

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 01-1217

ELEANOR ZEREGA, INDIVIDUALLY and as
ADMINISTRATRIX OF
THE ESTATE OF ALFRED J. ZEREGA, SR.,
Plaintiff

v.

ALFRED J. ZEREGA, JR., INDIVIDUALLY and as
TRUSTEE OF AN IRREVOCABLE INTER VIVOS TRUST OF
ALFRED J. ZEREGA, SR.,
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF JUDGMENT

Plaintiff challenges the validity of an irrevocable inter vivos trust ("the Trust") established by Alfred J. Zerega, Sr. ("Alfred, Sr.") six days before his death. His widow, Eleanor Zerega, brings this action against her stepson, Alfred J. Zerega, Jr. ("Alfred, Jr."). The complaint alleges testamentary incapacity on her husband's part (Count I), undue influence by Alfred, Jr. (Count II), conversion (Count III), fraud (Count IV) and breach of fiduciary duty (Counts V and VI). Defendant's counterclaim alleges that plaintiff wrongfully interfered with operation of the Trust, breached her fiduciary duty to his father's estate and converted assets of the Trust.¹

¹ The counterclaims are not identified as separate counts.

The case was tried jury-waived during April of 2003. On the basis of the credible trial evidence and the reasonable inferences I draw therefrom, I find and rule as follows under Mass. R. Civ. P. 52(a).

FINDINGS OF FACT

1. Alfred, Sr. died on March 31, 1998 at the age of 82. There is no evidence that Alfred, Sr. had a will at any time, and he died intestate. Six days before his death, he signed an irrevocable inter vivos trust (the "Trust") as settlor. The Trust names Alfred, Jr. as sole trustee and Alfred, Jr.'s wife, Jean C. Zerega, as successor trustee. The ultimate beneficiaries of the Trust are Alfred, Jr. and two of his four siblings. Alfred, Jr. is the son of Alfred, Sr. and the stepson of plaintiff.

2. Plaintiff Eleanor Zerega, who was 85 at her husband's death, was married to Alfred, Sr. from 1961 until his death. She was appointed administratrix of his estate on July 30, 1998.

3. Alfred, Sr. had five children, all from his first marriage; Phyllis Kulsa, age 62 at the time of trial; Joan Budryk, age 61, Alfred, Jr., age 60, Ronald Zerega, age 56 and Marianne Carey, age 45. When Alfred Sr's first marriage ended by divorce in early 1961, his children, except Marianne, lived outside the household. Before Alfred, Sr.'s death, Eleanor's relationship with her stepchildren was generally friendly. The relationship among the siblings was less amicable. Phyllis, for example, was not

informed of her father's death. Phyllis testified at trial that around the time of her mother's death in 1993, she had a conversation with Alfred, Jr. in which he made reference to getting their father's money. There is no evidence to the contrary on this point.

4. Alfred, Sr. died from prostate cancer which had metastasized. His medical history also included two aneurysms, one incurred at age 49 and the other shortly after his cancer diagnosis. At his death, Alfred, Sr. was a patient at Spaulding Rehabilitation Hospital ("Spaulding") in Boston. He had been admitted to Massachusetts General Hospital ("MGH") on February 24, 1998 with severe pain, anorexia and vomiting. He was released from MGH to Spaulding on March 4, where his medical condition deteriorated steadily until his death on March 31.

5. Alfred, Sr. was initially diagnosed with prostate cancer in November, 1990. A short time later, he began a treatment program. Around January 1998, after about six months of declining weight and increasing pain and nausea, Alfred, Sr. was diagnosed with metastatic bone cancer.

6. Alfred, Sr.'s oncologist from 1993 until his death was Ronald Kaufman, M.D. Dr. Kaufman has directed the Genitourinary/Oncology Disease Program at MGH since 1997. He is also a Clinical Professor at Harvard Medical School. He has an active clinical practice in oncology with emphasis on bladder and prostate cancers. He spends more than half his time on patient care.

