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Matter of Rodman
2012 NY Slip Op 52367(U)
Decided on December 28, 2012
Sur Ct, Bronx County
Holzman, J.
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Decided on December 28, 2012

Sur Ct, Bronx County

In the Matter of the Estate of Harry Rodman, Deceased.

2008-974/A

The appearances are as follows:

Sweeney, Gallo, Reich & Bolz, LLP, (Gerard J. Sweeney, Esq., Frank Bolz, Esq., Michael J. Dowd, Esq., of counsel) for David Gould, petitioner-co-executor

Bleakley, Platt & Schmidt, LLP (Vincent Crowe, Esq. & Michael Benenati, Esq., of counsel) for Alan Bronstein and Aurora Gems, Inc., respondents

Lee L. Holzman, J.

In this SCPA 2103 proceeding the petitioning co-executor

David Gould, a grandnephew of the decedent, seeks to set aside the transfer by the decedent of his 50% interest in the respondent Aurora Gems, Inc. to the other respondent, the decedent's stepson Alan Bronstein (collectively, the respondents). After a 10-day bench trial the parties submitted post-trial briefs. Prior to reviewing the testimony of specific witnesses, pertinent facts gleaned from documents in evidence or apparently uncontested will be noted.

The decedent and Bronstein incorporated Aurora Gems in 1986 for the purpose of buying and selling diamonds and gemstones. The same number of shares were issued to the decedent and Bronstein, the only shareholders. The primary tangible assets of Aurora Gems are two collections of fancy colored diamonds known as the "Pyramid of Hope" and the "Butterfly of Peace," and both collections have been prominently exhibited in many museums around the world. The decedent provided the funds to purchase most of the diamonds that comprise the collections and Bronstein selected all of the diamonds. Bronstein's mother, Jeanette, was Aurora Gems' bookkeeper and, after the decedent's first wife died, the decedent married Jeanette in August, 2001. The transfer at issue occurred on or about October 6, 2006, about one year and four months before the decedent's death at the age of 99 on February 24, 2008. The decedent was the first president of Aurora Gems and Bronstein became president on October 7, 2002.

The petitioner contends that Bronstein, as president of Aurora Gems, had a confidential relationship with the decedent that gives rise to a fiduciary duty requiring the highest degree of loyalty. The petitioner argues that, as at the time of transfer the decedent was represented by an attorney who was also representing both of the respondents, the attorney, at the very least, should have obtained a waiver of his conflict of interest from the decedent prior to speaking to Bronstein about the transaction. The petitioner concludes that in view of these circumstances, coupled with the fact that the decedent did not receive compensation that comes close to the true value of the diamond collections, the transfer was unconscionable and should be set aside on that ground. The petitioner also contends that in light of the confidential relationship with the decedent, Bronstein failed to meet his burden of establishing a valid lifetime gift because: (1) the decedent never intended [*2]to make a gift of his interest in Aurora Gems to Bronstein; and, (2) the transaction was the product of overreaching, undue influence and fraud by Bronstein.

The respondents counter that the transfer was an arm's-length transaction for value and

at all times the decedent was competent. Further, they argue that in exchange for the transfer of his interest in Aurora Gems the decedent received fair consideration; i.e., $10,000 and an interest-bearing note in the sum of $1,784,167. In the alternative, the respondents contend that in the event that the court finds that the agreement was invalid for insufficient consideration, the difference between the amount that the decedent received and the value of his interest in the corporation should be deemed a partial gift to Bronstein. In essence, the respondents argue that the transfer accomplished the decedent's objective to transfer his interest in Aurora Gems to his stepson, who the decedent treated like a son even prior to his second marriage, and to whom the decedent always intended to give his interest in Aurora Gems.

