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In the Matter of the Estate of Susan J.
Porto, Deceased.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION; PROBATE PART
BERGEN COUNTY
DOCKET No. BER-P-069-16
CIVIL ACTION
OPINION

Argued: March 13, 2017, April 4, 17, and 18, 2017
Decided: April 28, 2017

Honorable Robert P. Contillo, P.J.Ch.

John K. Walsh, Jr., Esq. appearing on behalf of the Plaintiff-Executrix, Cathy Timpone.
(Walsh & Walsh, Esqs.).

Christopher Leyden, Esq. appearing on behalf of the Defendant-Exceptant, Ronald Porto.
(Leyden Law LLC).

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Susan J. Porto died March 16, 2012, survived by her two adult children: Cathy Timpone and Ronald Porto. Decedent's Last Will and Testament dated November 5, 1997, and a Codicil dated November 4, 2010, were admitted to probate and Cathy Timpone was issued letters testamentary by the Bergen County Surrogate on May 14, 2012.

Susan J. Porto was pre-deceased by her husband, Carl Porto, who died on August 5, 2009.

By Order dated October 29, 2015, under Docket No. P-371-14, the court directed the Executrix Cathy Timpone to render, file and serve her First and Final Account.

On February 26, 2016, the Executrix Cathy Timpone filed a Verified Complaint to Settle the First and Final Account. On February 26, 2016, the court entered an Order to Show Cause, returnable May 6, 2016, through which the Executrix sought court approval of the Accounting as well as an allowance to the Executrix of \$26,998 in corpus commissions and \$2,272.89 in income commissions, and allowing counsel fees in the amount of \$45,611.37.

The Accounting is for the period from the date of deaths of the decedent (March 16, 2012) to December 31, 2015.

Ronald Porto—son of decedent—filed exceptions to the Account on April 22, 2016.

A Case Management Order was entered on May 6, 2016 setting forth deadlines for discovery and scheduling the matter for trial.

The parties attempted to mediate their dispute but were unable to resolve their differences.

A summary of the First and Final Account as submitted is as follows:

The Executrix Charges Herself as Follows:

Corpus Receipts, Per Pages 2-4	\$780,317.34
Increase on Sale or Redemption of Assets, Per Pages 5-8	<u>55,759.89</u>
Total Corpus Charges	<u>\$836,077.23</u>

The Executrix Prays Allowance For:

Decrease on Sale, Redemption or Exchange, Per Pages 5-8	\$ 457.42
Corpus Disbursements, Per Page 9-18	129,683.48
Corpus Distributions, Per Pages 19	93,649.99
Total Corpus Allowance	<u>\$223,790.89</u>

Corpus on Hand, Per Page 21 \$621,286.34

AS TO INCOME

The Executrix Charges Herself as Follows:

Income Receipts, Per Pages 23-30	\$37,774.02
Increase on Sale or Redemption of Assets, Per Page 31	\$ 107.06
Total Income Charges	<u>\$37,881.08</u>

The Executrix Prays Allowance For:

Income Disbursements, Per Page 32	-0-
Income Distributions, Per Page 33	<u>\$ -0-</u>
Income on Hand, Per Page 34	\$37,881.08

By way of General Allegations, the Exceptant Ronald Porto sets forth that Decedent had been in “extremely debilitated health conditions and suffering from brain dementia”, and that the Executrix had served as Decedent attorney-in-fact and primary caregiver.

By way of specific exceptions, Exceptant alleged as follows:

U.S. SAVINGS BONDS

“2. It is undisputed that on or about February 19, 2010, approximately two years prior to decedent’s passing and during the time period that she was suffering from extremely debilitated physical conditions and brain dementia, the decedent transferred U.S. Savings Bonds in the amount of \$121,891.28 to the executrix (then attorney-in-fact), Cathy Timpone.

3. In that the transfer of these U.S. Savings Bonds were made by the decedent to Cathy Timpone while acting as her attorney-in-fact (then fiduciary), Cathy Timpone must explain the nature and propriety of this transfer.

4. Beneficiary, Ronald C. Porto, states that the transfer of the U.S. Savings Bonds should be set aside; and, those assets should be part of the decedent’s estate and available for distribution.

