

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF THE ESTATE
OF PASQUALE SURACI,
DECEASED

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET No. BER-P-284-09
PROBATE ACTION
OPINION

Argued: August 6, 2010

Decided: August 9, 2010
Honorable Peter E. Doyne, A.J.S.C.

Douglas J. Kinz, Esq. appearing on behalf of the plaintiffs, Paul F. O'Reilly and Claire Rosztoczy (Douglas J. Kinz, Esq.)

James Fitzgerald, Esq. appearing on behalf of the defendant, Flora Durkan (Friedman, Kates, Pearlman & Fitzgerald, P.C.).

Introduction

Before the court is a motion filed by James Fitzgerald, Esq. ("Fitzgerald") on behalf of Flora Durkan ("Flora" or "defendant") seeking partial summary judgment. Opposition to the motion, as well as a cross-motion for partial summary judgment was filed by Douglas J. Kinz, Esq. on behalf of Paul F. O'Reilly ("Paul") and Claire Rosztoczy ("Claire" together with Paul, referenced as "plaintiffs"). Defendant's counsel submitted a reply and opposition to plaintiffs' cross-motion.

Oral argument was requested and the same was entertained on August 6, 2010.

Statement of Facts and Procedural History

The matter before the court stems from an ownership dispute over the assets in a TD Ameritrade investment account (the “Ameritrade account”) owned by Pasquale Suraci (the “decedent”) and his daughter, Flora, as joint tenants with rights of survivorship. Plaintiffs, decedent’s grandchildren, seek to treat the account as part of decedent’s estate (the “estate”) and have it probated accordingly, while defendant asserts she became the sole owner of the account as a matter of law. The issues presented are whether New Jersey law mandates the account pass to defendant by operation of law, whether the account was the result of undue influence based upon his purported confidential relationship with his daughter and son-in-law, and whether decedent actually intended for this account to be transferred to defendant upon his death or whether it was merely a convenience account intended to be transferred back to the estate and probated according to the terms of his Last Will and Testament (the “Will”).

Decedent had two daughters, defendant and Patricia O’Reilly, deceased (“Patricia”). Flora and Patricia took care of their mother, decedent’s wife, until her death in 2001. Their mother suffered from osteoporosis and sporadically lived with Flora for periods of up to six weeks at a time before living with her for two years from 1994-1995. On September 7, 2001, two months after his wife’s death, decedent executed an updated Will leaving his entire estate, in equal shares, to his daughters Flora and Patricia, or their issue per stirpes. Patricia died two months later, in November 2001, and was survived by her two children, the plaintiffs, Paul and Claire.

Prior to his wife's death, decedent routinely traveled into Manhattan where he owned a cigar shop in lower Manhattan and operated the business independently. Decedent retired at the age of 88 after the collapse of the World Trade towers on September 11, 2001, rendered his shop inaccessible. Upon his retirement, Flora took on the role of her father's care-giver. She maintained his home in Rutherford, New Jersey and his properties in Hoboken and Garfield, New Jersey. Additionally, she cooked for him, took him to doctors' appointments, paid his bills and bought him food and clothes. Defendant stated she was "on-call 24/7." Decedent's health purportedly began to deteriorate around that time and, when he was injured in a fall in 2002, defendant asked him to move in with her. Decedent refused, preferring to remain in his own home, but defendant hired caregivers to be with him. Plaintiffs assert Flora provided emotional and physical support to decedent, as well as guidance and counsel. Decedent's New York attorney was allegedly drafting guardianship papers for decedent, but upon asking defendant for advice and guidance, she convinced him not to proceed with the anticipated action and he subsequently refused to execute the papers.

