding received by Decedent and the only liquid funds available at that time for compensation. Unfortunately, there were no further liquid assets or additional income from which to pay Philip Maika at that time for his caregiving services. [R. 147, 163].

At no point did the Attorneys-in-Fact indicate the $300 monthly payment to Anne Maika was adequate or the only compensation to which either she or Philip Maika were entitled. [R. 148]. The lack of funds to adequately compensate Respondents severely limited their ability to engage in respite time, social events, religious pursuits, or other activities. [R. 148, 163]. As a means of acquiring basic necessities of living, Anne Maika was forced to apply for public assistance in the form of subsidies for utility bills, food stamps and Medicaid for health insurance. Philip Maika simply went without his own health insurance for many years and was unable to afford his own healthcare. [R. 148, 163, 168, 173].

Throughout the 7½ years Respondents were providing caregiving services to Decedent, they did not make any contributions to their own social security, thereby negatively impacting their ability to care for themselves in retirement when they would ordinarily qualify for such benefits. [R. 148, 163]. During this time, both

Respondents also depleted all savings they had accumulated before 2010. [R. 148, 163]. As the years passed and Decedent's state of health decreased, thereby making the work even more difficult and time-consuming, compensation for Respondents was a frequent topic of conversation between the Attorneys-in-Fact and Respondents. [R. 148, 169, 174].

Decedent was so destitute, he was also unable to keep up with his own cost of living, and once his liquid assets were depleted, both the Canada property and the subject property fell in arrears on property taxes. Ms. Archbell generously paid Decedent's property taxes to avoid tax foreclosure so he and his caregivers could remain in his home. [R. 148]. Several of Decedent's children expressed a desire that Respondents be compensated for their services. [R. 169].

Decedent's Attorneys-in-Fact, bound to act as a majority, discussed more and more how Decedent might compensate Respondents for providing him with caregiving services for so many years, but the Attorneys-in-Fact were unable to devise a viable solution. [R. 169, 174]. The Attorneys-in-Fact considered a reverse mortgage on the Property, but rejected that option because it likely would mean the Property would belong to a bank upon Decedent's death. [R. 169, 174]. Essentially, Decedent's only assets were the Property and the cottage in Canada. He had no available income to compensate Respondents. [R. 169, 174].

In late 2016 or early 2017, Maria Damjan (one of the disinterested Attorneys-

in-Fact) recommended to the other co-Attorneys-in-Fact that Decedent transfer the Property to Respondents as compensation. [R. 169]. In 2017, after more than seven years of providing extreme care to Decedent, a majority of his then-acting Attorneys-in-Fact, on his behalf, in his stead and under the legal guidance of an experienced attorney, transferred the Property located at 4978 Fayetteville-Manlius Road, Manlius, New York, to Respondents as compensation for their past and anticipated future services to decedent. [R. 163, 169, 175]. Further, the attorney understood the transfer was not a gift by Decedent, but instead was in exchange for the extreme caregiving Respondents provided to Decedent during that period. [R. 169, 175].

The value of the services Respondents provided to Decedent greatly exceeded the value of the Property transferred to them as compensation. [R. 150–56, 164]. Additionally, Decedent retained a life estate in the Property when the transfer was made, so only the remainder interest, or a lesser value than the whole, was actually transferred to Respondents. [R. 139-42].

By comparison, twenty-four-hour in-home care costs between $17,000 and $20,000 per month, or approximately $220,000.00 annually. These hourly rates would have been higher for Decedent due to his multiple and severe disabilities. [R. 150–56, 164]. Furthermore, live-in home health aides and caregivers typically receive room and board as part of their compensation package, in addition to hourly wages. [R. 150, 164]. The cost of such hired in-home health aides for the 7½ years

Respondents provided caregiving services to him would have exceeded $1,650,000.00. [R. 150, 164].