TANGIBLE PERSONAL PROPERTY¹

5. Under the Verified Complaint, Schedule C, Executrix's First and Final Account, Summary of Account, As to Corpus (Continued) [page 2, also shown as (3)], the Account lists "Tangible Personal Property" in the amount of \$1,000.

6. Beneficiary, Ronald C. Porto, communicated, through counsel, to the estate attorney, John Walsh, Jr., a detailed list of valuables and household furnishings which were part of the estate in a letter dated December 09, 2014. (See attached Exhibit A.).

7. In that there is an enormous discrepancy between the tangible personal property reported in the Account and that with which beneficiary, Ronald C. Porto, was clearly familiar, the executrix must explain the nature and reason for the discrepancy.

JOINTLY HELD ASSETS

8. In the Summary of Account [Page 1, also shown as (19)], titled "Distributions of Principal to Beneficiaries," the executrix lists four bank / brokerage accounts with a total fair market value of \$93,649.99.

9. Beneficiary, Ronald C. Porto, states that these assets were transferred under conditions when the decedent owner was suffering from infirm capacity and especially subject to the undue influence of her caregiver and fiduciary, Cathy Timpone.

10. Beneficiary, Ronald C. Porto, states that the assets in the amount of \$93,649.99 which were transferred to Cathy Timpone by operation of law as joint tenant should be set aside and recaptured for distribution to the estate beneficiaries pursuant to the terms of the Last Will and Testament.

EXECUTRIX'S COMMISSIONS AND ATTORNEY'S FEES

11. The commissions claimed by the executrix and the fees and costs claimed by her lawyers are excessive, especially in view of the improper acts taken in the administration of this estate.

WHEREFORE, Ronald C. Porto demands judgment:

- a. Disallowing the Account;
- b. Awarding damages for the executrix's breach of duty;
- c. Surcharging and removing the executrix;
- d. Forfeiting all commissions to the executrix;

¹ The Exceptions as to tangible personal property were withdrawn during trial.

- e. Disallowing payment of any legal fees or costs to the executrix's counsel from the assets of the estate;
- f. Awarding Ronald C. Porto all legal fees and costs he has incurred in this matter, either against the executrix personally or from the assets of the estate; and
- g. Awarding all the relief deemed just and equitable by this Court.”

As distilled in the pre-trial submissions of the parties, Ronald C. Porto alleges that his sister Cathy Timpone improperly acquired, inter vivos, the following assets which by right should be part of Susan Porto's Estate:

1. Florence Faye Wilson's Estate
Value = \$122,000.00
(bequeathed to Susan J. Porto)
2. Susan J. Porto's Estate
Re-titling bank assets
Value = \$93,649.99
(five separate joint financial accounts which passed to Cathy Timpone upon the death of Susan Porto).

Ronald Porto alleges that Cathy Timpone engaged in a pattern of self-dealing while serving under a power of attorney granted to her by the parties' mother on May 5, 2009, as well as while servicing as Executrix of the mother's estate. He challenges certain inter-vivos transactions as being the product of undue influence by Cathy Timpone upon the mother while the mother was incapacitated or of diminished capacity. In essence, Ronald Porto contends that the bonds (\$122,000) and financial accounts (\$93,649.99) should be a part of the estate.

For her part, Ms. Timpone asserts that the estate accounting is accurate and complete. She denies abusing the power of attorney. Ms. Timpone characterizes as “gifts” her acquisition of the bonds owned by the Decedent, which were inherited by the Decedent from the Decedent's sister, Ms. Timpone's and Mr. Porto's Aunt Florence Wilson (“Faye”), who died on November

18, 2008. Ms. Timpone also claims ownership of the joint accounts set up in the name of Decedent and Ms. Timpone before Decedent died.

The matter was tried by the court sitting without a jury on March 13, 2017, April 4, 17 and 18, 2017. Following closing argument, the court reserved decision. The Executrix's case was presented by John K. Walsh, Jr., Esq. Exceptant's case was presented by Christopher Leyden, Esq.

