IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK SLOAN and JACK SLOAN,	)	
	)	
Petitioners,	)	
	)	
v.	)	C.A. No. 2319-VCS
	)	
LOUIS SEGAL and DELAWARE TRUST COMPANY,	)	
	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

Date Submitted: October 10, 2007
Date Decided: January 3, 2008

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STRINE, Vice Chancellor.

I. Introduction

This is a dispute over the proper beneficiaries of a trust. Here, the battle line has been drawn between three brothers; with Frank Sloan and Jack Sloan (collectively "the Sloans") on one side and Louis Segal on the other. The brothers dispute the allocation of the proceeds of their stepfather's trust, the "Martin Sloan Trust." The Martin Sloan Trust is a revocable inter-vivos trust that states that its proceeds shall be distributed for the benefit of the issue of Patricia Sloan, Martin Sloan's wife and the mother of the three brothers, as she designates in her last will by specific reference to that power of appointment (the "Power of Appointment"). If Patricia Sloan failed to exercise the Power of Appointment in her last will, the Trust provides that the unappointed trust property shall be distributed half to Frank Sloan and half to Jack Sloan.

At dispute in this action is the validity of Patricia Sloan's exercise of the Power of Appointment in her last testamentary document, the "July 2003 Codicil." Specifically, the Sloans argue that Patricia Sloan was either incompetent or under Segal's undue influence at the time she executed that document. The July 2003 Codicil, in which Patricia Sloan specifically exercises the Power of Appointment and appoints the entire Trust balance to Segal, was one of a rapid series of changes made near the end of Patricia Sloan's life. Those changes started in 2002, at a time when Patricia Sloan was starting to suffer the effects of Alzheimer's disease. Segal, the only one of Patricia Sloan's sons to have any contact with her during the final years of her life, was actively involved in those changes. In August 2002, she executed a new will at a Delaware bank after being driven there by Segal. The "August 2002 Will" gave all her property to Segal, but failed to

specifically exercise the Power of Appointment over the proceeds of the Martin Sloan Trust. That meant that the Trust proceeds would go to the Sloans under the Trust's default provision.

Next, in October 2002, Segal and Patricia Sloan filed suit in this court seeking the Trust's records and the disbursement of the Trust balance. The ultimate resolution of that suit resulted in Segal's appointment as a co-trustee of the Trust. In October 2002, Segal also transported his mother, a long-time Delaware resident, to Florida. Soon after arriving in Florida, Segal helped his mother make two additional major changes in her life. He helped Patricia Sloan execute a new will, the "October 2002 Will," that was the same as her August 2002 Will except that it recited Palm Beach County, Florida as her permanent residence. Segal also arranged for a permanent residence for his mother in Florida in a locked Alzheimer's unit at a nursing home. Eventually, realizing the 2002 Wills failed to exercise the Power of Appointment, Segal arranged for the execution of the July 2003 Codicil. Segal also took care of finalizing his mother's move from Delaware by collecting her personal items and selling her Wilmington condominium.

This opinion addresses Segal's motion to dismiss the Sloans' complaint because this court lacks subject matter jurisdiction over the question of whether the exercise of the Power of Appointment was valid, lacks personal jurisdiction over Segal, and is an improper venue for the litigation. I deny Segal's motion to dismiss.

Segal's contention that this court lacks subject matter jurisdiction is based on the mistaken belief that the validity of Patricia Sloan's exercise of the Power of Appointment presents solely an issue of whether the July 2003 Codicil was properly executed under

Florida testamentary law. Instead, the issue is first and foremost a matter of Delaware trust law that this court has the jurisdiction to adjudicate. The Trust Agreement explicitly states that the Trust has its situs in Delaware and that all questions regarding the validity and construction of the Trust Agreement or the administration of the Trust are governed by Delaware law. It is settled Delaware law that the validity of the exercise of a power of appointment reserved in a Delaware-based trust is to be determined in accordance with Delaware law. Given that the subject matter is a Delaware trust and Delaware law governs the dispositive issue, this court has subject matter jurisdiction in this action.