Between January 2010 and July 2017, Anne Maika received a total of $98,650 as compensation for caring for Decedent, which is calculated as the sum of her one-half interest in the Property ($77,500)[3] and the $300 monthly payments she received (totaling $21,150). [R. 150–56, 164]. For his caregiving services during that same period, Philip Maika received $77,500 as compensation for caring for Decedent, i.e., his one-half interest in the Property. [R. 152–56, 164]. Based upon the hours Respondents worked caring for Decedent and this total compensation, Anne Maika's hourly wage during this 7½-year period was approximately $3.10, and Philip Maika's was less than $2.03. [R. 150–56, 164]. It is respectfully submitted no reasonable person would provide the herein-described caregiving services for 7½ years without expectation of compensation, and that there was a valid transfer of the Property from Decedent to Respondents as compensation for the services provided.

D. The Instant Proceeding

The Deputy Public Administrator, as duly appointed representative of Decedent's Estate, commenced this proceeding by filing a Verified Petition on or about December 11, 2018.[4] [R. 35–57]. In that Petition, Appellant alleged the

3 A certified appraisal of the Property obtained in 2019 found the fair market value of the Property, in fee simple, to be $155,000. [R. 537].

4 No will was offered for probate, but Appellant proffered, as an exhibit to the affidavit of

Property was improperly transferred to Respondents by Decedent's Durable Power of Attorney by deed dated March 28, 2017. The Petition further asserts the Power of Attorney instrument did not authorize the Attorneys-in-Fact to make gifts of Decedent's property, nor did it authorize the Attorneys-in-Fact to receive compensation for their services *qua* Attorneys-in-Fact. [R. 37].

Issue was joined on or about January 28, 2019, by the filing and service of Respondents' Verified Answer. [R. 58–67]. Respondents admitted title to the Property was transferred to them by Decedent's Attorneys-in-Fact, but denied all other material allegations. Respondents asserted various affirmative defenses, including that there was an implied contract with Decedent, and the property was validly transferred as compensation for caretaking services. [R. 58–67].

At the close of discovery, Respondents moved for summary judgment dismissing the Petition. [R. 8]. Appellant filed a threadbare opposition to summary judgment based upon purported questions of fact [R. 176–82] and an affidavit of Respondents' sister (which Appellant declined to even vouch for) entirely comprised of speculative and hearsay statements [R. 183–200], but did not cross-move for

---

Respondents' sister, a copy of Decedent's Will from 1971. [R. 194–95]. In the absence of an original of said Will, it is presumed to have been revoked or destroyed. *In re Fox's Will*, 9 N.Y.2d 400, 407 (1961). In any event, this Will predated Decedent's ill-health, Respondents' homecare, and the compensatory transfer of the Manlius Property by decades, and therefore cannot be deemed reliable evidence of any intent on the part of Decedent. Appellant advanced no evidence, admissible or otherwise, that Decedent's estate plan from 1971 remotely reflected his desires over forty (40) years later.

summary judgment. Respondents' motion was heard on March 13, 2020. [R. 230-253]. At the close of oral argument, and on the eve of the pandemic shutdown of the New York Unified Court System, Hon. Spencer Luddington, A.J.S.C., issued an oral decision wherein he denied Respondents' motion for summary judgment, and searched the record to grant summary judgment *sua sponte* in favor of Appellant. [R. 230–53]. Based on this decision, the Court rendered an Order dated March 20, 2020. [R. 4–6].

The Appellate Division, Fourth Department—with a two Justice dissent—reversed and granted summary judgment in favor of Respondents. Recognizing the existence of an agreement by disinterested Attorneys-in-Fact to transfer the Property, the majority held that "[e]ven assuming, arguendo, that the presumption [that services were rendered in consideration of love and affection, without expectation of payment] applies to the inter vivos transfer at issue here… we conclude that respondents supported their motion with 'clear, convincing and satisfactory evidence[ ] that there was an agreement… that the services would be compensated.' " [R. 255]. Specifically, the Fourth Department determined that the affidavits of the disinterested Attorneys-in-Fact were sufficient to rebut this presumption because: (1) "[e]ach averred that the transfer was intended to compensate respondents for their continued care of decedent"; and (2) "[e]ach further averred that she agreed to the transfer knowing that it would diminish her

own share of decedent's estate." [R. 255].