The court heard testimony from Exceptant Ronald Porto and from the Executrix/Accountant Cathy Timpone. The court also heard testimony from Ms. Timpone's three (3) sons, Edward Timpone, Christopher Timpone and Joseph Timpone, from Mr. Porto's son Jonathan Porto. The court also heard testimony from local attorneys Timothy Tuttle, Esq., Adam Tuttle, Esq. and Dennis Maher, Esq. Numerous exhibits were received into evidence.

II. DECISION OF THE COURT

Before the court for decision is how to characterize transactions involving U.S. Savings Bonds, and how to characterize certain joint accounts with rights of survivorship set up by the Decedent in her name and that of her daughter, Cathy Timpone. In the Executrix's view, the bonds were given to her by her aunt prior to the aunt's passing. Alternatively, they passed by Will upon the aunt's death to Susan Porto, who gave them to Cathy Timpone by inter vivos gift. Mr. Porto contends the bonds were never effectively gifted to Cathy Timpone by the Aunt but rather were inherited by Susan Porto. Mr. Porto contends that Susan Porto was then unduly influenced to give the bonds to Cathy Timpone, in a transaction not understood by Susan Porto.

As to the joint accounts, Cathy Timpone contends that Susan Porto created these accounts with her own money and knowingly, voluntarily and effectively made Cathy Timpone a joint tenant with rights of survivorship as to each account. Accordingly, upon the death of Susan

Porto, the funds in the accounts became the sole property of Cathy Timpone. Exceptant Ronald Porto contends that these transactions were the product of undue influence by Cathy Timpone upon Susan Porto.

In the court's view, the Exceptant's contentions as to the bonds are correct: they properly are viewed as assets of the Estate of Susan Porto. In the court's view, the Executrix's contentions as to the joint account are correct: they are properly viewed as belonging to Cathy Timpone.

(A) Savings Bonds Are Estate Assets

Susan Porto, the Decedent, is the mother of Cathy Timpone and Ronald Porto. Susan's husband, Carl, died in August, 2009. Cathy is divorced and has three adult sons, Edward, Christopher and Joseph. Ronald is also divorced, and has three adult children, Ronald F., Stacey and Jonathan.

Susan Porto had a sister named Florence Wilson, whom I will refer to as Aunt Faye, as did the litigants during the trial. Aunt Faye was married to Joseph Wilson. Joseph Wilson died on February 21, 2004. The couple had no children born to them.

Susan Porto died on March 16, 2012, at age 90.

Aunt Faye executed a Last Will and Testament on December 28, 2007, prepared by attorney Adam S. Tuttle, Esq. Through her Will, Aunt Faye bequeathed to her "...beloved niece, CATHY TIMPONE the contents of my residence located at 305 3rd Street, Palisades Park, New Jersey. In the event my beloved niece predeceases me, this bequest shall lapse". Aunt Faye left her entire residuary estate to her sister, Susan Porto, and, should Susan Porto have predeceased Aunt Faye (which she did not), then the entire residuary estate was to be divided between Cathy

Timpone, Ronald Porto and another niece of Aunt Faye's, Delores Senatore. Cathy Timpone is the named Executrix; Cathy's son Christopher is the Alternate Executrix.

Aunt Faye and her husband Joseph had accumulated a substantial amount of U.S. Savings Bonds over the course of their marriage. It is said that they were titled in the name of Aunt Faye, or Joseph, or both of them.

These bonds – worth \$121,891.28 — passed to Susan Porto upon Aunt Faye's death on November 18, 2008, pursuant to the terms of Aunt Faye's Will of December 28, 2007. The court rejects the suggestion that these bonds were gifted to Cathy Timpone by Aunt Faye during Aunt Faye's lifetime, sometime in 2006. The bonds remained in Aunt Faye's apartment at the time of her death. They remained titled as they were – in her name, her deceased husband's name, or in both names.

Cathy Timpone testified that sometime in 2006, while she was at Aunt Faye's apartment, Aunt Faye handed her the bonds and said she wanted her to have the bonds. Cathy Timpone testified that she “accepted” and “took possession” of the bonds from her Aunt, and thanked her.