Segal's assertions that this court lacks personal jurisdiction over him and that this court is an improper venue are equally without merit. Lack of personal jurisdiction and improper venue are affirmative defenses that are waived if they are not asserted in either a timely Rule 12 motion or, if a timely Rule 12 motion is not filed, in the first responsive pleading. Segal requests leniency in reviewing his answer and his notice of joinder, a filing made six months after his answer that purports to challenge this court's jurisdiction, because those documents were filed at a time when Segal was representing himself pro se. I grant him the requested leniency in reviewing his filings for any indication of a challenge to personal jurisdiction or venue, but even this permissive review cannot overlook the utter absence of any hint of those defenses in his 15-page, 23-exhibit answer. Even the notice of joinder only raises the issue of subject matter jurisdiction. The first time Segal raised the defenses of lack of personal jurisdiction and improper venue was in this motion to dismiss, which was filed approximately a year after the

complaint. Segal waived the defenses of personal jurisdiction and improper venue by not raising them in a timely manner.

Even if Segal had not waived the defenses of personal jurisdiction and improper venue, he would not prevail on those defenses. Segal engaged in abundant conduct in Delaware relevant to the Martin Sloan Trust and the issues in this lawsuit. Segal is therefore subject to specific personal jurisdiction in Delaware for this action involving the Trust because he can be served with process under the Delaware long-arm statute[1] and because his contacts with Delaware in relation to the Trust far exceed the minimum contacts required under *International Shoe*.[2] Segal's contention that Delaware is an improper venue for this action is also without merit. To prevail on this point, Segal must show that the procession of this lawsuit will subject him to undue hardship. For reasons I explain, Segal does not come close to meeting this standard.

II. Factual Background

A. The Relevant Family Members

Frank Sloan, Jack Sloan, and Louis Segal are the sons of Patricia Sloan. Frank, Jack, and Louis are full brothers. Frank and Jack changed their last name to Sloan based on the strength of their relationship with their step-father, Martin Sloan. Frank Sloan is a resident of Louisiana, Jack Sloan is a resident of Virginia, and Louis Segal is a resident of Florida. Patricia Sloan was a long-time resident of Delaware before Segal helped

[1] 10 *Del. C.* § 3104(c)(1),(3).
[2] *International Shoe v. Washington*, 326 U.S. 310 (1945).

relocate her to Florida in October 2002.[3] Martin Sloan was a long-time Delaware resident[4] who married Patricia Sloan and became stepfather to her three sons, the Sloans and Segal.

This case is rooted in sadness. From 1991 forward, the Sloans had no contact with their mother. For reasons they feel strongly about, the Sloans estranged themselves from Patricia Sloan that year and did not communicate with her or see her after that. By contrast, Segal remained a presence in his mother's life. Although there seems to have been some sporadic contact between Segal and his brothers, their relationship was also strained and untrusting.

Segal believes this case to be an outrage, brought by two sons who voluntarily chose to end their relationship with their mother in 1991 and then selfishly appeared after her death to question whether her desire to exclude them from taking under the Martin Sloan Trust was genuine. For their part, the Sloans view Segal has having maintained a relationship with their mother so as to serve his own financial needs, by receiving regular financial help from her. The Sloans have children of their own whose interests are at stake. They also say they valued their relationship with Martin Sloan and that it is his wishes that they seek to vindicate.

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[3] Segal Rep. Br. Ex. A ("2002 Complaint") at 6. The record is not entirely consistent on when Segal moved his mother to Florida. At oral argument, Segal's attorney indicated that the move occurred in August 2002, but the 2002 Complaint seems to indicate the move occurred in October 2002. *Compare id. with* Tr. Of Oral Arg. On Mot. To Dismiss (Oct. 10, 2007) at 5. In this opinion, I treat the move as if it occurred in October 2002, but my conclusions would not differ if the move actually occurred in August 2002.

[4] Martin Sloan played an important role in post-war Delaware history — co-founding that quintessential Concord Pike institution, the Charcoal Pit. *See* Charcoal Pit Restaurants – Home of the Original 1/4 Pound Hamburger, http://www.charcoalpit.net (last visited Nov. 28, 2007).

If this case proceeds, a deeper consideration of these family dynamics may, I regret, become unavoidable. For now, this summary of the family schism suffices.