The dissenting Justices, however, overlooked that a majority of the disinterested Attorneys-in-Fact approved the transfer in concluding that Respondent Philip Maika's "action or vote [was] necessary to approve a transfer of property," and, therefore, Respondents "must rebut the presumption with evidence of the parent's intent to transfer the property as compensation." [R. 256]. Further, the dissenting justices characterized the affidavits of the disinterested Attorneys-in-Fact as merely containing hearsay statements, and instead credited the speculative and hearsay affidavit of a sibling who was not even an Attorney-in-Fact and did not aver to being present for the vote on whether to transfer the real property. [R. 256].

Based upon the clear evidence of Decedent's intent that the siblings devise a way to care for him without placement in a nursing home, and that the Attorneys-in-Fact (including two disinterested Attorneys-in-Fact) determined that this intent could best be furthered by conveying the Property to Respondents as compensation for their tireless work, Respondents submit that the Appellate Division, Fourth Department's decision granting them summary judgment should be affirmed.

ARGUMENT

POINT I

THE JUNE 3 DECISION SHOULD BE AFFIRMED BECAUSE A MAJORITY OF DISINTERESTED ATTORNEYS-IN-FACT APPROVED THE TRANSFER OF THE PROPERTY TO RESPONDENTS AS COMPENSATION FOR THEIR LONG-TERM CARE SERVICES

The dissenting Justices reasoned that "it is our view that, when an attorney-in-fact child, whose action or vote is necessary to approve a transfer of property allegedly as compensation for services rendered to a parent, is an interested party who stands to receive such alleged compensation, the attorney-in-fact child must rebut the presumption with evidence of the parent's intent to transfer the property as compensation." [R. 256]. In reaching this conclusion, the dissent principally relied upon cases involving pure self-dealing where the attorney-in-fact acted alone in conveying property to him- or herself (*i.e.*, *In re Estate of Naumoff*, 301 A.D.2d 802, 804 [3d Dep't 2003]; *Mantella v. Mantella,* 268 A.D.2d 852 [3d Dep't 2000]), or where the decedent's child made a claim of compensation for him- or herself against the estate (*i.e*., *In re Estate of Barr*, 252 A.D.2d 875, 877 [3d Dep't 1998]; *In re Estate of Wilson*, 178 A.D.2d 996, 997 [4th Dep't 1991]; *In re Adams' Est.*, 1 A.D.2d 259, 261 [4th Dep't 1956], *aff'd sub nom. In re Will of Adams*, 2 N.Y.2d 796 [1957]). In other words, the presumption of impropriety which the dissenting Justices applied arises where the attorney-in-fact acts alone and without the consent of disinterested parties. *See Mantella,* 268 A.D.2d at 852–53. Should the proponent of the transfer

rebut the presumption of impropriety with evidence that the transfer was compensation for services rendered, then a second presumption—that services rendered to a family member or member of the household were provided out of love and affection—must be rebutted. *Id.*

On this Record, however, neither presumption is applicable because the Attorneys-in-Fact acted as a committee, and the conveyance of the Property was approved by a majority of the disinterested Attorneys-in-Fact.[5] To this end, "the scope of authority granted under a power of attorney is governed by the terms of the power of attorney itself, and, of course, the applicable law." *In re Goetz*, 8 Misc. 3d 200, 203 (Sur. Ct., Westchester Cnty. 2005) (citing, *inter alia*, *Cymbol v. Cymbol*,