7. By early February of 1998, Dr. Kaufman determined that Alfred, Sr.'s cancer was intractable. Thus, he treated Alfred, Sr. by radiation and medication to increase his comfort and relieve pain. The narcotic medication was increased in the days before his death to alleviate increasing pain. The narcotic medication has a negative effect on thought process and alertness, especially for elderly, frail individuals like Alfred, Sr.

8. On February 26, Dr. Kaufman had a lengthy discussion with Alfred, Sr. and Eleanor, after which Alfred, Sr. was declared "DNR" (do not resuscitate).

9. On March 20, Dr. Kaufman evaluated Alfred, Sr. in person for the last time. He observed that Alfred, Sr.'s health was rapidly deteriorating and that he was in "very poor" condition.

10. Between March 20 and trial, Dr. Kaufman reviewed all Spaulding records of Alfred, Sr. Given Alfred, Sr.'s physical and mental condition, Dr. Kaufman believes it was unlikely that Alfred, Sr. on March 15 could appreciate the importance of inquiry regarding disposition of his assets. I credit Dr. Kaufman's trial testimony in its entirety.

11. I particularly credit Dr. Kaufman's testimony that, to a reasonable degree of medical certainty based on his training and experience, Alfred, Sr. could not have conducted a meaningful sustained conversation with anyone on March 25, the day he signed the Trust and power of attorney. Dr. Kaufman based this opinion on his review of Alfred, Sr.'s medical records, his knowledge of his patient and the progression of his

cancer, the amount of narcotic medication Alfred, Sr. was taking, his age of 82, and the fact he was almost unable to take fluids and was receiving no IV's. Dr. Kaufman's opinion permits the inference, which I draw, that Alfred, Sr. could not read or understand the contents or significance of the Trust at the time he signed it.

12. Throughout Alfred, Sr.'s hospitalization at MGH and Spaulding, Eleanor visited him daily for four to five hours, except for a few days when she was ill. Eleanor recalls that Alfred, Sr. spoke little, if at all, the last week of his life.

13. Dr. Hilary Siebens, Alfred, Sr.'s attending physician at Spaulding, noted in her admission notes that he had a history of delirium on narcotics.

14. On March 9 or 10, Dr. Siebens had a conversation with Alfred, Jr. and Eleanor, during which Alfred, Jr. told Dr. Siebens that his father had no will. Dr. Siebens urged him to start working to remedy the situation. That night, Eleanor invited Alfred, Jr. to her home and showed him documents relating to his father's assets.

15. On March 11, morphine was added to Alfred, Sr.'s medications. On March 13, he was reported to continue to decline and was doing poorly overall. On March 14, a visiting physician found him to be debilitated and slightly confused.

16. On March 19, Alfred, Sr. was incontinent and getting worse, with "delirium and intermittent worsened confusion."

17. On March 23, Alfred, Sr. was lethargic and confused. On March 26, his overall deterioration was noted, and he was reported to refuse food. On March 27, Dr. Siebens wrote in a physician's note:

spoke today with Mrs. Zerega. She said Mr. Zerega recognized her. He knows he is not doing well. Son. Al Zerega. spoke to his stepmother and said that patient's death was imminent. He states that he believes he has a durable power of attorney. He promised his father his family would be with him when he dies. He wants DNR reversed until family could get here.² I explained death not imminent, but that it would be desirable to get family here this weekend, also resuscitation efforts not likely to be useful. (emphasis added).

18. On March 28, 1998, Margaret Lovett, Eleanor's sister, visited Alfred, Sf. Lovett was shocked at Alfred, Sr.'s appearance. She had last seen him in December, and he was now a skeleton of his former self. In Lovett's opinion, he looked gravely ill and very thin. Alfred, Sf. did not acknowledge Lovett.