Cathy Timpone then purportedly told Aunt Faye “I'll leave the bonds in your home until you pass away”, and Aunt Faye said “Fine”. Cathy Timpone then put the bonds in a bureau drawer in Faye's home, where this conversation is said to have occurred.

The court determines that the bonds were never gifted by Aunt Faye to Cathy Timpone, were not inherited by Cathy Timpone from Aunt Faye, and were not shown to have been effectively gifted from Susan Porto to Cathy Timpone.

The above-related event whereby Aunt Faye is said to have given the bonds to Cathy, who “accepted them” and “took possession” of them but then immediately handed them back to Aunt Faye is, obviously, self-serving, but it is also entirely uncorroborated. The ritualistic

invocation of “acceptance” and “took possession” appears contrived to satisfy the delivery element of a lawful gift. See Rommell v. Happe, 93 N.J. Eq. 383 (Ch. 1921). Cathy Timpone’s explanation that she placed the bonds in Aunt Faye’s bureau drawer so she could receive them upon Faye’s passing makes no sense if she considered that Faye had made an unconditional, completed gift. Why not just accept the tendered gift with thanks and be done with it? No coherent explanation was proffered. The alleged conversation and gift giving is unestablished by the trial evidence. There was no effective inter vivos gift of the bonds by Aunt Faye to Cathy Timpone.

Aunt Faye’s Will, created after the alleged gifting, does not bequeath the bonds to Cathy Timpone. Rather, the entire residuary estate is bequeathed to Susan Porto, if she survived Faye, and, if she did not, then to Cathy Timpone, Ronald Porto and another niece of Aunt Faye’s, Delores Senatore. Now, there is a specific bequest to Cathy Timpone of the “contents of my residence”. There was some suggestion at the trial that Cathy Timpone and perhaps Susan Porto were of the belief that this Will provision somehow served as a **bequest** of the **bonds** to Cathy Timpone. (See Ex. P-14, noting that Aunt Faye bequeathed the contents of her home to Cathy Timpone as if to suggest that it was Aunt Faye’s intent that Cathy Timpone inherit or otherwise ‘get’ the bonds). But it was not specifically contended at trial that the specific “contents” bequest in Aunt Faye’s Will somehow served to bequeath the bonds to Cathy Timpone, and I find as a matter of law the bonds were not “contents” of Aunt Faye’s residence within the meaning of Aunt Faye’s Will. Indeed, the bonds are treated on Aunt Faye’s Estate Return as belonging to Aunt Faye at her death.

The scrivener of Aunt Faye’s Will — Adam Tuttle, Esq. — testified credibly to a post – Will telephone conversation with Aunt Faye (i.e., post December 28, 2007, as well as after the

purported 2006 ‘gifting’ by Aunt Faye to Cathy Timpone of the bonds). Mr. Tuttle testified that Aunt Faye called him several months after executing the Will to say she had bonds in a drawer in her home and that she wanted Cathy to have the bonds. Mr. Tuttle advised her she would have to do a new Will. Aunt Faye, who lived ten (10) minutes from the attorney’s office, and who would die on November 18, 2008, never re-did her Will. Mr. Tuttle’s testimony establishes that she knew what she would have to do in order for Cathy Timpone to inherit her bonds – re-do the Will – and that she never followed up to accomplish that task.

Accordingly, because the alleged gifting of the bonds rests entirely on the self-serving and uncorroborated testimony of the recipient, and because the scenario as related is implausible, and because the evidence in the case establishes that all participants — Aunt Faye, her estate’s counsel, Cathy Timpone, Cathy Timpone’s attorneys and even Susan Porto — realized or came to realize no effective gifting of the bonds was made to Cathy Timpone, the court must reject any suggestion that Faye gifted the bonds to Cathy Timpone or that Cathy Timpone inherited the bonds under Aunt Faye’s Will.

Pursuant to the terms of Aunt Faye’s Will, Susan Porto inherited the entire residuary estate, including the bonds. The issue then becomes whether or not Cathy Timpone has proven that Susan Porto effectively gifted the bonds to her, *inter vivos*. This was the heart of the trial (as to the bonds). I find those proofs to be insufficient and, as a result, determine that the bonds were in the estate of Susan Porto at her death, and the disposition of the bonds is controlled by the terms of Susan Porto’s Will.