The decedent's will dated June 12, 2007 was admitted to probate on July 30, 2008. As the decedent's second spouse, Jeanette, predeceased, the entire estate is to be distributed under the residuary clause which provides for two equal shares, A and B. The beneficiaries of A are six grandchildren of the decedent's second spouse. There are also six beneficiaries of B; namely, the decedent's four grandnephews, a grandniece and a nephew of the decedent's first wife. The decedent's penultimate will dated October 6, 2006, the same date as the stock transfer, provides for the following bequests: (1) $10,000 to the issue of the decedent's nephew Larry, and grandnephew Dean; (2) an elective share to his wife, Jeanette; and, (3) a trust of the residuary estate for Jeanette's benefit during her lifetime and upon her death, or if she predeceased, the division of the residuary estate into equal shares, A and B, with 75% of the then trust principal to A for the benefit of Bronstein or his issue, and the remaining 25% to B to be shared equally among three of the decedent's grandnephews, a grandniece and a nephew of the decedent's first wife. It is not surprising that neither the probated will nor the penultimate will refer to the decedent's interest in Aurora Gems, as that interest was transferred by the stock transfer agreement. In 1998, 2000, 2001, and 2003 the decedent executed wills, each of which contained a provision bequeathing Aurora Gems to Bronstein on the condition that the he pay all estate taxes owed due to the value of this bequest and that he personally sign a note and a personal guarantee to repay all loans that the decedent made to the respondents or either of them. Prior to his death, the decedent instructed his attorney to prepare a new will which increased the bequest to members of the Gould family, his blood relatives, and reduced the bequest to relatives of the decedent's predeceased second wife, the mother of Bronstein. After the decedent's death, a draft of this will was found in the decedent's mailbox.

The respondents called 10 witnesses, two of whom gave expert testimony with regard to the value of the fancy colored diamond collections. The petitioner called four witnesses, one of whom gave expert testimony about the value of the fancy colored diamond collections. The two expert witnesses called by the respondents were Gail Levine and Antoinette Matlan. The other witnesses called by the respondents were Jefrrey Zankel, Deborah Brooks, Janet Zapata, Ben Temkin, Bronstein, Edward Rode, Anna Marie Nussli and George Siegal. The expert witness called by the petitioner was Donald Palmieri. The other witnesses called by the petitioner were Dean Gould, Tigist Mamo and Elliot Ferrer. Additionally, portions of the examinations before trial of Gerald Gould, the decedent's nephew who resides in Florida, were read into evidence by both sides.

Zankel, the attorney drafter of each of the wills that the decedent requested to be drawn [*3]between 1998 and 2007 and of the transfer documents of the transactions at issue, testified that he was admitted to practice law in 1978 and specializes in trust and estates law. He stated that prior to his representation of the decedent, he did not know Bronstein. The decedent became Zankel's client when another attorney who represented the decedent on other matters referred the decedent to Zankel. According to Zankel, the decedent described Bronstein as the son that he never had. Zankel's notes reflect that at various times the decedent had estimated the value of the fancy colored diamond collections at between $2 million and $20 million. Zankel met with the decedent and his nephew Gerald Gould on August 22, 2006. During this meeting it was decided that the decedent would execute a new will but, instead of leaving his shares in Aurora Gems to Bronstein, he would sell the shares pursuant to a stock purchase agreement, a promissory note and other ancillary documents. This meeting was the only time that Zankel explained any aspects of the sale transaction to the decedent in person. Zankel explained to the decedent that if he transferred his shares in Aurora during his lifetime any appreciation in the value of the diamonds would not be taxable to his estate, and if the transaction was accepted as an arm's-length transaction his estate would not be required to pay any taxes. Although Zankel's notes did not specifically indicate any details of the lifetime transfer, the notes also did not include that the will should contain any provision disposing of the decedent's interest in Aurora Gems. Zankel referred to the lifetime transfer as a "family" transaction.

On cross-examination, Zankel was sure that the lifetime transfer was discussed at the August 22, 2006 meeting, noting that his notes refer to the need to obtain the stock

certificate book for Aurora Gems which would only be necessary for a lifetime transfer. In any event, thereafter, Zankel obtained from Ben Temkin, the accountant for both respondents, the basis for the stock and other pertinent information to complete the transaction. Zankel recalled that Temkin suggested that the note be executed by Aurora Gems instead of Bronstein, individually, to show that it was an arm's-length transaction and that Temkin at first suggested a book value between $10,000 and $25,000 for the stock, and ultimately selected $10,000 as the amount to be used. With regard to the several amendments to the conveyance documents during the drafting stage, which generally favored Bronstein, Zankel testified that he would not make any changes without the consent of the decedent. He also testified that at the decedent's request, he sent copies of the documents not only to the decedent but also to Bronstein and Gerald Gould. During cross examination Zankel conceded that he neither requested nor received written authorization from the decedent to send the documents to anyone other than the decedent.