5 Appellant claims, without authority, that all three disinterested Attorneys-in-Fact were required to vote in favor of the transfer, rather than a majority of the disinterested Attorneys-in-Fact. (App. Br. at 17–18). The principle Appellant proposes is not based in the case law of transactions involving interested parties, and is, in fact, directly contrary to New York cases relating to votes of boards with interested members. *See e.g., Rapoport v. Schneider*, 29 N.Y.2d 396, 402 (1972); *Pallot v. Peltz*, 289 A.D.2d 85, 86 (1st Dep't 2001) ("A determination of whether a board is properly disinterested at the time a transaction is voted on turns on whether the majority, not the minority, of the board participating in the vote was disinterested and independent"). By Appellant's reckoning, the Attorneys-in-Fact would have been unable to act at all in any matter where two of them were interested, as no majority could be had even if the disinterested Attorneys-in-Fact were unanimous, regardless of if the transaction were in Decedent's best interest. *See also Giuliano v. Gawrylewski*, No. 654215/2012, 2013 WL 3497611, at *9 (Sup. Ct., NY Cnty. June 27, 2013), *aff'd*, 122 A.D.3d 477 (1st Dep't 2014) (noting that under Delaware business corporation law, a board of directors may authorize a contract or transaction by a vote of the disinterested directors, even if the disinterested directors are less than a quorum); *Maldonado v. Flynn*, 597 F.2d 789, 795 (2d Cir. 1979) ("We need not reach the question of whether these circumstances would require that Woolcott be classified as an interested director since even if his vote were disregarded, a majority of the disinterested directors present would still have approved the resolutions."). Absent any contrary authority in the context of a Durable Power of Attorney, it is submitted similar principles as those involving interested directors serve as persuasive direction for the High Court.

122 A.D.2d 771, 772 (2d Dep't 1986)); *see In re Estate of Ferrara*, 7 N.Y.3d 244, 247 (2006) (General Obligations Law, article 5 "specifies the powers that [a statutory short form power of attorney] may authorize and defines their scope"). Although any unwritten agreement to compensate for lifetime services *postmortem* is void under New York law, no such prohibition exists for agreements pursuant to which compensation is provided during the decedent's lifetime. *See In re Estate of Albin*, 35 Misc. 2d 322, 325–26 (Sur. Ct., Suffolk Cnty. 1962); *In re McGrath's Est.*, 71 N.Y.S.2d 853, 856 (Sur. Ct., Monroe Cnty. 1947).

In the case at bar, Decedent duly executed a "Power of Attorney New York Statutory Short Form" on February 5, 2010.[6] [R. 130–38]. That Durable Power of Attorney granted broad authority to the Attorneys-in-Fact to enter into a variety of transactions and "all other matters" on behalf of Decedent. [R. 130-31]. However, no single agent had authority to act alone, but instead only a majority of the Attorneys-in-Fact could act "to carry out any authority… granted to them." [R. 131]. Following Mrs. Maika's untimely death in December 2009, Decedent's twelve children held a meeting around the dining room table to discuss how to care for Decedent. [R. 150, 163, 169, 175]. It was agreed among all involved that Respondents would live with Decedent to provide him with the twenty-four-hour

6 Contrary to Appellant's contention (App. Br. at 26–28), the Fourth Department did not "ignore" that Decedent did not execute a gift rider. Respondents' position and the June 3 Decision are clear that the basis of the transfer was compensation for years of caretaking services, not a gift. [R. 255].

care he required. [R. 150, 163, 169, 175]. All twelve children believed Decedent would likely live less than one year. [R. 150, 163, 169, 175].

After Respondents cared for Decedent for over a year, including washing, toileting and feeding him every day, Anne Maika specifically addressed with the Attorneys-in-Fact the need for compensation for the extreme work she and Philip Maika were doing for Decedent. [R. 148-49, 169, 174]. Decedent, through his Attorneys-in-Fact, originally agreed to partially compensate Anne Maika $300 per month and nothing to Philip Maika, as these were the only liquid assets Decedent had available. [R. 150].[7] After four or five years of these continuing services (at nearly 10,000 working hours combined per year), the Attorneys-in-Fact, on behalf of Decedent, again began discussing how Decedent might compensate Respondents for their years of caregiving services. [R. 150, 163, 169, 175]. During these ongoing discussions, various options were considered (such as a reverse mortgage), but none was satisfactory. [R. 169, 175].