After Aunt Faye died, Susan Porto met with local counsel and created written evidence of her intent to gift the bonds to Cathy Timpone, and thereafter implemented the transfer of the bonds to Cathy Timpone. However, this gifting was undertaken at a time when Susan Porto was

88 years of age, very soon after the devastating loss of her husband Carl, at a time Susan Porto was in diminished physical and mental health, and while she was in a deeply trusting, confidential and dependent relationship with the putative donee – her daughter Cathy Timpone, in whose home she was residing. And the memorialization of her supposed intent to gift the bonds was done by Cathy Timpone’s counsel. Susan Porto was uncounseled. The gifting was then implemented through the assistance and guidance of Cathy Timpone’s son, Christopher, a financial advisor to both his mother Cathy and his grandmother Susan. Under these circumstances, the burden of proving the viability of the gift of the bonds is not met.²

The burden of proving an inter vivos gift is on the party who asserts the claim. Bhagat v. Bhagat, 217 N.J. 22, 41-42 (2014).

The court is mindful that gifting from parents to their children is commonplace, (as is disproportionate gifting by a parent to children of the parent). When “the transfer is from a parent to a child, the initial burden of proof on the party claiming a gift is slight.” Bhagat, supra. 217 N.J. at 41 (citing Metropolitan Life Ins. Co. v. Woolf, 136 N.J. Eq. 588, 592 (Ch. 1945), aff’d, 138 N.J. Eq. 450 (E. & A. 1946)). In essence, it is said that “a presumption arises that the transfer is a gift,” ibid. (citing numerous cases, including, Peppler v. Roffe, 122 N.J. Eq. 510, 515 (E. & A. 1937)), because “a child is considered a natural object of the bounty of the donor,” id. at 42 (citing Weisberg v. Koprowski, 17 N.J. 362, 373 (1955)).

However, whereas here the party challenging the gift demonstrates that the donor and donee shared a “confidential relationship”, the burden of proof shifts to the recipient to prove that no undue influence occurred. In Re Dodge, 50 N.J. 192, 216, 227 (1967). Under those circumstances, the donee has the burden to show by clear and convincing evidence not only that

² The conduct of the attorneys and financial advisors was in no way improper; the nature and extent of their involvement in the gifting of the bonds, however, does not support Cathy Timpone in meeting her burden of proving the effectiveness of the gifting of the bonds.

“no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood”. Id. at 227. That is a very high burden; a more stringent test than the similar doctrine in Will contests.

In general, there is a confidential relationship if the donor (or testator in a Will context) by reason of weakness or dependence reposes trust in the particular donee. In Re Hopper, 9 N.J. 280, 282 (1952). In Re Estate of Stockdale, 196 N.J. 275, 303 (2008). Cathy Timpone and Susan Porto shared a confidential relationship far beyond that which may be thought to be characteristic or typical of parents and adult children who are close.

Susan Porto’s husband, Carl Porto, died in August 2009. Susan Porto thereafter resided in Cathy Timpone’s home in Chestnut Ridge, New York from Labor Day, September 2009, until Susan Porto’s own death on March 16, 2012.³ Throughout this period of time, Susan Porto, who did not drive, was dependent upon Cathy Timpone, with whom she enjoyed a close, loving, trusting relationship. The mother was dependent on the daughter for the roof over her head, the food she ate, for transportation to and from her doctors, and for arranging for the attendance of home health aides. Throughout this period of time, Susan Porto depended upon Cathy Timpone for assistance in getting her bills paid on time and having her medications properly organized. On May 5, 2009, Susan Porto executed a power of attorney in favor of Cathy Timpone, whereby she granted her daughter plenary, durable authority over her finances and medical affairs. The trial proofs clearly establish that the relationship was not simply that of a mother and a daughter but rather one of complete trust, and intimate dependence and reliance by an aged, ailing parent, upon the ultimate recipient of the purported gift of \$121,891.28 in bonds.