Although Zankel mailed the closing documents to the parties in advance, he did not attend the closing of the transaction at issue. The documents that were prepared included a stock purchase agreement, a promissory note, a copy of the stock certificate for the shares actually sold, a copy of the purchase agreement for the shares purchased, a copy of the stock certificate for the shares that Bronstein owned prior to the transaction and a Uniform Commercial Code financing statement (UCC-1). The stock was sold to the respondent for $10,000 and Aurora Gems executed a note to the decedent in the amount of $1,784,167 plus monthly interest at 5% per annum. The principal payment became due on October 31, 2016 or sooner, if the gems in the collections were sold before then. Stock certificates were signed. The filed UCC-1 form indicated that the diamond collections furnished security for the notes. According to Zankel, the decedent never complained to him about the transfer, including in 2007 when the decedent contacted Zankel to prepare the probated will. [*4] Zankel claims that he never discussed any of the terms of the transfer with Bronstein alone; however, in telephone conversations he explained the terms to both the decedent and Bronstein. The stock purchase agreement contains a clause that the parties thereto waive any conflict of interest arising from Zankel representing more than one party to the transaction. The decedent was billed for this transaction but Zankel did not recall whether the check he received was paid by the decedent or by Aurora Gems. Zankel conceded on cross-examination that, in effect, he represented the decedent and both respondents in the transaction at issue and thereafter continued to represent all three to some extent.

Temkin testified that he knew the decedent since Aurora Gems was incorporated in 1986 and that he was Bronstein's accountant prior to the formation of Aurora Gems. After Aurora Gems was incorporated, Temkin did accounting work for the corporation and the personal tax returns for both Bronstein and the decedent. From time to time the decedent told Temkin that he viewed Bronstein as his son. In August 2006, Temkin learned that the decedent planned to transfer his one-half interest in Aurora Gems to Bronstein. Temkin recalled that he was involved in a conversation with Zankel, Gerald Gould, and the decedent about effectuating the transfer at issue. Temkin wanted to insure that the transaction occurred with the least possible tax consequences. During cross examination, Temkin acknowledged that: (1) he held himself out as a certified public accountant even though he was not; (2) starting in 2002, only Bronstein signed checks for Aurora Gems; (3) the profits were not split equally between Bronstein and the decedent because Bronstein had to make a living; (4) every check paid by Aurora Gems to the decedent in 2005 and 2006 was in partial repayment of loans; (5) Aurora Gems' books and records on October 6, 2006, the date of the stock transfer, revealed $599,493.89 on hand; and, (6) Temkin provided the $1,784,167 figure which was utilized by Zankel to prepare the promissory note, and Zankel was the one who suggested that the transaction reflect consideration of between $10,000 and $25,000.

The testimony of Anna Marie Nussli, George Siegal, Edward Rode and Deborah Brooks was, to a substantial extent, cumulative. Anna Marie Nussli and George Siegel for many years resided at the same building as the decedent and all three of their apartments were on the same floor. Edward Rode was more friendly with Bronstein than the decedent but he did see the decedent on numerous occasions either at Bronstein's home or at the decedent's apartment. Brooks interviewed the decedent in connection with taping a documentary about his career in the jewelry business and was present at a 2007 taping about the decedent's life. Zapata sold a piece of jewelry for the decedent in 2007 for which she received a commission. Each of these witnesses testified about a specific occasion or occasions after the 2006 transaction in which that witness interacted with the decedent. The impression of each was that the decedent was intelligent, with a clear mind and an excellent memory. Most of these witnesses also testified that the decedent was very fond of Bronstein and viewed him as his son. Nussli testified that shortly before the decedent was hospitalized and died, he told her that the Gould family was unhappy that Bronstein and members of Bronstein's (or the second wife's) family were to receive such a large portion of the decedent's estate.

Bronstein's testimony was limited due to sustained objections based upon CPLR 4519. Nonetheless, he was allowed to testify about his interaction or lack thereof with the attorney Zankel with respect to the transfer at issue, as well as about his acquisition of some of the diamonds that formed the collection prior to the incorporation of Aurora Gems. [*5]

Included in the portions of Gerald Gould's examination before trial that were read into evidence was Gould's claim that he could not recall if he attended the August 22, 2006 meeting when the decedent met with Zankel, but he was certain that at some point in time, he spoke with Zankel about the transaction. Gould testified that he urged the decedent to get a note so that there would be a paper trail of what the decedent was owed. Gould also stated that it was Zankel who suggested for tax purposes it would make sense to give the diamond collection to Bronstein sooner, rather than after the decedent's death, to ensure that none of the appreciation in the value of the diamonds would be included in the decedent's estate for estate tax purposes. When told of this plan, Gould did not question the transaction because he was not familiar with the tax consequences. Gould also stated that the decedent started to complain about money, but Gould could not figure out why the decedent believed that he did not have enough money because it seemed to Gould that the decedent had sufficient money to live in the style to which he was accustomed more or less indefinitely.