Since Decedent's only assets were the Manlius Property and the Canada cottage, the Attorneys-in-Fact agreed to transfer the former to Respondents in exchange for the years of service they provided to Decedent and were anticipated to

7 At no time has the Estate challenged this compensation to Anne Maika during Decedent's lifetime in exchange for her caregiving services. Under Appellant's unsupported theories, the ability for the Attorneys-in-Fact to compensate Anne Maika for her services, unchallenged, but not Philip Maika due to his status as a member of the committee of Attorneys-in-Fact (notwithstanding a majority vote of disinterested members), would create an unjust dichotomy.

continue providing. [R. 148–50, 163, 169, 175]. Three of the four Attorneys-in-Fact (including two of three disinterested Attorneys-in-Fact) voted to approve the transfer to Respondents. [R. 148–50, 163, 169, 175]. A deed conveying title to the Manlius Property to Respondents was executed by the Attorneys-in-Fact and recorded in March 2017, nearly four months before Decedent's death. [R. 148–50]. It is respectfully submitted that this transfer, as *inter vivos* compensation by Decedent to Respondents for their years of caregiving services, was pursuant to a valid and fully-performed agreement between the parties.

Under these facts, Appellant's reliance on *Mantella v. Mantella*, 268 A.D.2d 852 (3d Dep't 2000), is inapposite. In that case, the defendant made a gift to himself as sole power-of-attorney, thus invoking the presumption of impropriety. *See id*. at 852–53. In an attempt to rebut that presumption, the defendant claimed the transfer was consideration for services rendered, and that such payment was intended by the decedent. *Id.* However, the defendant was only able to offer the inadmissible hearsay of the decedent to support his own contentions. *Id.* The decedent had allegedly promised to "help him with his expenses" in exchange for caring for the decedent. *Id.* Notwithstanding the clear evidentiary problems presented by this self-serving affidavit, the Court also found such vague promises were insufficient to conclude the decedent intended that the defendant transfer the property to himself. *Id.*

By contrast, there is undisputed proof here from three of Decedent's four co-Attorneys-in-Fact of the intent to compensate Respondents for their caregiving services. [R. 163, 169, 175]. Philip Maika could not have acted alone to compensate himself, as did the defendant in *Mantella*, thereby raising a presumption of impropriety. Since Decedent was unable to speak in these final years, he had to rely upon his co-Attorneys-in-Fact to act in his best interest, including avoiding nursing home confinement, consistent with his expressed wishes, which are uncontroverted or challenged in this Record. [R. 143, 157]. Inasmuch as Decedent undoubtedly benefited from being able to stay in his own home during these final 7½ years of his life, without losing all of his assets to the cost of nursing home care or claims by the Department of Social Services against his Estate for amounts paid for his long-term care through Medicaid, compensating Respondents for their extreme services was consistent with Decedent's desires.

Under the dissent's wooden application of *Mantella*, the Attorneys-in-Fact would be powerless to effectively utilize Decedent's meager assets to effectuate Decedent's expressed desire to avoid a nursing home or otherwise benefit Decedent in his advanced state. As demonstrated above, the cost of the round-the-clock care Decedent required greatly exceeded his assets. As it was, Respondents impoverished themselves to care for Decedent, with their principal compensation being the Property. Moreover, Decedent was, by this point, incapable of verbalizing

a present intent. [R. 143, 157]. Without other options, *a majority of the Attorneys-in-Fact, including a majority of the disinterested Attorneys-in-Fact*, approved the conveyance of the Property to Respondents, the value of which was only a small fraction of the value of Respondents services. Under the circumstances, it is clear the relevant intent which the Court should consider is that of the disinterested Attorneys-in-Fact in acting in Decedent's best interest. Respondents have clearly demonstrated that Ms. Damjan and Ms. Archbell intended to convey the Property to Respondents as compensation.

Similarly, the Fourth Department's decision in *Wilson*, upon which Appellant relies heavily, is clearly distinguishable. In that case, the petitioner, decedent's son, made a claim against the estate for caretaking services rendered in the final years of the decedent's life. *Wilson*, 178 A.D.2d at 996–97. The petitioner's proof, however, did not establish that the decedent—or any attorney-in-fact—expressly consented to the proposed charges for caretaking. *Id.*, at 997. Moreover, the Appellate Division reasoned that a review of the record demonstrated that the petitioner's testimony was contradicted by other evidence and inherently incredible. *Id.* Here, the uncontroverted evidence established that the transfer was approved by two of the three disinterested Attorneys-in-Fact. Accordingly, the June 3 Decision should be affirmed.

