

**SURROGATE'S COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER**

In the Matter of the Application of Josephine Williams
as Preliminary Executor of the Estate of

DECISION and ORDER

SAVERIO P. TEDESCO,

File No. 2012-781/D

Deceased,

Pursuant to SCPA § 2103 to Discovery Property
Withheld.

WALSH - ACTING SURROGATE

In this contested turnover proceeding pursuant to SCPA 2103, petitioner Josephine Williams (Josephine), as executrix of the estate of her brother, Saverio Tedesco (decedent), moves pursuant to CPLR 3212 for summary judgment on her petition, and respondent Fordham University (Fordham) cross-moves for summary judgment dismissing the petition. Respondent Alma Fein (Alma) opposes Josephine's motion and supports Fordham's cross motion. For the reasons that follow, Josephine's motion is denied and Fordham's motion is granted.

The decedent was a retired attorney. He died on February 13, 2012, survived by the petitioner and two adult children of a predeceased brother, all of whom were the residuary beneficiaries of his approximately \$7 million estate. He had never married and had no children. He and Alma had a close, personal relationship for 47 years.

In 2009, the decedent established a charitable gift annuity with a \$100,000 gift to Fordham, naming himself as annuitant and Alma as successor annuitant. At that time, the decedent delivered a \$100,000 check to Fordham in anticipation of establishing the charitable gift annuity. He sent written instructions with the check requesting that Fordham

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not deposit it until the parties had executed written gift annuity agreements, and directed Fordham to return the check to him in the event the agreements were not executed. The parties eventually executed the required documents, Fordham cashed the check, and the decedent received payments under the annuity agreement.

Approximately two years later, on December 14, 2011, the decedent and Alma met with Pauline McDougall (Pauline), then the director of gift planning at Fordham, at Fordham's Rose Hill campus to establish another charitable gift annuity. The decedent had requested the meeting. During the meeting, the decedent tendered 3,561 shares of IBM stock to Fordham. Of the 3,561 shares, 875 shares were in the form of physical stock certificates, which the decedent gave to Pauline, and 2,686 were in the form of book shares held through Computershare, Inc. (Computershare). At the meeting, the decedent signed a stock power to transfer ownership of the physical stock certificates to Fordham and signed instructions to Computershare to transfer the ownership of the book shares to Fordham. During the meeting, Pauline illustrated the annuity payments and the interest rate the decedent would receive.

Following the meeting, Fordham liquidated the IBM stock and deposited the proceeds into its charitable gift annuity fund from which annuities to Fordham's charitable gift annuitants are paid. Although the decedent signed the instructions to Computershare for the transfer of the book shares on December 14, 2011, the transfer of the book shares took more time, and Fordham's subsequent liquidation of the book shares was not completed until December 27, 2011. Accordingly, as discussed at the December 14th

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meeting, two separate gift annuity agreements were needed, one for the gift of the 875 physical stock shares, made as of December 14, 2011, and the other for the gift of the 2,636 book shares, made as of December 27, 2011, the date the transfer of the book shares was completed.

On January 6, 2012, the decedent entered the hospital, where he remained, often on a ventilator, until his death on February 13, 2012. On or about January 23rd, while the decedent was in the hospital, Fordham sent drafts of the two written gift annuity agreements to his home. Alma signed the decedent's name on the gift annuity agreements and returned them to Fordham. Fordham then signed the agreements and returned a fully executed copy of each to the decedent. The drafts and final agreements provided that, with respect to the 875 shares, the gift amount was \$165,497.50 and the agreement was "as of" December 14, 2011, and, with respect to the 2,686 shares, the gift amount was \$497,232,32 and the agreement was "as of" December 27, 2011 (the date the transfer of the book shares was completed).

Josephine seeks summary judgment invalidating the December 14, 2011 and December 27, 2011 charitable gift annuity agreements on the grounds that (i) the decedent did not make a gift to Fordham because he lacked donative intent when he transferred the stock to Fordham; (ii) he did not intend for the transaction to be binding without a signed agreement; and (iii) he never signed the agreements. According to the petitioner, the essential terms of the annuity agreements were never presented to the decedent in final form at the December 14, 2011 meeting inasmuch as Pauline only presented calculations

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for a \$100,000 gift, with a cost basis of 50%, when the final amount of the gifts totalled \$662,729.82, with a cost basis of 29% for the 875 shares and 30% for the book shares.