Dean Gould, Gerald Gould's son and a share B residuary beneficiary under the decedent's probated will, testified that the decedent was more of an uncle than a great uncle and like a surrogate grandfather to him. He visited the decedent once or twice a year from California where he resides and spoke to the decedent approximately once a week. In 2006, Dean visited with the decedent for two days, and at that time, the decedent told him that the decedent was afraid that he would outlive his funds because the diamond collection was not liquid. Dean offered to give the decedent money because the decedent had been so generous to him and other members of his family, but the decedent declined the offer. This witness claimed that the decedent's health was declining by this time as the decedent could not see out of one eye, his hearing was poor but he did not always wear his hearing aid and he needed a cane or a walker to ambulate. After the decedent's death, Dean continued his phone conversations with Tigist Mamo, the decedent's caretaker, on a monthly basis and during those conversations, Mamo told Dean that Bronstein and his mother had not treated the decedent well and that Mamo was afraid of Bronstein. In 2009, Dean taped a conversation with Mamo with the intention that it be used in this proceeding. Repeated objections were

interposed to the admission of that tape and a transcript of it. Although the petitioner offered a transcript of the tape in evidence, it was not admitted into evidence because the tape was of such poor quality it was difficult to understand many of Mamo's responses to Dean's questions and the questions were obviously leading with the intent to obtain negative responses about Bronstein's conduct with regard to the decedent. During cross examination, Dean acknowledged that he was responsible for a memorial web page posting titled "Honoring our Uncle Harry," in which Dean included a statement indicating that the decedent "was sharper than a lot of people 20 years younger up until the day he died." Dean also acknowledged that he submitted a patent application to the U.S. Patent Office, dated January 11, 2008, on behalf of the decedent for the decedent's invention of a bow tie locket. This witness also conceded that he wrote a letter to the decedent stating that his entire family regretted living so far away that they were unable to provide the attention and companionship the decedent needed and they thanked God that Bronstein and his mother came along to be the decedent's family.

Tigist Mamo ultimately testified that although it was her voice on the tape, she did not recall making many of the comments on the tape, and denied that she ever was afraid of Bronstein or that Bronstein had threatened the decedent. Mamo essentially confirmed that the decedent had the physical problems that Dean testified about. In accord with the testimony of the other witnesses, Mamo testified that the decedent loved to talk about the diamond collection he had paid for and, [*6]toward the end of his life, he expressed financial concerns because his money was all tied up in the diamonds. The witness appreciated gifts or loans that the decedent gave to her or her husband; however, she disliked the decedent's second wife.

Elliot Ferrer, a jewelry designer, friend and business partner of the decedent, testified that he and the decedent went into business together in 1999. Ferrer admired the decedent as a talented jeweler who loved to tinker and compile collections. Ferrer lamented that the decedent did not share Ferrer's own ambition to profit from their business venture as the decedent was interested more in the technical and artistic aspects of jewelry than in making money from it. This witness opined that Bronstein's mother pressured the decedent to marry her and that she always had her eyes on the decedent's money to benefit her son. Ferrer recalls that the decedent had purchased a Cadillac for Bronstein at Bronstein's request but, on other occasions, the decedent had refused Bronstein's requests for money. According to

Ferrer, the decedent complained that he was pressured by both his second wife and Bronstein to turnover the diamond collection to Bronstein. Nonetheless, Ferrer acknowledged not only that Bronstein located the gems to assemble the colored diamond collections but, also, that the decedent considered the diamond collections a big feather in his cap.

Three expert witnesses testified about the value of the diamond collections. Gail Levine, a principal of Timeless Inc., testified that her firm appraised the diamonds that formed the two collections at the request of the respondents. This witness valued the Pyramind of Hope collection at $1,995,661 and the Butterfly of Peace collection at $963,972. This witness traveled to San Diego in April, 2010 to appraise the Butterfly of Peace collection when it was on display at the San Diego Museum of Natural History and then traveled to the London Museum of Natural History in June, 2011 to evaluate the Pyramid of Hope collection where it was on display. Levine testified during direct examination that she examined, measured and weighed each stone individually and arrived at the value of each stone utilizing the "Gem Dialogue System," a proprietary method of valuation created by her late husband in 1982. During cross examination, Levine acknowledged that she could not get an exact weight for every stone as some of them were set with glue and pins for display purposes. This witness acknowledged that Bronstein and his counsel requested that she provide a wholesale, rather than a retail, value for the diamond collections.