Plaintiffs allege decedent had a confidential relationship with Flora, as well as her husband, Joseph Durkan ("Joe") which should be imputed to Flora. Joe has an MBA in finance from Harvard, is a former investment banker and Chief Financial Officer, and currently works for the United States Census Bureau. Due to his experience with investing, decedent sought Joe's help in setting up various accounts and managing his affairs. Joe prepared decedent's income tax returns and corresponded with decedent's attorney regarding his Will. Decedent relied upon Joe for advice concerning financial

and legal matters, including the sale of his buildings and the creation of at least two brokerage accounts. On April 24, 2002, decedent executed a durable power of attorney appointing Joe to be his attorney-in-fact and granting him the authority to handle his financial matters, securities and investments, and general matters of living. Subsequent to executing the power of attorney, Joe opened an operating account at Kearny Federal Savings Bank (“Kearny account”), which designated him and decedent as joint tenants with right of survivorship. The purpose of the account was to allow Joe to assist in the payment of decedent’s expenses and the management of his property. There is no dispute it was a convenience account and the funds were not intended to pass to Joe upon decedent’s death. Joe filed a disclaimer of the account with a Bergen County Surrogate.

On or about May 18, 2002, decedent opened an Ameritrade account in his and Flora’s names as joint tenants with a right of survivorship. Joe was listed as the designated agent on the account and, as a result, was authorized to issue checks and make trades for the account. The Ameritrade account consisted of funds from the sale of decedent’s property and neither defendant nor Joe contributed monies to the account. The contents of this account are in dispute, as the parties disagree as to whether the funds were intended to pass to defendant via her right of survivorship. Defendant argues the monies were intended to pass to her upon decedent’s death, but plaintiffs assert it was a convenience account, intended only to enable defendant to assist decedent with his expenses and was intended to pass to the estate upon his death. It is noted plaintiffs were unaware of the Ameritrade account or decedent’s intention when creating the same. Their argument it was a convenience account is partially based upon Joe’s certification

the purpose of \$52,000 worth of checks written on the account was to reimburse defendant and him for paying decedent's expenses and taxes. Despite several requests, there is no documentary evidence to support his position. At oral argument plaintiffs' counsel asserted copies of the checks from the Kearny account were first made available in late July, and upon reviewing the materials counsel believes additional claims may be appropriately brought at this time.¹

In stark contrast to Flora's and Joe's extensive involvement in decedent's life, plaintiffs allegedly rarely visited decedent and had no role in caring for him. The frequency of their visits is in dispute, with Claire stating she visited decedent six or seven times a year, Paul stating he visited five or six times since 2001, and defendant asserting both plaintiffs visited significantly less than that. Defendant submitted certifications from three of decedent's caregivers, all of whom noted plaintiffs rarely visited him, coming to the house only once or twice during the last three years of his life.²

On December 25, 2005, the decedent died testate, leaving behind a gross estate of approximately \$1,955,000.00. The Ameritrade account contained approximately \$101,000.00, or slightly more than five percent of estate. The Will was admitted to probate and defendant was appointed executrix of the estate on March 3, 2006.

In July of 2006, Claire's attorney at the time, Raymond C. Staub, Esq. ("Staub") requested an accounting of the estate. Fitzgerald sent a response listing the expenses

¹ Counsel were advised trial would proceed as scheduled but an application for a R. 4:30A could be made on short notice.

² The certifications are from Judeline Lawgbaum, decedent's caregiver from 2002 until his death in 2005, Virginia Palacio, decedent's caregiver from 2004 until his death, and Jocelyn Peral, decedent's caregiver in 2002 and 2003.

incurred by the estate and asserting the rents collected from the Hoboken rental property covered such expenses. On October 16, 2006 decedent's Rutherford residence was sold and, on May 7, 2007 the Hoboken rental property was sold. Subsequent to the sales of the properties, Staub renewed his request for an accounting, actually making two such requests during the month of May and purportedly receiving no response from defendant. Staub's requests for a formal accounting continued by letters dated October 25, 2007, March 3, 2008, May 9, 2008 and May 29, 2008. By letter dated June 2, 2008, Fitzgerald forwarded to Staub an informal accounting which listed "Executive Fees" in the amount of \$57,000.00 to be paid to the defendant. The accounting lists the Ameritrade account valued at \$101,455.00 as a joint asset with rights of survivorship in favor of defendant and the bank account at Kearny Federal Savings Bank in the amount of \$2,516.00 as a joint account with rights of survivorship in favor of Joe.