³ Susan Porto did return to her Palisades Park, New Jersey home for three (3) weeks, around late June, early July, 2009, while Cathy Timpone travelled out of the country for educational purposes.

The presumption of a parent to child gift is thus rebutted and what adheres is a burden upon the donee to establish by clear and convincing evidence that:

1. No deception was practiced;
2. No undue influence was used;
3. All was fair, open and voluntary;
4. All was well understood.

In Re Dodge, supra 50 N.J. at 227.

Here, there is no proof that Susan Porto was deceived into gifting the bonds to her daughter. There was no trickery involved. There is no evidence or suggestion Susan Porto was lead to believe something was true that was in fact not true.

The trial evidence, however, fails to impair the conclusion that the 88 year old Susan Porto was unduly influenced by her daughter while in a deeply trusting, dependent, confidential relationship, and accordingly has failed to show that the process by which Susan Porto surrendered the bonds to Cathy Timpone was either fair or voluntary, or well understood.

In cases where a dependent donor makes an “improvident gift” to the donee upon whom she is dependent, a presumption arises that the donor did not understand the consequences of the gift that stripped her of all or virtually all her assets. In such cases, the donee must show that the donor had the benefit of competent and disinterested counsel. Pascale v. Pascale, 113 N.J. 20, 31 (1988). I impose no such burden upon Cathy Timpone, as the bonds did not constitute all or virtually all of Susan Porto’s assets. Susan owned her own home and had various financial accounts at her disposal until her death. However, it is a fact in this case that the donee was counseled with respect to the proposed gifting of the bonds and that Susan Porto was entirely unrepresented and uncounseled in the transaction. The only professionals who spoke with Susan

Porto about the bond transaction were Cathy Timpone's attorneys, who questioned her about it at their law office, and then prepared the written documents Susan Porto signed memorializing her supposed intention to gift the bonds to Cathy Timpone (P-14 and then P-13). That accomplished, Cathy Timpone's son Christopher, a lifetime friend of one of Cathy Timpone's attorneys, implemented the transfer through a financial institution where he served as financial advisor to both his mother Cathy Timpone and his grandmother Susan Porto. The lack of independent legal or financial advice regarding this significant inter vivos transfer these assets (\$121,891) weighs significantly in the scales against meeting the burden of proving that no undue influence was exercised by Cathy Timpone, or proving that the decision and implementation of the decision to make the bond transfer was free, open, voluntary or well understood by the 88 year old, ailing, dependent donor.

Several of the classic hallmarks of undue influence are present in this case. First, the condition of the donor. She was 88 years old and was sufficiently failing in health that she required in home visiting nurses in her home in Palisades Park even before she was removed to Cathy Timpone's home in Chestnut Ridge. The issue here is not total incapacitation or complete mental incompetence; it is the markedly diminished capacity of a person whose children did not think could safely live unaided alone, who could not drive, who could not cook for herself, who could not be left to organize her own medications, who, after the passing of her husband, suffered multiple hospitalizations and frequent stints in rehab facilities. The vulnerability of such a person is the very reason the law puts the onus on the recipient of the gift to prove by clear and convincing evidence the viability of the gift. That high standard has not been satisfied and is not rebutted by evidence that Susan Porto was able to go on trips or attend parties or converse with people.

Secondly, there is a relocation of Susan Porto from her long-time home to the home of Cathy Timpone, during the vulnerable period shortly after Susan's husband's death and continuing for some two and one-half years until the death of Susan Porto. Ronald Porto testified credibly as to his greatly diminished and inhibited ability to interact with his mother upon her removal to Chestnut Ridge. His calls to Susan Porto went unanswered and unreturned, an experience noted as well by Susan Porto's lifetime friend Stella Gregorowicz (P-10). Thirdly, the attorney who prepared the codicil that vested Cathy Timpone with exclusive executrix role as to Susan Porto's estate is not the same attorney who prepared Susan Porto's Will, but rather is an attorney recommended to Susan Porto by Cathy Timpone's son Christopher. The attorney was also an attorney for Cathy Timpone and had a business relationship with Christopher. There is absolutely nothing improper about any of these relationships, but they weigh in the scales against proving the gift of the bonds was free of undue influence, fair, open, voluntary and well understood. Moreover, the fact that the attorney met Susan Porto but once — the day she executed the codicil removing Ronald Porto as Co-Executor — provided the attorney with limited insight into the relationship between Susan Porto and Cathy Timpone on November 4, 2010 (P-2).