POINT II

RESPONDENTS' UNDISPUTED PROOF OVERCOMES ANY PRESUMPTION

Should this Court determine the presumptions of impropriety or that lifetime services were provided out of love and affection apply, notwithstanding the transfer being approved by a majority of the disinterested Attorneys-in-Fact, it is respectfully submitted the undisputed evidence overcomes such presumptions.

It has long been the case in New York that "courts regard with suspicion and disfavor claims brought against an estate for personal services rendered by relatives, especially where the latter are members of decedent's household, as the presumption is that such services between persons occupying such relationship are intended to be gratuitous." *In re Estate of Long*, 144 Misc. 181, 186–87 (Sur. Ct., Livingston Cnty. 1932) (citing *Collyer v. Collyer*, 113 N.Y. 442, 449, 68 Sickels 442, 449 (1889)); *accord In re Estate of Wilson*, 178 A.D.2d 996, 997 (4th Dep't 1991); *In re Sypian's Will*, 114 N.Y.S.2d 587, 590 (Sur. Ct., Monroe Cnty. 1952), *aff'd*, 281 App. Div. 1072 (4th Dep't 1953); *Seaman v. Jamison*, 158 App. Div. 832, 835 (2d Dep't 1913); *In re Estate of Dashnau*, 194 Misc. 156, 161 (Sur. Ct., Oswego Cnty. 1948) (finding existence of agreement between daughter and decedent, notwithstanding the Court's lack of sympathy to "exorbitant claims made against estates after death has effectively sealed the lips of the person against whom payment is sought"); *In re Jones' Est.*, 70 N.Y.S.2d 739, 742 (Sur. Ct., Madison Cnty. 1947); *In re Estate of*

Parker, 69 Misc. 136, 138 (Sur. Ct., Cattaraugus Cnty. 1910). Such presumption can be rebutted by "clear, convincing and satisfactory evidence[] that there was an agreement, express or implied, that the services would be compensated." *Estate of Wilson*, 178 A.D.3d at 997.

The case of *In re Sypian's Will*, 114 N.Y.S.2d 587 (Sur. Ct., Monroe Cnty. 1952), *aff'd*, 281 App. Div. 1072 (4th Dep't 1953), is illustrative of the manner in which this presumption may be rebutted. In that case, the decedent was the mother of at least eight children. At the time decedent became seriously ill, her daughter Olga was living with decedent, but was "drinking excessively." *Id.* at 589. The Court noted that "it appears that none of [decedent's] children could find it convenient to care for her." *Id.* Another of decedent's daughters, whose marriage had broken up, was living independently, and working in California for some time before her mother became ill. *Id.* The decedent requested this daughter give up her position in California and move back to Rochester to care for decedent. *Id.* Realizing the sacrifice her daughter would be making, decedent assured her daughter "that she would compensate [her] for it. How was not stated." *Id.* The daughter "promptly quit her job in California, sold and gave away much of her apartment furnishings… and took the train to Rochester." *Id.* Upon her arrival, she "immediately began to keep house for and to care for [decedent], and continued doing so until [decedent's] death," some twenty-seven (27) weeks later. *Id.* "Part of this time [decedent] was

unable to control herself, and [the daughter's] duties in this respect became 'onerous and repulsive', and were rendered twenty-four hours each day seven days per week, except for time out to sleep." *Id.* at 590. Following her mother's death, the daughter made claim against the estate on an implied contract to pay the fair and reasonable value of her services. *Id.* The Court found the daughter rebutted the presumption arising from the filial relationship and awarded her the fair and reasonable value of her services and reimbursement for expenses. *Id.* at 590–91. The Fourth Department unanimously affirmed these holdings. 281 App. Div. 1072 (4th Dep't 1953); *see also In re Estate of Curtis*, 83 A.D.3d 1182, 1183 (3d Dep't 2011) (finding decedent's daughter rebutted presumption through clear and convincing evidence that decedent agreed to pay daughter for home care after a series of strokes left decedent physically debilitated).