By letter dated July 17, 2008, plaintiff's newly retained counsel, Robert A. Knee, Esq. ("Knee"), requested the details and circumstances surrounding the Kearny account and the Ameritrade account, as well as other information to assist in evaluating the accounting. Fitzgerald replied by letter dated July 29, 2008, stating the Ameritrade account was established by the decedent as a joint account to compensate defendant for all of her help. The letter also stated although the Kearny account was titled jointly with Joe, he had disclaimed any rights he had with regard to same. Joe testified the only money removed from the Ameritrade account was used either directly for decedent's expenses or as a deposit in Joe's account to reimburse Joe for money previously spent on decedent. Despite several requests for an accounting and supporting documents,

plaintiffs argue defendant never provided bills, invoices, or cancelled checks to account for the money taken from the Ameritrade account, supposedly as a reimbursement for decedent's expenses.

On July 28, 2009, plaintiffs filed an order to show cause and a three-count verified complaint. Plaintiffs seek an order directing defendant to perform an accounting of the estate and to turn over the Ameritrade account or its proceeds to the estate. They assert the Ameritrade account should pass to the estate either under the theory it was a convenience account or based on the existence of a confidential relationship between decedent and defendant and the subsequent undue influence Flora and Joe had on decedent when he created the account. On August 24, 2009, defendant filed an answer and counterclaim seeking to enforce the no contest clause of the Will and reimbursement of costs and fees. Plaintiffs' counsel filed an answer to the counterclaim on September 14, 2009.

On September 28, 2009 the court entertained oral argument on the order to show cause and denied plaintiffs' application to compel a formal accounting and dismiss defendant's counterclaim. The parties were further ordered to correspond with one another regarding the purported deficiencies in the informal accounting. On October 29, 2009 an order was entered appointing the Honorable Gerald C. Escala, P.J.Ch. (ret'd) to mediate this matter. The parties did not reach a settlement and a trial date was set for August 16, 2010. On July 2, 2010, defendant's counsel requested permission to file a motion for partial summary judgment. By letter dated July 6, 2010, the court granted the

request, provided all motion papers were submitted by July 30, 2010 and the motion would then be returnable on August 6, 2010.

On July 7, 2010, Fitzgerald filed a motion on behalf of defendant for partial summary judgment seeking a declaration the contents of the Ameritrade account should pass to defendant as a matter of law. Defendant asserted she took care of decedent after her mother's death while plaintiffs rarely even visited. She alleged the Ameritrade account, opened in May 2002, was meant to reward her for taking care of her parents. While being deposed, defendant stated "[the decedent] just wanted to benefit me and show his appreciation." She further asserted decedent had used the word "gift" when discussing opening up the Ameritrade account and it was his idea to ask Joe to purchase stocks for him. Flora certified the Ameritrade account was "not intended to pay [her] father's bills." Joe testified the balance of the account was to go to Flora upon decedent's death "because of the special things she did for her mother, she did for him . . ." Joe's testimony differed from Flora's, in that he stated decedent did *not* indicate the account was to be a gift, but rather "it was still going to be his account while he was alive." While Joe stated the account was not to be used for large expenditures, he disagreed with Flora and asserted the account could be used for decedent's smaller expenses. In fact, Joe wrote a check for \$52,000 to reimburse himself for decedent's purported expenses which he paid. Joe set up the account with a right of survivorship and while he, not decedent, filled out the on-line application and determined how to fund the account, Joe asserts he explained the forms to decedent before obtaining his signature. Joe

purportedly explained the banking forms for “[a]bout fifteen minutes to make sure that he had a full grasp of what was going on.”

Defendant’s brief in support of her motion for partial summary judgment relies wholly upon N.J.S.A. 16:16 I-1 to :16 I-17, the Multiple-Party Deposit Account Act (the “Act”). The Act provides the contents of a joint account shall be passed to the surviving party upon death “unless there is clear and convincing evidence of a different intention at the time the account is created . . .” N.J.S.A. 16:16 I-5. Defendant’s counsel argues, based upon the Act, the burden is on plaintiffs to prove decedent had different intentions. He further argues there is no question of material fact, and, as such, partial summary judgment should be granted.