Dominic Palmieri, the petitioner's expert, was critical of virtually every aspect of Levine's valuation of the collections. Palmieri valued the Butterfly of Peace collection at $4,346,35 and the Pyramid of Hope Collection at $9,005,367. Palmieri criticized Levine for valuing the diamonds at a wholesale value instead of a market value, and also criticized her for not increasing her valuations in light of the provenance factor. This witness described the provenance factor as the value of the historical significance or prominence of a particular collection, which would stem from various factors including desirability, collectability and connoisseurship. Although Palmieri never actually viewed the two collections, he asserted that he was able to accurately arrive at their value by making modifications to Levine's appraisal of each stone based upon the Gemological Institute of America certificate he obtained for the stone and by looking at pictures and descriptions of the diamonds in a book by Stephen C. Hofer titled "Collecting and Classifying Colored Diamonds, an Illustrated

Study of the Aurora Collection."

Antoinette Matlan, the respondent's second expert witness, criticized Palmieri's method of evaluating the diamonds. Matlan testified that her late father was "one of the founding fathers of modern practical gemology" and she held a certificate from a gemological institute he founded. [*7]Taking issue with Palmieri's evaluation, this witness opined both that merely exhibiting the gems in a museum did not add any extra provenance value, and that a physical examination of a stone is necessary for a proper valuation. In support of her opinion that the collections did not have any provenance value, she referred to a collection that was widely exhibited and sold for only 10% above its acquisition cost.

The controlling shareholder of a close corporation is in a fiduciary relationship with the other shareholders (see Richbell Info. Serv., Inc. v Jupiter Partners, L.P., 309 AD2d 288, 300 [2003]; Spodek v Neiss, 304 AD2d 557 [2003]). "[T]he relationship between shareholders in a close corporation, vis-a-vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith" (Fender v Prescott, 101 AD2d 418, 422 [1984], affd 64 NY2d 1079 [1985]). This "strict standard of good faith imposed upon a fiduciary may not be so easily circumvented" (id. at 423). In order to recover damages for breach of fiduciary duty, the petitioner must establish: (1) the existence of a fiduciary relationship; (2) misconduct by the fiduciary; and, (3) damages directly caused by the fiduciary's misconduct (see Rut v Young Adult Inst., Inc., 74 AD3d 776 [2010]; Fitzpatrick House III, LLC v Neighborhood Youth & Family Serv., 55 AD3d 664 [2008]; Kurtzman v Bergstol, 40 AD3d 588 [2007]). In order to recover damages for a breach of fiduciary duty, it is not enough to make accusations of unscrupulous acts (see Greenberg v Joffee, 34 AD3d 426, 427 [2006]).

Three elements must be established to prove that the decedent made a valid inter vivos gift; namely, donative intent, delivery and acceptance (see Gruen v Gruen, 68 NY2d 48 [1986]; Matter of Szabo, 10 NY2d 94 [1961]). The donee of a gift allegedly made by a decedent bears the burden of proving each of the three elements by clear and convincing evidence (see Matter of Szabo, 10 NY2d at 94; PJI 7:65; see also Gordon v Bialystoker Ctr. & Bikur Cholim, Inc, 45 NY2d 692 [1978]; Matter of Lefft, 44 NY2d 915, 918 [1978]; Bader v Digney, 55 AD3d 1290 [2008]; Matter of Clines, 226 AD2d 269 [1996], appeal dismissed 88 NY2d 1016 [1996]).