As set forth herein, there was in fact an agreement between Decedent, through Decedent's Attorneys-in-Fact, and Respondents for the provision of the caregiving services, fully performed during Decedent's lifetime. As recognized by the Fourth Department, the attestation to this agreement for services by Maria Damjan and Elizabeth Archbell rebuts any presumption of impropriety. [R. 169, 175]. Thus, this is <u>not</u> a case where Respondents make a *postmortem* claim against the Estate for services, and no presumption should apply. In any event, consistent with *Sypian's Will* and *Estate of Curtis*, the evidence overwhelmingly established such

presumption was easily rebutted. Anne Maika originally requested Decedent, through the Attorneys-in-Fact, compensate her for providing such services in 2011. [R. 149, 163]. *See In re Harvey's Will*, 15 A.D.2d 834, 224 N.Y.S.2d 767, 770 (3d Dep't 1962). Beginning in 2014 or 2015, the Attorneys-in-Fact began discussions of how Decedent might compensate Respondents for providing him with caregiving services for so many years. [R. 149–50, 163–64]. Since Decedent's only assets were the Manlius Property and the Canada cottage, the only options were to either mortgage a property or transfer title. [R. 149–50, 163–64]. The Attorneys-in-Fact specifically rejected a reverse mortgage. [R. 169, 174]. Ultimately, the Attorneys-in-Fact transferred title to the Manlius Property to Respondents in exchange for their past caregiving service and anticipated future services. [R. 148, 163, 168-69, 173-74].

There was at minimum a contract implied-in-fact, if not express between Decedent and Respondents. Alternatively, there was a contract implied-in-law based upon the overwhelming services Respondents provided to Decedent during this 7½-year period. Both Respondents sacrificed any personal or professional life for the entire 7½-year period they were providing caregiving services for Decedent. [R. 169,]. As a result of his multiple strokes, Decedent was "physically debilitated" and "unable to control [himself]," such that Respondents had to regularly engage in "onerous and repulsive" duties on a daily basis. [R. 148, 163, 169, 174]. *See Estate*

of Curtis, 83 A.D.3d at 1183; *Sypian's Will*, 114 N.Y.S.2d at 589–90. Given the extreme level of services and the length of time such twenty-four-hour care was provided, it is submitted Respondents had a reasonable expectation of compensation, as a matter of law, and there was also a contract implied-at-law.

Respondents' sacrifice and financial hardship was recognized by Maria Damjan and Elizabeth Archbell, and they, as disinterested Attorneys-in-Fact, intended the transfer of the Property to serve as compensation to make continued caretaking services possible. [R. 168-69, 174–55]. During this period, Decedent was non-verbal and suffered from diminished capacity, such that ascertaining Decedent's intent—as Appellant's wooden application of the case law would require—would not have been possible. Rather, this Court may look to the intent of the Attorneys-in-Fact, and particularly the majority of the disinterested Attorneys-in-Fact, to determine the intent of the transfer made on the Decedent's behalf. In this light, affidavits from three of the Attorneys-in-Fact[8] rebuts the presumption that 7½ years' round-the-clock care for Decedent was rendered only out of love and affection, and was instead intended to be compensated.

Thus, even if the Court found the above presumptions to apply (they should not, Point I, *supra*), Respondents' undisputed proof satisfied their burden to rebut the presumptions, and the June 3 Decision should be affirmed.

8 No affidavit of the fourth Attorney-in-Fact was submitted contradicting the three affidavits.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Appellant Division, Fourth Department's Memorandum and Order dated June 3, 2022, should be affirmed.

DATED: December 14, 2022

COSTELLO, COONEY & FEARON, PLLC

Daniel R Rose

DANIEL R. ROSE
Attorneys for Respondents-Respondents
Office and Post Office Address
211 West Jefferson Street, Suite 1
Syracuse, New York 13202
Telephone: (315) 422-1142
E-mail: drose@ccf-law.com

CERTIFICATE OF COMPLIANCE

PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally-spaced typeface was used, as follows:

Font: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations or certificate of compliance, etc. is 7879.