B. The Martin Sloan Trust

Martin Sloan executed a revocable "Trust Agreement" on September 1, 1989.[5] That Trust Agreement created one trust for the benefit of Martin Sloan during his lifetime that would split into two trusts at the time of Martin Sloan's death — a marital deduction trust and a remainder trust. At issue in this case is the remainder trust, the Martin Sloan Trust. The Trust provided for the payment of all income and such principal as the trustee determined was necessary for Patricia Sloan's comfort, care, maintenance, and support throughout her lifetime.[6] Upon Patricia Sloan's death, the balance of the Trust was to be distributed in accordance with a specific power of appointment allowing Patricia Sloan to appoint the Trust property to or for the benefit of her then-surviving issue as designated in her last will *by specific reference* to the Power of Appointment.[7] If at death Patricia Sloan had failed to exercise the Power of Appointment, the Trust default provision directs that the balance of the Trust be split evenly between Frank Sloan and his issue and Jack Sloan and his issue.[8]

In addition to the above, the Trust Agreement contains a "Situs of Trust" clause that states:

> The State of Delaware is hereby designated as the situs of the Trusts herein created, and all questions pertaining to the

[5] Sloans Ans. Br. Ex. A.
[6] *Id.* § I.B.2.(c)(i).
[7] *Id.* § I.B.2.(c)(ii)(A).
[8] *Id.* § I.B.2.(c)(ii)(B).

> validity and construction of this Trust Agreement or the administration of the Trusts hereunder shall be determined in accordance with the laws of Delaware, regardless of the jurisdiction in which the Trusts may at any time be administered.[9]

Currently, the Trust funds are held by the Delaware Trust Company in Wilmington, Delaware, with Segal and the Delaware Trust Company serving as co-trustees. The value of the Trust exceeds $500,000.

C. Patricia Sloan's Wills And Codicils

After she received the Power of Appointment, Patricia Sloan executed a series of wills and codicils between 1991 and 2001. Those documents, however, have been supplanted by the final series of testamentary documents that Patricia Sloan began executing in 2002. On August 28, 2002, after being driven to a Delaware bank by Segal, Patricia Sloan executed a new will. The August 2002 Will recites that Patricia Sloan is a resident of New Castle County, Delaware, and gives all her assets to Segal.[10] In that Will, Patricia Sloan explains that she gives "no part of [her] estate to either of [her] sons, Frank Sloan and Jack K. Sloan, or to their Issue" because "they have voluntarily removed themselves from [her] life and have made no effort to contact [her] in any way, since 1991."[11] The August 2002 Will does not refer to the Power of Appointment under the Martin Sloan Trust.

In conjunction with the execution of the August 2002 Will — and doubtless to shore up his rights thereunder from later attack — Segal arranged for his mother to have a

[9] *Id.* § XII.
[10] Segal Answer Ex. I ("August 2002 Will") at 1.
[11] *Id.* § 1.A.

psychiatric evaluation performed in May 2002 and again on the date she executed the August 2002 Will.[12] Dr. Weisberg, a Delaware psychiatrist, noted that Patricia Sloan had "some mild memory impairment," but that in his opinion she was "competent to make decisions regarding the distribution of her estate."[13] Weisberg also noted that Patricia Sloan "felt [Segal] was preoccupied with her will, however, when I directly asked her what she would like to leave to [Segal] after Bertha and her niece got their inheritance, she stated, 'everything.'"[14]

Segal remained actively involved with his mother and her estate planning into the fall of 2002. On October 15, 2002, Segal, utilizing a power of attorney for Patricia Sloan and on his own behalf,[15] filed suit in this court seeking the Trust's records and the disbursement of the balance of the Trust to himself. The 2002 Complaint alleged breaches of the Trust Agreement by previous trustees and questioned how the Trust had declined more than 50% in value over approximately a decade. After a forensic examination of the Trust's records, the 2002 Complaint was dismissed because there was

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[12] Segal Answer Ex. H ("Weisberg Letter") at 1 ("The evaluation was initiated by Ms. Sloan's son, Louis Segal.").
[13] *Id.* at 2.
[14] *Id.*
[15] There was and still is some confusion as to Segal's role in that prior lawsuit. He originally stated that he represented both himself and his mother:

> THE COURT: You're for yourself or are you for your mother?
> MR. SEGAL: Myself and my mother. But basically -- yeah.

