

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

BURNETTA SMITH, EXECUTRIX	:	CASE NO. C-96579
OF THE ESTATE OF ROY SMITH,	:	
DECEASED, et al.,	:	
	:	<u>DECLARATORY JUDGMENT</u>
Plaintiffs	:	<u>REGARDING DISPUTED</u>
	:	<u>OWNERSHIP OF STOCK IN</u>
-vs-	:	<u>M & A REALTY CO., INC.</u>
	:	
PHILLIP SMITH, et al.	:	
	:	
Defendants	:	
	:	

This matter came before Judge Wayne F. Wilke on March 10th, 11th and 12th, 1997, concerning Count One of Plaintiff’s Amended Complaint, which asked the Court for declaratory judgment with respect to the number of shares outstanding in M & A Realty Company, Inc. At the close of trial, the Court scheduled the dates for the filing of closing arguments and replies to those closing arguments. On April 30, 1997, Defendants Phillip Smith and Lawrence Ashford filed their closing brief. Plaintiffs Burnetta Smith, et. al filed their closing brief on May 1, 1997. Plaintiffs’ reply to Defendants’ brief was filed on May 7, 1997, and Defendants’ reply to Plaintiffs’ brief was filed the next day, May 8, 1997.

STATEMENT OF FACTS

The decedent, Roy Smith, died testate on February 12, 1996. He was survived by his spouse, Burnetta Smith, and three adult children, to wit: Mark S. Smith, Gary R. Smith and Shelli Smith-Diamond. Burnetta Smith was appointed Executrix of her

husband's estate. Burnetta Smith and her three children are the plaintiffs to this action. Additionally, the decedent was survived by one brother, Phillip Smith, who is one of the defendants to this action.

M & A Realty Co., Inc. (hereinafter M & A Realty) is a closely-held corporation that owns and operates various rental real estate properties. The evidence produced at trial showed that the decedent managed M & A Realty and was responsible for its financial affairs. Furthermore, the decedent served either as President of M & A Realty or as Secretary/Treasurer. In March of 1993, the decedent was named Phillip Smith's attorney-in-fact pursuant to a general power of attorney.

Plaintiffs allege that the decedent's brother, Phillip Smith, seized control of M & A Realty after Roy Smith's death. Defendant Phillip Smith allegedly refused to disclose any information about the company to Plaintiffs and assumed total control of the company's operations. Simply put, there is a controversy among the parties over both the ownership and the number of outstanding shares of stock in M & A Realty, and the dispute must be resolved so that the decedent's estate may be properly administered. Plaintiffs believe there are 174 shares and that the shares are owned as follows:

Estate of Roy Smith:	16 shares
Phillip Smith:	16 shares
Mark S. Smith:	44 shares
Gary R. Smith:	44 shares
Shelli Smith-Diamond:	44 shares
Lawrence Ashford:	10 shares

Defendant Phillip Smith, on the other hand, disputes this scenario. The ownership scheme listed above assumes that Roy Smith and Phillip Smith each gifted ten shares of stock to Plaintiffs Mark S. Smith, Gary R. Smith and Shelli Smith-Diamond in 1989 and again in 1994. The decedent's children initially owned 4 shares each prior to

1989. They were given ten shares each from their father in 1989 and again in 1994. They were all given ten shares in 1989 from the Defendant, Phillip Smith, bringing to 34 the total of the undisputed ownership of shares of M & A Realty by the decedent's children. While he admits to giving gifts of ten shares of M & A Realty to each of Mark S. Smith, Gary R. Smith and Shelli Smith-Diamond in 1989, Phillip Smith flatly denies making ten-share gifts to the decedent's children in 1994.¹

Plaintiffs filed an amended complaint for declaratory judgment on January 9, 1997. This court has been asked to determine the number of shares outstanding of M & A Realty and the ownership of those shares. A determination of the exact ownership, in turn, depends upon whether Phillip Smith validly gifted ten shares of M & A Realty to each of Mark S. Smith, Gary R. Smith and Shelli Smith-Diamond in 1994.

CONCLUSIONS OF LAW

A probate court has jurisdiction under R.C. §2101.24(l) to render declaratory judgments; under R.C. §2101.24(c) to direct and control the conduct and settle the accounts of executors and order the distribution of estates; and under §2115.16 to determine what is lawfully included in an inventory as an asset of an estate. Additionally, any person interested in an estate as a result of being an executor, administrator or other fiduciary, devisee, legatee, heir, or next of kin in the administration of an estate may have a declaration of rights in respect to any question arising in the administration of the estate. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400.

¹ That Lawrence Ashford was gifted five shares of stock by both Roy Smith and Phillip Smith is not disputed. The evidence indicated that Lawrence Ashford is, and has been, a loyal and trusted employee. Lawrence Ashford's ownership of ten shares was the direct result and manifestation of the Smith family's appreciation of his long-term service.

Accordingly, jurisdiction rests with this court to render declaratory judgment and to determine first, the number of outstanding shares of M & A Realty and second, the ownership of those shares.

Under R.C. §2721.10, when a proceeding for declaratory judgment involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issue of fact are tried and determined in other civil actions in the court in which the proceeding is pending. Accordingly, Plaintiffs are obligated to prove by a preponderance of the evidence the number of shares outstanding.