Josephine asserts that Alma has admitted to forging the decedent's signature on the executed gift annuity agreements, since her defense to signing the decedent's name-- that she did so with the decedent's authorization--is, inter alia, barred by CPLR 4519 (the deadman's statute) and she did not have a power of attorney. She contends that Alma committed fraud-- that she knew from her presence at the December 14, 2011 meeting that she was the successor annuitant, that the value of the 3,561 shares was substantial, and that she therefore forged the decedent's name on the agreements without his knowledge at a time when he lacked capacity to enter into a contract.

In opposition, and in support of its motion for summary judgment dismissing the petition, Fordham asserts that the decedent intended to and did create a charitable gift annuity contract on December 14, 2011 when he delivered his IBM shares to Fordham together with the stock powers and instructions to Computershare to transfer ownership. In exchange, Fordham agreed to pay him an annuity for his lifetime and, upon his death, to pay Alma an annuity for her lifetime. Fordham also asserts that there is no evidence in the record that the decedent conditioned the creation of the charitable gift annuities on his signing written gift annuity agreements; that on December 14, 2011, the parties came to a full agreement on the terms of the charitable gift annuities; that Pauline advised the decedent that Fordham would liquidate the shares and transfer the proceeds to its gift annuity fund; that two charitable gift annuities would be created because completion of the

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transfer and subsequent liquidation of the book shares would take longer than the transfer and liquidation of the physical stock certificates; that the decedent named himself as the annuitant and Alma as the successor annuitant; and that the charitable gift annuities would be effective as of the date the stock was transferred into Fordham's name. Fordham also asserts that the record establishes that Pauline discussed the financial projections for the annuities, including the quarterly payments of annuities expected to be paid and the interest rate to be accorded.

In her affidavit in support of Fordham's motion for summary judgment, Alma joins in Fordham's recitation of the facts and law. In addition, she asserts that the decedent was "fine" when she saw him during his hospitalization and that she signed the gift annuity agreements at his request.

In further support of its motion for summary judgment dismissing the petition, Fordham asserts that the gift annuity agreements should be enforced as written, as they reflect the parties' agreement and comply with the Statute of Frauds. According to Fordham, even if Alma's signing of the agreements is deemed improper, the decedent's signature was not required because the objective evidence shows that the parties intended the contract to be binding, and the petitioner has failed to challenge the terms of the charitable gift annuities or the decedent's intent to enter into them.

In order to prevail on a motion for summary judgment, the moving party must submit sufficient evidence to show that there are no material issues of fact and that he is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

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[1986]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any genuine material issues of fact (*see id.*; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Such evidence generally consists of affidavits from persons having personal knowledge of the facts and/or documentary exhibits in admissible form which provide evidentiary proof that no genuine issues of fact exist, requiring a trial (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985] ; *Zuckerman v City of New York*, 49 NY2d at 562). The burden then shifts to the party opposing the motion to show the existence of triable issues of fact (*id.*). While a court must construe the facts in the light most favorable to the non-moving party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), mere conclusions, unsubstantiated allegations, or expressions of hope, are insufficient to defeat a summary judgment motion (*Zuckerman v New York*, 49 NY2d at 562).

By its terms, CPLR 4519 generally excludes testimony by an interested witness concerning a personal transaction or communication between the witness and the deceased only upon the trial of an action or a hearing on the merits (*see CPLR 4519; Phillips v Kantor & Co.*, 31 NY2d 307, 313 [1972]). Thus, evidence that might otherwise be excluded by CPLR 4519 may be considered in opposition to a motion for summary judgment (*see id.* 315). Where, however, such evidence is the sole evidence presented in support of the opposing party's claim, courts have held that it is insufficient to defeat a

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motion for summary judgment (*see Mantella v Mantella*, 268 AD2d 852,853 [3d Dept 2000]). The petitioner asserts that Alma's testimony that the decedent authorized her to sign the agreement is barred by CPLR 4519, and since that is the only evidence that the decedent authorized her to sign the agreements, it cannot be used here (*see Mantella v Mantella*, 268 AD2d 852). However, the court finds that her testimony is not necessary for purposes of determining these motions.