Teleconference Tr. (May 23, 2003) at 3, *In re Revocable Trust of Martin Sloan*, C.A. No. 19979-NC. Soon after, Segal was ordered to obtain Delaware counsel for Patricia Sloan. Segal Rep. Br. at 2. Despite obtaining Delaware counsel to represent his mother's interests, Segal continued to be personally involved in the litigation. *E.g.*, Hr'g Tr. (Jan. 4, 2006) at 19, *In re Revocable Trust of Martin Sloan*, C.A. No. 19979-NC.

no indication of any conversion or misuse of Trust funds by the former trustees.[16] As part of the stipulated dismissal of that action, Segal was appointed as co-trustee of the Trust along with Delaware Trust Company.[17]

In the 2002 Complaint, Segal also informed this court of his other reason for coming to Delaware in October 2002, which was to transport his mother to Florida.[18] Segal explained: "Patricia R. Sloan and Louis Segal will be in Florida from October 17, 2002, until after January 1, 2003."[19] Although Segal's representation to the court made Patricia Sloan's time in Florida seem temporary, that was clearly not the intention. The re-execution of Patricia Sloan's will evidences the permanency of Patricia Sloan's move to Florida. On October 18, 2002 — three days after the 2002 Complaint was filed — Patricia Sloan executed a replica of her August 2002 Will changing only her recited residence to Palm Beach County, Florida.[20]

Almost immediately after she was transported to Florida by Segal, Patricia Sloan apparently was placed in a locked Alzheimer's unit at a nursing home because she had problems with wandering, one of the most dangerous and frightening symptoms of Alzheimer's disease.[21] Approximately eight months into her stay in the Alzheimer's unit,

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[16] Order of Dismissal (Feb. 9, 2006) at 1, *In re Revocable Trust of Martin Sloan*, C.A. No. 19979-NC.
[17] *Id.* ¶ 4.
[18] 2002 Complaint at Please Notice Clause.
[19] *Id.*
[20] Segal Answer Ex. J ("October 2002 Will") at 1.
[21] Tr. Of Oral Arg. On Mot. To Dismiss (Oct. 10, 2007) at 28. Patricia Sloan's confinement to a nursing home casts doubt on the extent she was in control of her actions during the time period where she was moved to Florida, placed in a nursing home, and signed the July 2003 Codicil — approximately one month before her move to Florida she had expressed to Dr. Weisberg that

Patricia Sloan executed the July 2003 Codicil to her October 2002 Will. The July 2003 Codicil exercised the Power of Appointment by appointing the entire balance of the Trust to Segal.[22] As with her execution of the August 2002 Will, Patricia Sloan was examined by a doctor — this time Dr. Lori Lynn Dowie — on the day she executed the July 2003 Codicil. Dr. Dowie noted in her report that Patricia Sloan was suffering from "mild dementia of Alzhem Type" and that while she responded appropriately and was oriented to person and time, she was not oriented to place.[23] Dr. Dowie's report made no specific reference to Patricia Sloan's competency or her capacity to execute a testamentary document.

D. The Family Drama Continues After The July 2003 Codicil

Segal continued his active involvement in his mother's affairs after the execution of the July 2003 Codicil. Although Segal's specific actions are disputed, he indisputably participated in the March 2004 sale of Patricia Sloan's Wilmington condominium. Again, although the details are disputed and the parties do not specify the date on which the activities occurred, Segal indisputably came to Delaware and took possession of the personal property of Patricia Sloan.

The next important event in the Sloan family saga was the death of Patricia Sloan on July 1, 2006. After his mother's death, Segal filed the October 2002 Will and July 2003 Codicil with the clerk for Palm Beach County, Florida on July 25, 2003. As of the

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"she did not want to have to go into a nursing home if she became unable to care for herself." Weisberg Letter at 1.

[22] Segal Answer Ex. K ("July 2003 Codicil") at 1.

[23] Sloans Ans. Br. Ex. C.

time this motion to dismiss was argued, Patricia Sloan's testamentary documents had not been probated in Florida — they remain merely filed and no Florida court has determined the validity of the documents. There is therefore no litigation pending in Florida over the issues now before this court.

Soon after Segal filed Patricia Sloan's testamentary documents in Florida, the Sloans filed this action against Segal and the Delaware Trust Company on August 6, 2006. The Delaware Trust Company responded on September 14, 2006 by asserting several affirmative defenses and requesting that this court issue a declaration as to the appropriate beneficiaries of the Trust. One of the affirmative defenses asserted by the Delaware Trust Company was that this court might lack subject matter jurisdiction over the action because Patricia Sloan's testamentary documents might need to be interpreted by a Florida court. Segal responded pro se on September 19, 2006 with a fifteen-page "Answers With Motion To Dismiss" supported by twenty-three exhibits. The substance of Segal's answer was that the Sloans' complaint lacked merit because Patricia Sloan's testamentary documents made it clear that he was to receive the proceeds of the Trust. It did not make any explicit or implicit reference to lack of subject matter jurisdiction, lack of personal jurisdiction, or improper venue.