On July 23, 2010, the attorney for plaintiffs submitted a cross-notice of motion for partial summary judgment seeking a declaration the Ameritrade account is an estate asset and shall be admitted to probate as such. Defendant’s sole argument for summary judgment is application of the Act, which plaintiffs contend does not govern the Ameritrade brokerage account. Plaintiffs’ counsel sets forth the statutory definitions for “account,” and “financial institution” and argues brokerage firms are not included in the Act. Plaintiffs’ brief further argues defendant has failed to demonstrate the creation of the joint account constitutes an inter vivos gift which should pass to defendant. In addition to arguing there was no inter vivos gift, plaintiffs assert there was a confidential relationship between Flora and decedent and, as a result, there is a presumption of undue influence.

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

On July 27, 2010, Fitzgerald filed a reply brief and brief in opposition to plaintiffs' cross-motion. The reply restated defendant's position the Act was controlling and the Ameritrade account should pass to defendant as a matter of law.

Oral argument was entertained on August 6, 2010.

Legal Analysis

Motions for summary judgment are controlled by R. 4:46-2, which states in pertinent part:

[t]he judgment or order sought shall be rendered forthwith if the pleadings... together with the affidavits...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require the submission of the issue to the trier of fact. R. 4:46-2.

The seminal New Jersey case interpreting R. 4:46-2 is Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). In Brill, the Supreme Court of New Jersey held when deciding a motion for summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party and considering the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party. Id. at 523.

As such, the court must first interpret the facts in the light most favorable to the non-petitioner. Second, should material facts be legitimately in question, the motion must be denied.

Defendant's Motion for Partial Summary Judgment

Defendant's motion for partial summary judgment is based solely upon the Act which purportedly mandates the Ameritrade account pass to defendant rather than the estate.

In 1979 New Jersey adopted Article 6, Part II of the Uniform Probate Code ("UPC") and codified the same as N.J.S.A. 17:16 I-1 to :16 I-17, also referred to as the Multiple-Party Deposit Account Act (the "Act"). The legislative intent in drafting this section was to clarify multiple-person accounts, both while the parties are alive and upon their death. See Comments to U.P.C. 6-201. The statute controls the inter vivos rights of the parties and provides for the disposition of joint accounts upon the death of a joint tenant. The question whether the Act applies to a brokerage account is a matter of first impression and neither party provides precedential case law in support of its position.³ N.J.S.A. 17:16 I-2 defines an "account" as a "contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement." A "joint account" is defined as "an account payable on request to one or more of two or more parties whether

³ Plaintiff's counsel provided an unpublished opinion which purportedly supports the proposition the Act is not applicable to a brokerage account, but the language is merely dicta and an unpublished opinion cannot be relied upon by this court. R. 1:36-3.

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

or not mention is made of any right of survivorship, and regardless whether the names of the parties are stated in the conjunctive or in the disjunctive.” Ibid. Further, a “financial institution” is defined as “any organization authorized to do business under State or Federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan associations.” Ibid. Given these definitions, it is unclear whether brokerage firms qualify as a “financial institutions” or whether securities accounts are a “deposit of funds” and therefore qualify as “accounts” within the statute. This section of the UPC has been adopted by more than half the states in the country and the debate over its applicability to brokerage firms and securities accounts has taken place in states throughout the nation. The majority of the courts have determined the provided, or sufficiently similar, definitions do not apply to securities or brokerage accounts. See e.g., Spencer v. Estate of Spencer, No. 2008-SC-000191-DG, 2010 Ky. LEXIS 154, at *20 (June 17, 2010); DeKallow v. Weis, 941 S.W.2d 630 (Mo. App. 1997); In re Palmer, 145 Wn. App. 249 (Wash. App. 2008); Ashe v. Hurt, 117 Idaho 266 (Id. 1990). It is noted the Supreme Court of Pennsylvania ruled brokerage accounts are encompassed under the definition of “accounts” as “share accounts, and other like arrangements” and brokerage firms were determined to qualify as “financial institutions.” Deutsch, Larrimore & Famish, P.C., v. Johnson, 577 Pa. 637 (2004). The Pennsylvania court reached its decision due to the several definitions of “financial institutions” present in the Pennsylvania statutes and what it characterized as a resulting ambiguity. Ibid. Its ruling was not based upon the statutory language itself, so its logic is inapplicable in our state.

