

**SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND**

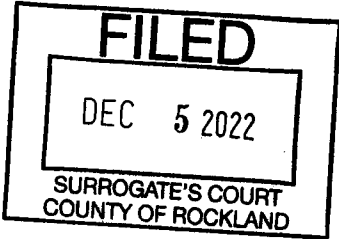
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In the matter of the application of June Fischer to :  
compel Margaret Lewis, Executor of the estate of :  
 :  
MARTIN A. FISCHER, :  
 :  
Deceased, :  
 :  
For turn over of Exempt Property :  
----- X

File No. 2020-587/B

**DECISION AND ORDER**

In the matter of the application of June Fischer, :  
surviving spouse of :  
 :  
MARTIN A. FISCHER, :  
 :  
Deceased, :  
 :  
For Determination of Validity and Effect of Exercise :  
of Right of Election :  
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File No. 2020-587/C



**Hon. Keith J. Cornell, Surrogate:**

Before the Court are two motions for summary judgment and one cross motion on the two petitions filed by June Fischer, surviving spouse of Decedent Martin Fischer. In the first petition, filed on July 14, 2021, Ms. Fischer (Petitioner) seeks to compel Margaret Lewis, Decedent's daughter and the executor of his estate (Respondent), to turn over exempt property per EPTL § 5-3.1. In the second petition, filed one week later, Petitioner seeks a determination that she is entitled to claim her elective share per EPTL § 5-1.1.

On August 23, 2022, Respondent filed motions for summary judgment seeking to dismiss both petitions. Petitioner opposed the motions and crossed moved for summary judgment on her petition seeking return of exempt property per EPTL § 5-3.1, specifically of \$6,743.72 previously located in a Chase bank account. The following papers were considered in making this decision:

1. Respondent's Notice of Motion for Summary Judgment on Subfile B/ Respondent's Statement of Undisputed Facts/ Attorney Affirmation of Frank W. Streng with Exhibits 1-7, all dated August 22, 2022;
2. Respondent's Notice of Motion for Summary Judgment on Subfile C, dated August 22, 2022/ Respondent's Statement of Undisputed Facts, dated August 22, 2022/ Attorney Affirmation of Frank W. Streng with Exhibits 1-7, dated August 21, 2022;
3. Petitioner's Notice of Cross-Motion for Summary Judgment on Subfile B, dated September 13, 2022/ Attorney Affirmation of Richard S. Pakola with Exhibits B-L dated September 13, 2022/ Affidavit of June Fischer, sworn to September 12, 2022 (attached as Exhibit A)/ Memorandum of Law in opposition to Respondent's motions and in support of the cross-motion, dated September 13, 2022;
4. Reply Memorandum of Law in further support of Respondent's motions and in opposition to Petitioner's cross-motion, dated September 26, 2022.

### Background

On September 10, 1977, Petitioner June Fischer nee Fox married Martin A. Fischer. Each party had been married twice previously and each had children from the prior marriages. The day before the wedding, the parties executed an antenuptial agreement in which they agreed that their property was separately owned and that they waived their right of election per EPTL § 5-1.1.

In keeping with the antenuptial agreement, each party's testamentary instruments left their entire estates to their respective children and/or grandchildren. Decedent executed a will dated March 27, 2015, that left his estate to his two daughters and the children of his predeceased third daughter. The will did not include any gift for his wife, June. Petitioner executed a living trust on February 27, 2019 which transfers the trust estate to Petitioner's children upon Petitioner's death. The Trust also contained no disposition to her husband, had he survived her.

Decedent passed on April 16, 2020 after the parties had been married for forty years. His will was admitted to probate on November 10, 2020 and letters testamentary issued to his named executor, Margaret Lewis (Respondent) on that date. Prior to the admission of the will to probate, Petitioner, who is currently 96 years old, served a notice of election to take her elective share of Decedent's estate.

In July 2021, Petitioner served two petitions. In the first, she sought set off by Respondent of certain items of exempt property. In the second petition, June alleged that the antenuptial agreement is void, invalid and ineffective, and as a result, she claims that she should be entitled to her elective share of her husband's estate.

In the motions for summary judgment, Respondent argues that the antenuptial agreement is valid and therefore forecloses both the claim for exempt property and the claim for the elective share. Respondent argues that Petitioner knowingly and intelligently entered into the antenuptial agreement for her benefit and to protect her own assets for her heirs. Respondent argues that Petitioner was the more monied spouse at the time of the parties' marriage. Respondent argues that the fact that Petitioner did not have her own attorney present at the execution of the agreement does not prove that she was a victim of fraud or overreaching. Respondent argues that Petitioner's own trust was drafted to comply with the antenuptial agreement. Based on the valid agreement, Respondent argues that Petitioner has no argument that she is entitled to the elective share or the exempt property.

In her opposition, Petitioner argues that the antenuptial agreement is part of a larger agreement. She argues that she and Decedent had agreed that he would maintain a life insurance policy with her as the beneficiary as part of the broader division of property. She claims that Decedent's daughters fraudulently changed the beneficiary on the life insurance to themselves using a 2015 Power of Attorney granted to them by their father. She claims that their change of the beneficiary on the life insurance was a breach of the antenuptial agreement, rendering it void.