Approximately six months later, Segal, again pro se, filed a "Notice of Joinder" purporting to join the Delaware Trust Company's affirmative defense that this court might lack subject matter jurisdiction over the Sloans' complaint. The Notice of Joinder also "makes mention" that Patricia Sloan was a resident of Florida from 2002 until the time of her death and that "this additional fact adds significantly to the question of

jurisdiction by any Delaware court."[24] That filing made no explicit or implicit reference to the argument that this court lacked personal jurisdiction over Segal or that it was an inconvenient forum.

Eventually, Segal retained Delaware counsel and brought this motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and improper venue on August 1, 2007 — nearly a year after the complaint was filed.

III. Legal Analysis

In his motion to dismiss, Segal requests that I dismiss the Sloans' complaint because this court lacks personal jurisdiction over Segal, lacks subject matter jurisdiction over the action, and is an improper venue to adjudicate the Sloans' complaint.

Segal's dismissal motion is based on the following subsections of Court of Chancery Rule 12(b): Rule 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(2) for lack of personal jurisdiction, and Rule 12(b)(3) for improper venue. This court has the discretion to consider evidence outside the pleadings in deciding motions under Rule 12(b)(1)-(5), and I do so here.[25]

[24] Segal Notice of Joinder at 1-2.

[25] *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. 2000); *see also Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000) (stating that the court is "permitted to rely upon the pleadings, proxy statement, affidavits, and briefs of the parties in order to determine whether the defendants are subject to personal jurisdiction"); 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364, at 124-26 (3d ed. 2004) (noting that the validity of motions to dismiss under Federal Rules of Civil Procedure 12(b)(1)-(5) "rarely is apparent on the face of the pleading and motions raising them [and] generally require reference to matters outside the pleadings").

A. Subject Matter Jurisdiction

Segal argues that the determination of whether the exercise of the Power of Appointment in the July 2003 Codicil was valid should be made by a Florida probate court because it only involves the question of whether the Codicil was properly executed under Florida law. That argument fundamentally misunderstands Delaware trust law. The Trust Agreement contains an explicit clause that designates Delaware as the situs of the Trust and states that "all questions pertaining to the validity and construction of this Trust Agreement or the administration of the Trusts hereunder shall be determined in accordance with the laws of Delaware."[26] In *Lewis v. Hanson*, the Delaware Supreme Court reiterated the well-known principle of Delaware law that "the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument."[27] As a result, the Court stated that:

> Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law.[28]

Thus, the question of whether the Codicil validly exercised the power of appointment is a question of Delaware law that this court has jurisdiction to resolve.[29]

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[26] Trust Agreement § XII.
[27] 128 A.2d 819, 830 (Del. 1957) *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958); *see also Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309, 312 (Del. 1942) (same).
[28] *Lewis v. Hanson*, 128 A.2d at 826.
[29] Candidly, I find it hard to conceptualize this issue as one of subject matter jurisdiction rather than a form of abstention and comity analysis. That is, if this court can exercise personal jurisdiction over the parties and an equitable issue is at stake, is the issue really one of subject matter jurisdiction? Or is it one of the appropriate deference that ought to be shown if another forum has a superior interest in adjudicating the case? But because Segal has chosen the rubric

Segal contends that *Lewis v. Hanson* is not on point because that case involved an inter-vivos trust that created a power of appointment that could be exercised either by inter-vivos instrument or will. The court in *Lewis v. Hanson* did not cabin its holding only to powers of appointment exercised by inter-vivos instrument, and I see no reason to draw a jurisdictional distinction between powers of appointment that may be exercised by inter-vivos instrument and those that may be exercised by testamentary instrument. Although it is true that the Delaware Supreme Court determined that the exercise of the power of appointment it upheld in *Lewis v. Hanson* was exercised by inter-vivos instrument, that does not change the fact that the exercise of a power of appointment is governed by the law of the situs of the trust because the resulting appointments are "regarded in law as though they had been embodied in the original trust agreement."[30] Segal points to nothing in *Lewis v. Hanson* or anywhere else that suggests that Delaware trust law should control an appointment pursuant to an inter-vivos exercise of a power of appointment but not an appointment pursuant to a testamentary exercise of a power of appointment. It might be true that there could be a difference between the substantive Delaware trust law governing the validity of an inter-vivos exercise of a power of appointment and that governing the validity of a testamentary exercise of a power of appointment.[31] But that does not mean that Delaware trust law does not determine the

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of subject matter jurisdiction to classify this aspect of his motion, I adopt that nomenclature for the present purpose.