19. On March 30, Alfred, Sr. verbalized only in moans and needed an oxygen mask to breathe.

20. On March 31, 1998, at approximately 9:00 a.m., Eleanor received a phone call from a Spaulding employee, requesting her presence because Alfred, Sf. was close to death. Eleanor contacted her stepson, Ronald, who lived near her, informed him of the situation and asked him to drive her to the hospital. Ronald did so and told Eleanor that he had contacted Alfred, Jr., who said that he would also come to Spaulding.

21. Alfred, Sr. was pronounced dead around 11:00 a.m. on March 31. Alfred, Jf. was not present at his death.

² The "do not resuscitate" order was not reversed.

22. Alfred, Sr. was a high school graduate. Before his retirement at age 71, he had been employed for 31 years as a mechanical designer at Hewlett-Packard.

23. Under its terms, the Trust continues until the death of both Alfred, Sr. and Eleanor. The trustee is to pay the income of the trust to Eleanor during her lifetime, or in his discretion, withhold payment and apply it to her benefit. After Eleanor's death, the trust holdings are to be divided equally among Alfred, Jr., Ronald and Marianne.³ Alfred, Sr.'s other children, Phyllis and Joan, are not beneficiaries of the Trust. The Trust states that they had been "taken care of".

24. The Trust provides in pertinent part that Alfred, Sr. transferred to Alfred, Jr. various assets allegedly identified in a statement attached to the Trust and entitled Schedule A. At Alfred's death, the holdings of the Trust approximated \$525,000 and included three stocks and three accounts. The stocks include 2880 shares of Atlantic Richfield, valued at \$218,8504; 90 shares of Imperial Tobacco, valued at \$1192, and 3145 shares of New England Electric System, valued at \$141,000. The accounts include Fidelity with a balance of \$37,477, Hewlett-Packard Union, with a balance of \$76,731, and Tilton/Providian National Bank, with a balance of \$50,000.

25. Alfred, Jr. testified that around March 15, 1998, he went to his father's home without notifying Eleanor or without her being present, and removed a list of his father's shareholdings from a toolbox in his father's workroom. He says he then provided

³ These individuals and Eleanor are beneficiaries of Alfred, Sr.'s Individual Retirement Account. Each received a distribution after Alfred, Sr.'s death of about \$42,000 from the IRA.

⁴ All valuations are as of March 25, 1998.

this list to the attorney who drafted the Trust, Anthony J. Scipione, through Scipione's home office mail slot. I do not credit this testimony, in part because the list was not introduced at trial or produced during discovery. From the credible evidence, I infer that the Trust was signed by Alfred, Sr. without a Schedule A. This inference is supported by the lack of Alfred, Sr.'s signature or initials on the schedule introduced at trial.

26. Alfred, Jr. completed the 11th grade, later received a G.E.D. and completed one semester at the Franklin Institute. He initially worked as a machinist. In 1992 or 1993 he retired from Digital where he had worked as a cost analyst.

27. Alfred, Jr. testified that he had a conversation in 1995 with his father, his wife and his stepmother about the value of a trust versus a will for his father's assets. I discredit this testimony and I credit Eleanor's testimony to the contrary. There is no credible evidence that an irrevocable inter vivos trust was considered by Alfred, Sr. before March 15.

28. Attorney Anthony J. Scipione drafted the Trust and still acts as its tax counsel. Before his work on the Trust, Alfred, Sr. did not know Scipione. They were brought together by Alfred, Jr. Scipione had previously prepared tax returns for Alfred, Jr., and Scipione's wife had worked with Alfred, Jr. on a town commission.

29. Scipione has been a member of the Bar since 1966. He has a general practice, approximately 50 percent of which is in the area of estate planning and probate.

30. Shortly before March 15, 1998, Alfred, Jr. contacted Scipione and asked him to meet with his father at Spaulding. In all, Scipione had two meetings with Alfred, Sr. The first, which lasted about an hour, occurred on March 15 in Alfred, Sr.'s hospital