With regard to setting aside a transaction on the ground of unconscionability, an unconscionable bargain has been described as one "such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other" (Christian v Christian, 42 NY2d 63, 71 [1977], quoting Hume v United States, 132 US 406, 411 [1889]). An unconscionable agreement is one where the inequality is so strong as to "shock the conscience" and confound the judgment of any person of common sense (see Christian v Christian, 42 NY2d at 71; see also Mandel v Liebman, 303 NY 88 [1951]). A finding of unconscionability is an equitable determination and, where warranted, a court of equity may set aside a transaction on that ground (see Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]; Rowe v Great Atlantic & Pacific Tea Co., Inc., 46 NY2d 62 [1978]; Christian v Christian, 42 NY2d at 71). For a court to find a transaction or conduct unconscionable, the party must show both procedurally and substantively that the contract was unconscionable when made; i.e., "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'" (Gillman v Chase Manhattan Bank, N.A., 73 NY2d at 10, quoting Williams v Walker-Thomas Furniture Co., 350 F2d 445, 449 [1965]). On the other hand, if the contract is not unconscionable, the court will not explore the adequacy of the consideration. In Mandel v Liebman (303 NY at 93) former Chief Judge, then Judge Albert Conway wrote that: "It is commonplace, of course, that adult persons, suffering from no disabilities, have complete freedom of contract and that [*8]the courts will not inquire into the adequacy of the consideration."

The proof adduced by the petitioner clearly establishes that the decedent suffered from various physical ailments during the last few years of his long life and during this period he expressed a concern to some of the witnesses that he would outlive his funds. On the other hand, no proof was adduced that the decedent actually had any financial problems after he became a successful jeweler. To the contrary, the proof indicates that the decedent could be generous to Bronstein, or to members of the Gould family, or to Mamo's family, while at the same time grousing to others about money problems and the requests for money made by those he loved. It is also clear that after the decedent reached a point in his life where he acquired what he deemed to be sufficient wealth from his trade, he would pursue his passion for creating or funding works of art made from gold or diamonds primarily for the sake of art and without any concern as to whether or not the endeavor would be profitable.

Virtually every witness testified that the decedent was intelligent, alert, responsive and had an outstanding memory. Most of the witnesses also testified, and the court finds, that this was the decedent's condition at the time of the 2006 transaction and continued to be his condition right up to his 99th birthday. The fact that no member of the Gould family interposed objections to the admission to probate of the decedent's June 12, 2007 will demonstrates that they did not think that the decedent lacked capacity as late as June, 2007. There also was unanimity amongst most of the witnesses that the assembly of the Aurora Gems collections and the acclaim that the collections received filled the decedent with pride and satisfaction because he had funded the collections. Moreover, the decedent always acknowledged that Aurora Gems was Bronstein's brainchild and that Bronstein was the one who selected the diamonds. Thus, long before Bronstein's mother married the decedent and while the decedent's first wife was still alive, the decedent told many of the witnesses that he viewed Bronstein as his son. The decedent's love and affection for Bronstein during this period is also reflected by the several prior wills that he prepared which bequeathed Aurora Gems to Bronstein.

Now that the court has determined that the decedent was clearly capable of understanding the 2006 transaction and that he viewed Bronstein as a son and a natural object of his bounty, there remains the issue of whether there was anything about the circumstances surrounding the 2006 transaction that would justify setting it aside. Essentially, the petitioner would like the court to find that the decedent would not have entered into the transaction had he known the value of the diamond collections, and that due to a conflict of interest on the part of Zankel and Temkin the transaction was structured in a manner that favored Bronstein and resulted in a transaction that would not be treated as an arm's-length transaction for tax purposes. The petitioner would also like the court to find that Bronstein had a duty to advise the decedent of the true value of the diamond collections and that Bronstein was ultimately responsible for how the transaction was structured. The court finds that the proof does not support the petitioner's contentions.

As a starting point, the petitioner failed to establish that Bronstein made a single demand or suggestion with regard to the manner in which the 2006 transaction was structured. The decedent, accompanied by Gerald Gould, met with Zankel on August 22, 2006, the first time the transaction was discussed. To the extent that Gerald was not certain during his deposition whether he attended that meeting, the court finds that his memory

failed him. The court finds Zankel's testimony that Gerald was present at the meeting credible and Zankel's testimony is corroborated by the fact that [*9]copies of the transaction documents were transmitted to Gerald. Moreover, Gerald conceded that at some point in time he had discussions with Zankel about the transaction and its tax ramifications. Furthermore, the court does not find persuasive the petitioner's argument that the 2006 transaction was not discussed at this meeting because Zankel's notes of the meeting make no specific reference to the transaction. Zankel's notes do make a reference to the stock transfer book of Aurora Gems and it is not surprising that those notes do not specifically refer to the transaction because it was discussed in only general terms at the meeting.