The same attorney who prepared the codicil also prepared a durable financial and medical power of attorney by which Susan Porto granted Cathy Timpone a durable power over Susan Porto's financial and medical affairs, reflecting facts of Susan Porto's finances apparently provided by Christopher Timpone. This document was not witnessed by the scrivener but was witnessed by the fiancé of Cathy Timpone. Again, these facts do not serve to satisfy the donee's burden to prove the gift of the bonds was free of undue influence, open, voluntary and well understood, but rather weigh against such findings.

This substantial inter-vivos transfer to Cathy Timpone occurred during the twilight of Susan Porto’s life, while she was dependent upon her daughter, and had the effect of materially diminishing the eventual Estate assets available for distribution to persons other than Cathy Timpone.

It may be debated whether these proofs are sufficient to disprove the alleged gifting of the bonds by a preponderance of the evidence. But it is not Exceptant’s burden to prove the invalidity of the gifting of the bonds. The trial evidence disables Cathy Timpone from proving by even a preponderance of the evidence that which the law burdens her to prove by clear and convincing evidence: that the gift of the bonds was free of undue influence, fair, open and voluntary, and well understood by Susan Porto. Accordingly, the court determines that the bonds were part of Susan Porto’s Estate when she died, and were not effectively gifted during her lifetime.

(B) Financial Accounts Passed to Cathy Timpone Upon the Death of Susan Porto

At the time of her death, Decedent had five (5) challenged joint accounts in her name and that of Cathy Timpone.

<u>Account</u>	<u>Date Interest</u> Acquired by C. Timpone	<u>DOD Balance</u>
1. Wells Fargo High Yield Savings	7-1-11	\$39,648.85
2. Chase Bank CD	1-23-10	\$23,160.98
3. Morgan Stanley Money Market	4-8-11	\$20,002.39
4. Hudson City CD	6-30-10	<u>\$10,837.77</u>
TOTAL		<u>\$93,649.99</u>

These sums were solely the property of Susan Porto. She named Cathy Timpone as co-owner, and the accounts passed to Cathy Timpone upon Susan Porto's death on March 16, 2012. On this there is no dispute. There is no proof of any improper utilization of the funds in these accounts by Cathy Timpone prior to Susan Porto's death.⁴ Susan Porto got the idea to make these arrangements in favor of Cathy Timpone from Susan's lifetime friend, Stella Gregorowicz. (P-10). Cathy Timpone was Susan Porto's primary caregiver after the death of Susan's husband, father to Cathy Timpone and Ronald Porto – Mr. Carl Porto – on August 5, 2009. Susan moved in with Cathy in September, 2009 and resided there up until Susan's death on March 16, 2012. To reward her for this extensive caregiving, Susan Porto gave Cathy Timpone survivorship rights to these accounts, similar to an arrangement Stella had implemented with respect to her own children. Susan wisely retained a right to the funds while she lived, in case she needed them, knowing that what remained would go directly to the child who had cared for her in her final years. Ronald Porto also loved his mother and was loved by her. But the disposition of these accounts is, I find, a natural arrangement, specifically prompted by the example of Susan's old friend. I find that it has been clearly established that Susan Porto implemented these joint accounts knowing what she was doing, and intending to accomplish what she did in fact accomplish, and that this idea originated not from Cathy Timpone or from members of her family, but from Susan Porto of her own free will. The arrangement of these accounts was voluntary, relatively open, free of the taint of undue influence, and sufficiently understood by Susan Porto. The accounts passed to Cathy Timpone upon the death of Susan Porto, and are not part of her estate.

⁴ The court further notes that there is no proof of wrongful use of the power of attorney by Cathy Timpone.

A Judgment on Accounting accompanies this decision.

ROBERT P. CONTILLO, P.J.CH.