[30] *Id.*

[31] In fact, there likely would be, although the following thoughts are necessarily tentative because the parties have not focused on these issues in their briefs. The standard for exercise by inter-vivos instrument is necessarily governed by the terms of the trust agreement. The standard

standard for the validity of an exercise of a power of appointment reserved in a trust with its situs in Delaware or that Delaware courts do not have subject matter jurisdiction over that question.

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for exercise by testamentary instrument is governed by a combination of the terms of the trust agreement and testamentary law. In the usual situation where a trust agreement only provides that the power of appointment be executed by will rather than by will in compliance with the law of a particular state, the trust agreement needs to be interpreted to determine the meaning of by will. This is especially so when the state whose law governs the trust agreement is different from the state whose law governs the will of the donee exercising the power of appointment. Although there is no Delaware law on what law governs the determination of a donee's capacity in such a situation, the situation is not uncommon. In fact, it is addressed as follows by the Restatement (Second) of Conflict of Laws:

> An appointment made in the exercise of a power created under a trust to appoint interests in movables is valid . . . if made
> . . .
> (b) as to questions of formalities and of the capacity of the donee, in accordance with either the law which determines the validity of the trust or the law applicable to the disposition by the donee of his own property.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 (1971); *see also* WILLIAM F. FRATCHER, VA SCOTT ON TRUSTS § 633 (4th ed. 1989) ("It is held that the exercise of the power is valid if the donee had capacity to exercise it under the law of the state that determines the validity of the trust under which the power was created, even though he lacked capacity under the law of the state of his domicil[e]. . . . So also it would seem that in the converse case where the donee has capacity to make a will under the law of his domicil[e], the appointment will be upheld even though he would have had no such capacity under the law of the donor's domicil[e].").

The Delaware statute on choice of law addressing the execution of wills is analogous to the approach taken by the Restatement (Second) of Conflict of Laws in determining the validity of a power of appointment exercised by will. That statute states that a will signed by the testator or someone subscribing on the testator's behalf in her presence and at her direction is valid if its execution complies with Delaware law or "if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national." 12 *Del. C.* § 1306.

In other words, this court, exercising its jurisdiction over the Martin Sloan Trust, may need to look to Florida law as an alternative measure to assess whether the exercise of the Power of Appointment in the July 2003 Codicil is effective. But that reality does nothing to divest this court of subject matter jurisdiction; rather, it is Delaware law itself that directs the court to the law of the place where the donee made her will.

B. Waiver Of Personal Jurisdiction And Venue

The affirmative defense of personal jurisdiction, as well as the affirmative defense of improper venue, is waived by a respondent if it is not raised in a timely Rule 12 motion or, if no timely Rule 12 motion is filed, in the first responsive pleading.[32]

The Sloans contend that Segal waived the right to raise the affirmative defenses of lack of personal jurisdiction and improper venue by not asserting those defenses in a timely Rule 12 motion or his first responsive pleading. Segal — through his new counsel — argues that he raised lack of personal jurisdiction and improper venue, albeit in an inarticulate fashion, in his Answer and later in his Notice of Joinder. Segal asks for leniency in reviewing his prior pro se pleadings and cites general Delaware case law on giving leniency to pro se litigants. Segal does not cite and I am unaware of any Delaware case determining how much and what type of leniency should be granted to a pro se litigant in determining whether that litigant has waived his right to contest personal jurisdiction and venue. An analysis of the leniency granted to pro se litigants in other situations suggests that Delaware courts, at their discretion, look to the underlying substance of a pro se litigant's filings rather than rejecting filings for formal defects[33] and hold those pro se filings to "a somewhat less stringent technical standard" than those