Zankel represented the decedent since 1998, before he even knew Bronstein, and the court finds that, regardless of whether the transaction, as structured, will achieve all or any of the tax benefits envisioned, Zankel from the beginning of his representation of the decedent in 1998 until the decedent's death, tried in good faith to effectuate the decedent's plan for disposing of his interest in Aurora Gems to Bronstein. In all of the decedent's wills between 1998 and 2006 there was a testamentary disposition of the decedent's interest in Aurora Gems to Bronstein. During the August, 2006 meeting, Zankel ascertained that the decedent was interested in presently conveying his interest in Aurora Gems to Bronstein and they discussed possible estate tax savings. In accord with the provisions of the decedent's then existing will, the quid pro quo that the decedent demanded in exchange for conveying his interest in Aurora Gems was that he would receive a note for the amount of loans owed to the decedent, apparently arising from the decedent's funding the purchase of the diamonds. The 2006 transaction provided for such a note, albeit not personally guaranteed by Bronstein.

It could be argued with some merit that Zankel should not have relied solely upon Temkin, the accountant for both of the respondents and the decedent, to fix the consideration to be paid in addition to the amount of the promissory note in exchange for the decedent's interest in Aurora Gems. Perhaps Zankel had more confidence in Temkin then he should have because Temkin held himself out to be a certified public accountant and, in fact, was not. It is also arguable that Zankel, in addition to including a waiver of his conflict of interest in the transfer purchase agreement, should have explained to the decedent that, as a result of his representing all of the parties to the transaction, the decedent should consider whether he wanted to consult with another attorney before closing on the transaction.

Although the court finds credible Zankel's testimony that he warned the decedent that the transaction would not achieve all of the tax savings envisioned if it was not viewed as an arm's-length transaction, it is unclear the extent to which he emphasized the possible problems with the transaction. Nonetheless, it was the decedent who chose Zankel to represent him in this transaction, as he had chosen Zankel to represent him in the past, and Bronstein was not in any way involved with either the decedent's retaining Zankel or with the structuring of the transaction. Accordingly, the court concludes that the proof adduced with respect to Zankel's representation fails to justify depriving Bronstein of the benefits under the transaction.

The court concurs with the petitioner that, based upon the strict legal definition of a gift, the transaction cannot be classified a gift due to the fact that the decedent was to receive something of value in exchange for his interest in Aurora Gems; i.e., $10,000 and an interest-bearing promissory note. In contrast, the court agrees with Zankel that the parties entered into a "family" transaction and in view of the fact that the decedent viewed Bronstein as a son, he did not seek the consideration he would have demanded from a stranger. The consideration that the decedent received from the transaction was the consideration that he requested and that consideration was congruent with what [*10]the decedent wanted as evidenced by the decedent's 1998 will and the wills executed thereafter. Whether or not the decedent was fully aware that there was a significant risk that the transaction would not achieve all of the estate tax savings envisioned, and whether or not he would have entered into the transaction exactly as it was structured if he were fully aware of those risks, is a matter of speculation. In any event, no proof was adduced to establish that Bronstein was responsible in any way for any possible failure of the decedent to correctly assess the potential tax ramifications of the transaction.

Despite the decedent's grumbling about his finances, it does not appear that he ever took any steps to set aside the transaction or to obtain the monthly interest to which he was entitled on the promissory note. The decedent apparently was not unhappy with Zankel's representation because he called upon Zankel to draft both the 2007 probated will and the will which was in the decedent's mailbox the day he died. Moreover, in light of the court's finding that the decedent was satisfied with the consideration he received under the contract and considering that the court is not the taxing authority, the court finds no need to either opine about the possible flaws in the respective appraisals obtained by the petitioner and the

respondents or try to fix the value of the diamond collections based upon those appraisals.

In summary, the court finds no basis to set aside the transaction on the ground that the contract was unconscionable. Furthermore, the proof adduced failed to show any comissions or omissions on the part of Bronstein, or even on the part of Zankel, to warrant setting aside the transactions based on a breach of a fiduciary duty, or undue influence, or fraud, or any other ground. Accordingly, this decision constitutes the decree of the court dismissing the SCPA 2103 petition. Of course, in reaching this determination the court in no way passes upon any gift or estate tax issues, upon the right of the estate to recover interest on the promissory note, or upon any issue other than that the petitioner failed to establish a basis to set aside the 2006 transaction. The Chief Clerk is directed to mail a copy of this decision and decree to counsel for the respective parties.

SURROGATE

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