The determination of this motion and the cross motion requires the court to examine the nature of charitable gift annuities. A charitable gift annuity is a contract between a charitable institution and a donor whereby the donor agrees to make a gift to the charitable institution and the charitable institution agrees to pay an annuity to the donor (and sometimes, to a successor annuitant) for life (*see Hunter & Makens, Nonprofit Symposium: Securities Regulation of Fundraising Activities of Religious and Other Nonprofit Organizations*, 27 Stetson L. Rev. 473, 505 [Fall 1997] (Hunter & Makens)). A charitable gift annuity has also been described as part gift, part purchase of an annuity (*see "The Charitable Gift Annuity in Pennsylvania"*, 69 Pa Bar Ass'n Quarterly 165 [Oct 1998]). Unlike the usual annuity contract, a charitable gift annuity is primarily a method of gift-giving rather than an investment vehicle (*see Hunter & Makens at 507-508* ["The donors who enter into charitable gift annuities do not act to make a profitable return on an investment. Rather, they are acting because they support the mission of the charity, and donate their money to that end. . ."] [quoting from the congressional testimony of Barry P. Barbash, then director of the SEC's Division of Investment Management]). The gift portion of the

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charitable gift annuity is usually deposited by the charitable organization into a charitable gift fund, from which the institution pays annuities to its charitable gift annuity donors (see Hunter & Makens at 510). There is no corpus in which the annuitant has an interest or participation (*id.*), and thus the annuitant has no say in how the charitable gift annuity fund is invested.¹

Because the decedent did not sign the charitable gift annuity agreements, the court must look to ordinary principles of contract law in order to determine whether the charitable gift annuities between the decedent and Fordham are enforceable under the circumstances presented. Under New York law, an enforceable contract requires an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). All the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy, although if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result (*Kolchins v Evolution Mkts, Inc.*, 128 AD3d 47, 61 [1st Dept 2015] [citing Restatement of [Second] of Contracts § 24]). In determining whether parties entered into a contract, and what its terms are, courts look to the manifestations of their intent as gathered by their expressed words

¹ The superintendent of insurance in New York has discretion to issue special permits to charitable organizations which authorize the charitable organization to receive gifts upon its agreement to pay out an annuity to the donors and to make and carry out such agreements (see N.Y. Insurance Law § 1110). The charitable gifts assets must be segregated from all other funds of the organization (e.g., placed in a charitable gift annuity fund) and must be invested pursuant to EPTL 11-2.3 (see *id.*).

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and deeds (see *Flores v. The Lower East Side Serv Ctr*, 4 NY3d 363 [2005]).

While a contract need not be in writing, where a party "gives forthright, reasonable signals that it means to be bound only by a written agreement," that intention will be honored (*Kowalchuk v Stroup*, 61 AD3d 118, 123 (1st Dept 2009)). As the court in *Kowalchuk v Stroup* stated,

This rule has been explained as distinguishing between a 'preliminary agreement contingent on and not intended to be binding absent formal documentation,' which is not enforceable, and a 'binding agreement that is nevertheless to be further documented' which is enforceable with or without documentation. . . . The former is established by a showing that a party made an explicit reservation that there would be no contract until the full formal document is completed and executed.

(*id.* citing *Hostcentric Technologies, Inc. V Republic Thunderbolt, LLC*, 2005 U.S. Dist LEXIS 11130).

In determining whether parties had agreed to be bound absent an executed agreement, courts have considered the following factors:

1. Whether there has been an express reservation of the right not to be bound in the absence of a writing;
2. Whether there has been partial performance of the contract;
3. Whether all the terms have been agreed upon; and
4. Whether the agreement is the type of contract that is usually committed to writing

(see *Kowalchik v Stroup*, 61 AD3d at 123).

Applying the forgoing principles to the undisputed facts in this matter, the court finds that the decedent and Fordham entered into a valid contract for a charitable gift annuity at their meeting on December 14, 2011, to be memorialized in a written agreement at a later

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date. There is no evidence to support the petitioner's contention that the decedent did not intend to make a gift or that he tendered his stock solely to establish an annuity pursuant to a signed written agreement. The petitioner cites *Matter of Hicks*, 82 Misc 2d 326 [1975] for the proposition that delivery of stock certificates does not prove donative intent. In that case, the decedent handed an envelope containing stock shares to his dinner host. The court stated that delivery of possession, alone, was insufficient to find a gift and noted that a gift is the present passing of title (*id.* at 678). In the instant case, the decedent, an experienced attorney, did just that. He clearly manifested his intention to make a gift of the stock to Fordham when he signed all the documents necessary to transfer ownership of the stock to Fordham, knowing that Fordham intended to liquidate the stock. Indeed, as Pauline's testimony shows, both parties knew that the actual gift amount would not be known until Fordham had liquidated the stock, at which time, of course, it would not have been able to return the stock. In this regard, the decedent's actions at the December 14th meeting stand in sharp contrast to the 2009 transaction when he expressly requested that Fordham return the check in the event the parties did not execute the gift annuity agreement.