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

When applying a statute, the court's role is to follow the clear language and give "statutory words their ordinary meaning and significance." DiProspero v. Penn, 183 N.J. 477, 492 (2005)(citing Lane v. Holderman, 23 N.J. 304, 313 (1957)). When the statutory language is ambiguous, extrinsic evidence such as legislative history and comments may be relied upon to determine the Legislature's intent. DiProspero, *supra*, 183 N.J. at 494. Reviewing the definitions in the Act, the statute's applicability to brokerage firms and securities' accounts is ambiguous and it is necessary to attempt to ascertain the Legislature's intent. While no comments are available regarding New Jersey's adoption of the Act, it is part of the adopted UPC and the committee's comments on the same provide insight into the Legislature's intent. When Article VI of the UPC was first enacted, critical commentary responded to the apparent failure to address securities. See Spencer v. Estate of Spencer, No. 2008-SC-000191-DG, 2010 Ky. LEXIS 154, at *20 (June 17, 2010)(citing Diane C. Amado, Uniform Probate Code Section 6-201: A Proposal to Include Stocks and Mutual Funds, 72 Cornell L. Rev. 397 (1987)). In 1989 a revised version of the Act was approved which incorporated a new section titled the Uniform Transfer-on-Death Security Registration Act ("TOD Act"). Id. at *21. The TOD Act was adopted by New Jersey in 1995 and codified as N.J.S.A. 3B:30-1 to :30-12. In the comments accompanying the revised UPC, the committee states:

The legislation has been drafted as a separate part, hence not interpolated as an expansion of Part 2, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities . . . Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering

certificates of deposit of large value under the same account forms that were devised for low value convenience accounts. Meanwhile, brokerage houses with their so called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check writing conduit to real estate values . . . Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules.

While the New Jersey Legislature has not provided its own commentary, adoption of the TOD Act clearly implies there is no intention the Act apply to securities and brokerage accounts. To interpret the same any other way would render the TOD Act unnecessary and superfluous. While the TOD Act may be the governing statute in this instance, neither party set forth such an argument and no decision regarding the same shall be rendered at this time.

As it appears the Act does not govern securities and brokerage accounts, it therefore is not applicable in the instant matter involving the Ameritrade account. As the Act is the only grounds upon which defendant seeks partial summary judgment, her motion is denied.

Plaintiffs' Cross-Motion for Partial Summary Judgment

Plaintiffs base their motion for partial summary judgment on three different theories. First, plaintiffs assert defendant fails to satisfy the requisite elements for an inter vivos gift. The requisite elements of an inter vivos gift are the donor must have an

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

unequivocal donative intent, followed by actual or symbolic delivery of the gift and the donor's absolute and irrevocable relinquishment of ownership and dominion of the gift. In re Dodge, 50 N.J. 192, 216 (1967); see also Pascale v. Pascale, 113 N.J. 20, 29 (1988). The donee has the burden of satisfying the three elements by "clear, cogent and persuasive" proofs. Czoch v. Freeman, 317 N.J. Super. 273, 284 (App. Div. 1999). Plaintiffs argue defendant failed to demonstrate decedent's donative intent and relinquishment of the account. Joe and defendant asked decedent for permission to use money from the account, indicating the funds were not relinquished. Further, he had the unbridled right to remove all monies in the account for his own use. While plaintiffs have a compelling argument, in briefs submitted by defendant's counsel, defendant did not assert the Ameritrade account was an inter vivos gift. At oral argument Fitzgerald took the position the account *was* a gift, the first time such a position was presented. Donor intent and possible relinquishment of control are fact sensitive inquiries which, when events are disputed, cannot be resolved in a summary action. Though it does not appear decedent ever relinquished control of the Ameritrade account and it is unlikely defendant will succeed on such a claim, no determination need be made at this time.