As to the exempt property, Petitioner argues that she is entitled to the funds previously held in a joint bank account, which contained approximately \$6500. She claims that Decedent deposited money that he collected from a rental unit into that account. She claims that they

specifically used those funds for the property taxes on her home in Suffern, where they resided together. She alleges that these funds are exempt property that should be excluded from the estate.

In reply, Respondent argues that the change of the beneficiary to the life insurance policy cannot and does not invalidate the antenuptial agreement. Respondent again argues that the valid antenuptial agreement prevents both the claim for spousal elective share and the claim for exempt property. Finally, Respondent argues that if the antenuptial agreement is found not to bar the claim for exempt property, that Petitioner's cross motion should be denied. Respondent argues that Petitioner retains possession of many items of Decedent's property that are properly part of the estate, including his coin collection, tools and a generator. Respondent argues the claim for exempt property is subject to an offset for the estate property that remains in Petitioner's possession.

#### Discussion

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to eliminate any material issues of fact from the case. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). The movant bears the burden of proving entitlement to summary judgment, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). Once sufficient proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form that raises a triable issue of fact. See Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

“An antenuptial agreement is a contract and an action to avoid it is subject to the same defenses as any other contract.” In re Lemle, 30 A.D.2d 785, 785 (1st Dept. 1968). A duly executed antenuptial agreement is given the same presumption of legality as any other contract. .

. . It is presumed to be valid in the absence of fraud.” Sunshine v. Sunshine, 51 A.D.2d 326, 327 (1st Dept. 1976). “In the absence of proof of facts from which concealment or imposition may reasonably be inferred, fraud will not be presumed.” In re Estate of Phillips, 293 N.Y. 483, 491 (1944).

Here, Petitioner makes the complex argument that the antenuptial agreement is a valid contract that was breached by the act of the Respondent when she changed the beneficiary on the life insurance policy. Petitioner admits that the antenuptial agreement does not refer to the obligation to maintain life insurance for her benefit, but she claims that the antenuptial agreement is part of a larger, unwritten agreement that required maintenance of the policy with her as its beneficiary. She suggests that the Court consider parol evidence that would prove that the antenuptial agreement is an incomplete writing. The proposed parol evidence is Petitioner’s affidavit, in which she asserts the claim that the full understanding of the parties included the maintenance of the life insurance.

Petitioner’s argument stretches credulity and runs roughshod over contract law. The antenuptial agreement is valid on its face and Petitioner denies any claim of fraud or overreaching. The agreement does not include any obligation for Decedent to maintain a life insurance policy. There is no legal ground to consider parol evidence, and if there were, there is no admissible parol evidence offered. Therefore, there is no ground to reject the antenuptial agreement, which contains a valid waiver of the right to election. Respondent’s motion for summary judgment dismissing the petition seeking to determine the validity of Petitioner’s claim to her elective share is GRANTED.

That said, antenuptial agreements that make provisions in the event of the death of one spouse are narrowly interpreted. See In re Dito, 218 A.D.2d 737 (2d Dept. 1995). Waiver of

property that is excluded from the estate by EPTL § 5-3.1 must be “definite and clear.” Id.; see Matter of Marrone, 36 Misc. 3d 225 (Surr. Ct. Queens Co. 2012). Even a pre-nuptial agreement by which each spouse waived all statutory interests in each other’s estates is insufficient to waive the right to family exempt property. See Matter of DeRoo, 148 Misc. 2d 856, (Surr. Ct. Yates Co. 1990).

In support of her motion for summary judgment, Respondent points to language in the first paragraph of agreement that states that the parties “shall separately retain all rights to his or her own property, whether now owned or hereafter acquired, and each of them shall have the unrestricted right to dispose of such separate property . . . with the same effect as if no marriage had been consummated between them,” and argues that this is a waiver of the right to exempt property per EPTL § 5-3.1. However, the Court finds that this is neither a clear nor unequivocal waiver of Petitioner’s right to the exempt property per EPTL § 5-3.1. Finally, Respondent argues that Petitioner allegedly retains estate property, and such property should be offset against any exempt property in the home. If Respondent believes that Petitioner has possession of estate property, the executor may file the appropriate petition to facilitate its collection. Therefore, it is

ORDERED that Respondent’s motion for summary judgment dismissing the petition seeking exempt property is DENIED. Petitioner’s cross-motion for summary judgment on her petition for the turn over of the exempt property is GRANTED; and it is further

ORDERED that any exempt property in Respondent’s possession or control shall be returned to Petitioner within 30 days of the date of this Decision and Order; and it is further

ORDERED that Respondent’s motion for summary judgment dismissing the petition seeking to determine the validity of Petitioner’s claim to her elective share is GRANTED.

The foregoing shall be the order of the Court.

Dated: December 5, 2022



**HON. KEITH J. CORNELL**  
**Rockland County Surrogate**

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