The record shows that there was a meeting of the minds on December 14, 2011 that the decedent made a gift to Fordham in exchange for Fordham's agreement to pay him an annuity for his life and thereafter to pay Alma an annuity for her life. Contrary to the petitioner's contentions, these were the essential terms of the agreement, and the decedent performed his part of the bargain. Had he not intended to be bound until a written

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agreement was executed, he could have liquidated the stock himself and delivered a check to Fordham to hold until the agreements were executed (as he had done in 2009). Moreover, a review of the final gift annuity agreements further demonstrates that the essential terms were in fact reached on December 14th: the shares of IBM stock that the decedent gave were identified at the meeting; the decedent transferred ownership of them by delivering and signing the stock power for the 875 shares and executing the instructions to Computershare to transfer ownership of the book shares; the annuitants were identified; the timing of the annuity payments (quarterly) was discussed.

Although the petitioner contends that the essential terms were not reached in the December meeting because the parties did not know the exact amount of the gifts or the cost basis for the stock, and the decedent did not see the final numbers, the court finds that these were not essential terms of the parties' contract. Both parties understood at the December 14th meeting that the exact amount of the annuity could not be determined until Fordham (exercising its ownership of the shares) liquidated the stock. Since that liquidation necessarily would come after the transfer of the shares, the exact amount of the gift could not have been an essential term. Moreover, the decedent, an experienced attorney who had retired from IBM where he had worked for many years, had reason to know the approximate value of his gift on December 14th, as well as his cost basis. His transfer of the stock clearly manifests his intention to enter into the charitable gift annuity at the meeting.

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Having determined that the parties entered into a valid contract on December 14, 2011, the next issue is whether the contract is enforceable. The Statute of Frauds provides that every agreement is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged, if such agreement "[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime" (see GOL § 5-701 [1]). Both parties agree that the charitable gift annuity agreements are governed by the Statute of Frauds, because, by their terms, the agreements continue beyond the lifetime of the decedent.

To be enforceable under the Statute of Frauds, the agreement need not be signed by both parties, but must be signed by the party to be charged (see *European Am. Bank & Trust, Co. v Boyd*, 131 AD2d 629, 631 [2d Dept 1987]; *Matter of Bonnard*, 2010 NY Slip Op 32516 [U]). According to the petitioner, the decedent (who never signed the agreement) was a party to be charged because, as the purchaser of the annuity contracts, he was financially exposed, not Fordham, as the annuities involved only his monies. However, once he transferred his stock to Fordham, the decedent had performed his part of the contract; he was exposed only if Fordham failed to pay him (and then Alma) an annuity. As Pauline testified, and as shown by the fact that State Street Global Advisors, Fordham's agent for its gift annuities fund, paid the December 2011 annuity on the gift of the 875 shares, Fordham become obligated upon its acceptance of the stock gift. Fordham paid the annuity that was due in December 2011 to the decedent, and has continued to pay the annuities to Alma, as the successor annuitant, pursuant to the parties agreement.

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The Statute of Frauds was designed to prevent the enforcement of unfounded claims, not to afford a party a bar to enforcement of a contract freely and fairly made (see *Morris Cohon & Co. V Russell*, 23 NY2d 569, 574 [1969]). Invalidating the charitable gift annuity agreements would negate the decedent's wishes as expressed by his gift of stock to Fordham. The court finds that the written gift annuity agreements, memorializing the parties' December 14th agreement and signed by Fordham, the party having the obligation after the decedent had gifted his stock, are valid and enforceable under the Statute of Frauds.

For the foregoing reasons, Fordham's motion for summary judgment dismissing the petitions is granted, and the petitioner's motion for summary judgment is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

The following papers were considered on this motion:

Amended notice of motion for summary judgment, dated November 17, 2015; affirmation of Donald Novick dated November 16, 2015 and exhibits; affidavit of Dr. Debabrata Dutta, sworn to on-December 8, 2014; affidavit of Omar Gonzales, sworn to January 9, 2015;

Memorandum in opposition;

Reply affirmation of Donald Novick dated December 14, 2015 and exhibits;

Notice of motion for summary judgment, affidavit of Christopher Houlihan Esq, sworn to November 23, 2015 and exhibits; memorandum of law; affidavit of Alma Fein sworn to November 23, 2015 and exhibits; affirmation of Frank Streng dated December 7,


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2015;

Affirmation in opposition, dated December 8, 2015 and exhibits; and

Reply memorandum of law and reply affidavit of Christopher Houlihan sworn to December 14, 2015 and exhibits; and reply affidavit of Alma Fein sworn to December 7, 2015.

Dated: White Plains, NY
March 24, 2016


HON. THOMAS E. WALSH II
Acting Westchester County Surrogate

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