Second, plaintiffs argue the Ameritrade account was a convenience account created for the purpose of granting defendant and Joe access to the account so they could assist decedent in paying his bills and managing his investments. See Sadofski v. Williams, 60 N.J. 385, 398-400 (1972). The joint account does not pass to the survivor upon the maker's death when an account is created solely to allow another to manage the maker's finances. Ibid. Plaintiffs provide facts and information in support of the

proposition decedent intended the Ameritrade account to be a convenience account, but there are not sufficient undisputed facts to merit such a determination now. Defendant disagrees on the account's use and purpose, certifying what each check was used for and arguing decedent intended the funds pass to her upon his death. As such, trial is necessary to determine decedent's intent before the account can be declared a convenience account.

Finally, plaintiffs assert decedent had a confidential relationship with defendant and Joe, creating a presumption of undue influence which must be rebutted. The doctrine of undue influence "affords donors protection against their voluntary actions, the import of which they may not have fully understood." In re Estate of Penna, 322 N.J. Super. 417, 423 (App. Div. 1999)(citing Bronson v. Bronson, 218 N.J. Super. 389, 392 (App. Div. 1987). The person challenging ownership of the account must demonstrate, by a preponderance of the evidence, that the donor, decedent, shared a confidential relationship with the surviving donee. Id. at 426; see also Petruccio v. Petruccio, 205 N.J. Super. 577, 580 (App. Div. 1985). Although the relationship between a parent and child has often been found to constitute a confidential relationship, such a relationship, in and of itself, is not sufficient to constitute a confidential relationship. A confidential relationship exists where trust is reposed by reason of one's weakness or dependence. In Re: Hopper, 9 N.J. 280 (1952). Also, see, In Re: Dodge, supra.; In Re: Liebl, 260 N.J. Super. 519 (App. Div. 1992), certif. den. 133 N.J. 432 (1993). While undue influence in matters involving wills requires a showing of suspicious circumstances in addition to a confidential relationship, it has been held inter-vivos transfers only require the existence

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

of a confidential relationship. In re Estate of Penna, supra, 322 N.J. Super. at 425. Once a confidential relationship is established, the donee must rebut a presumption of undue influence by clear and convincing evidence. Ibid. Undue influence is influence that prevents the person over whom it is exerted from following the dictates of her/his own mind, and accepting instead the domination and influence of another. Pascale, supra, 113 N.J. at 20. In order to rebut such a presumption, the donee must demonstrate no deception was employed and the donor understood the legal effect of the account and how the funds would be distributed upon his death. In re Estate of Penna, supra, 322 N.J. Super. at 423-424. Further, defendant must prove no undue influence was used and the creation of the account was fair, open, and voluntary. In re Dodge, supra, at 227.

Plaintiffs assert defendant and decedent had a confidential relationship, and therefore, the burden is on defendant to rebut the presumption of undue influence. It is undisputed defendant cared for decedent, cooked and cleaned for him, and managed his properties. Additionally, Joe acted as a financial advisor and offered decedent guidance, which could potentially be imputed onto defendant. While the submitted papers argue a confidential relationship exists and the burden should be shifted to defendant, plaintiffs' counsel fails to provide any support for the proposition such a determination may be appropriately made prior to trial. The finding of a confidential relationship is a fact sensitive determination, and one which is contested by defendant. There is no justification presented as to how, or why, such a determination should be made in a summary proceeding. Likewise, plaintiffs' numerous assertions regarding decedent's mental state when creating the Ameritrade account and defendant's responses to the

Re: In the Matter of the Estate of Pasquale Suraci
Docket No. BER-P-284-09
Decision dated August 9, 2010

same, while relevant to the final disposition of the account, are issues of fact and not properly decided in a summary manner.

Conclusion

Based on the foregoing, the defendant's motion and plaintiffs' cross-motion for partial summary judgment are denied. Plaintiffs' counsel shall prepare and submit an appropriate order pursuant to the five-day rule.

Counsel shall forthwith comply with the mandate of the case management order to insure timely and efficient presentation of proofs for the forthcoming trial which shall begin on August 16, 2010 as heretofore ordered.