The Court finds that the Plaintiffs have established that the number of issued and outstanding shares of M & A Realty, Co. is 174. Plaintiffs have also well documented and established the ownership of those shares up until 1994. The Court finds that through various bequests and gifts of M & A stock, the stock ownership of the company prior to 1994 was as follows:

Roy Smith:	46 shares
Phillip Smith:	46 shares
Mark S. Smith:	24 shares
Gary R. Smith:	24 shares
Shelli Smith-Diamond:	24 shares
Lawrence Ashford:	10 shares
total	174 shares

It is undisputed that Roy Smith gave each of his children ten shares of his stock in M & A Realty in 1994. What the parties dispute is whether Phillip Smith did so as well. For the reasons described below, the Court finds that Phillip Smith did not validly gift such stock to any of the decedent's children.

Plaintiffs allege that in 1994, Defendant Phillip Smith gave valid gifts *inter vivos* to each of the decedent's three children. To establish valid gift *inter vivos*, there must be

clear and convincing proof of an intention on the part of the donor to transfer title and right of possession of the particular property to the donee, and second, pursuant to such intent, a delivery by the donor to the donee of the gift with relinquishment of ownership, dominion and control over it. *Bolles v. Trust Co.*, (1936), 132 Ohio St. 21, 27. Plaintiffs have not demonstrated by clear and convincing evidence that Phillip Smith gifted thirty shares of M & A Realty stock to his nephews and niece by gifts *inter vivos*.

In *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, the court defined “clear and convincing evidence“ as

“that measure or degree of proof which is more than a mere ‘preponderance of the evidence’, but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.”

The evidence failed to clearly and convincingly demonstrate that Phillip Smith gifted the disputed stock to the decedent’s children. For example, Defendant Phillip Smith steadfastly denied ever making any gifts to the decedent’s children in 1994 and denied ever intending to make such gifts. He told the decedent that he “wasn’t interested” in making gifts to his nephews and niece when approached by the decedent (T. 375) and this was corroborated by at least one witness (T. 395). The evidence indicates that Mark S. Smith, Gary R. Smith and Shelli Smith-Diamond each received twenty shares of stock in M & A Realty in 1994 as a consequence of their father’s acts and not from any demonstrable act on Phillip Smith’s part to make those gifts. Plaintiffs failed to demonstrate the requisite intent for valid *inter vivos* gifts to be made.

While Phillip Smith appointed his brother his attorney-in-fact in 1993, neither may the Plaintiffs rely upon this relationship to validate the alleged gifts made in 1994 of

the thirty shares of stock. A power of attorney is a written authorization to an agent to perform specified acts on behalf of his principal. One who is appointed an attorney-in-fact under a power of attorney, as Roy Smith was, is a fiduciary. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165; *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440. As a fiduciary, Roy Smith had a duty to act primarily for the benefit of his principal when exercising the power and he owed the utmost loyalty and honesty to the principal, Phillip Smith. *Haluka v. Baker* (1941), 66 Ohio App. 308, 312; *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100. Moreover, as a fiduciary, Roy Smith is barred from making any personal profit, directly or indirectly, out of any transaction made upon behalf of his principal unless there is a full and fair disclosure to the principal. *Hey, Recr. v. Cummer* (1950), 89 Ohio App. 104, 140.

It is uncontroverted that the decedent's children had possession of the disputed thirty shares of M & A Realty. They also proved the element of acceptance of a gift by communicating their gratitude to their Uncle Phil. However, while all three of the decedent's children testified that they thanked Phillip Smith in 1994 for his alleged gifts of M & A Realty stock, the only way they could have received such stock was through the decedent, who acted completely against Phillip Smith's express wishes. It is clear that if Roy Smith gave each of his children ten shares of Phillip Smith's stock in M & A Realty, it was done without Phillip Smith's full knowledge of the facts. Moreover, even if Phillip Smith acquiesced in some part to the making of the alleged gifts, it is clear that he had no firm understanding of those actions. While the Plaintiffs allege Defendant Phillip Smith ratified the gifts *nunc pro tunc*, the Ohio Supreme Court has stated that ratification by a principal cannot occur unless that principal has full knowledge and

understanding of the acts performed by the agent. *Morr v. Crouch* (1969), 19 Ohio St.2d 24, 29. Additionally, the burden of proving that a principal ratified an agent's acts is upon the agent who must clearly show that the principal had knowledge of all the facts pertaining to the act. *Litchfield v. Standard Oil Co. of Ohio* (1939), 16 O.O. 67, 69-70. This the Plaintiffs failed to accomplish.

The evidence established that Phillip Smith had little knowledge about his own assets and that Roy Smith handled almost all of Phillip Smith's business affairs. The evidence indicated that Phillip Smith, almost to the point of indifference, was especially ignorant of M & A Realty's structure and operation. Such evidence negates any conclusion that Phillip Smith had full knowledge that his brother gifted some of Phillip Smith's stock in M & A Realty.

The parties argued strenuously about whether the disputed stock certificates had to be signed by corporate officers to be valid. Finding that Phillip Smith did not validly gift thirty shares in 1994, the Court need not address that issue.

In summation, the Court finds that there were no valid gifts *inter vivos* made in 1994 from Defendant Phillip Smith to neither Mark S. Smith, Gary R. Smith, nor Shelli Smith-Diamond. The number of shares of outstanding stock in M & A Realty amounts to 174 and at the time of Roy Smith's death, they are owned as follows:

Estate of Roy Smith:	16 shares
Phillip Smith:	46 shares
Mark S. Smith:	34 shares
Gary R. Smith:	34 shares
Shelli Smith-Diamond:	34 shares
Lawrence Ashford:	10 shares
total	174 shares

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: R. Joseph Parker
Julia B. Meister
William B. Singer