[32] Ct. Ch. Rule 12(h)(1); *Plummer v. Sherman*, 861 A.2d 1238, 1243-44 (Del. 2004).
[33] *E.g.*, *Jackson v. UIAB*, 1986 WL 11546, at *2 (Del. Super. Ct. 1986) (refusing to dismiss an appeal for failure to comply with technical brief requirements because "the Court may exhibit some degree of leniency toward a pro se litigant, in order to see that his case is fully and fairly heard.").

drafted by lawyers.[34] As this court recently stated, however, "self-representation is not a blank check for defect."[35]

The standard that other jurisdictions have used for leniency in pro se cases involving waiver of personal jurisdiction — overlooking the form of a challenge to personal jurisdiction as long as there is some substance in the pleading suggesting the defendant contests personal jurisdiction[36] — comports with Delaware's jurisprudence on the leniency given to pro se litigants in other circumstances.[37] That is the standard I will apply in analyzing whether Segal waived the defenses of personal jurisdiction and improper venue. Thus, I will interpret Segal's pleadings with leniency, but I will not overlook what is and, more importantly, what is not in Segal's pleadings.

A thorough analysis of Segal's first responsive pleading, his Answers With Motion To Dismiss, reveals no indication that Segal was challenging this court's personal

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[34] *E.g.*, *Vick v. Haller*, 522 A.2d 865, 1987 WL 36716, at *1 (Del. 1987) (TABLE) ("A pro se complaint, however inartfully pleaded, may be held to a somewhat less stringent technical standard than formal pleadings drafted by lawyers, and it is dismissed for failure to state a claim only if it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

[35] *Quereguan v. New Castle County*, 2006 WL 2925411, at *4 (Del. Ch. 2006).

[36] *E.g.*, *Bell v. Shah*, 2006 WL 860588, at *1 (D. Conn. 2006) (refusing to find waiver based on the form of a pro se defendant's challenge to personal jurisdiction when "defendant contested jurisdiction generally in his answer"); *Internet Archive v. Shell*, 2006 WL 1348559, at *1 (N.D. Cal. 2006) (refusing to find waiver of the defense of lack of personal jurisdiction where pro se defendant's initial and numerous subsequent submissions challenged the court's jurisdiction over her, even though her submissions confused the legal distinction between venue and personal jurisdiction); *see also Indymac Mortgage Holdings, Inc. v. Reyad*, 167 F. Supp. 2d 222, 234 (D. Conn. 2001) (finding that a pro se litigant waived the defense of lack of personal jurisdiction by failing to raise it in her first responsive pleading, but analyzing the merits of the challenge to personal jurisdiction as an alternate basis for dismissal in recognition of the litigant's pro se status).

[37] *E.g.*, *Dickens v. Costello*, 2004 WL 396377, at *1 (Del. Super. 2004) ("Because the Plaintiff is acting pro se, the Court will attempt to unearth the merits of his most recent motion.").

jurisdiction over him or that this court was a proper forum for this action. Rather, that voluminous pleading contains only one response — that this court should dismiss the Sloans' complaint as meritless. There is not even a hint that Segal thought that this court lacked personal jurisdiction over him or that this court is an improper venue. Even Segal's Notice of Joinder — which was filed six months after his Answer — only contests this court's subject matter jurisdiction. The Notice of Joinder joins the Delaware Trust Company's affirmative defense of subject matter jurisdiction and states that Patricia Sloan was a resident of Florida at the time of her death. It says nothing about Segal's lack of contacts with Delaware, the unforeseeability or hardship involved with him being haled into court in Delaware, or the inconvenience of this court as a forum. Therefore, I find that Segal has waived the defenses of lack of personal jurisdiction and improper venue.

That said, I recognize that the law, for high-minded reasons, puts trial judges dealing with (and parties facing) pro se litigants in peril of being second-guessed for enforcing procedural rules against pro se litigants. In view of that, I consider the merits of Segal's waived defenses.

C. Personal Jurisdiction

When a motion to dismiss for lack of personal jurisdiction is filed, the plaintiff bears the burden of demonstrating a basis for the court's jurisdiction over the nonresident defendant.[38] A familiar two-prong analysis is used to determine whether a plaintiff has carried that burden. First, the court considers whether service of process was authorized

[38] *E.g.*, *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).

by statute, in this case under Delaware's long-arm statute.[39] In considering whether Delaware's long-arm statute is applicable, that statute is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause of the U.S. Constitution.[40] Second, the court conducts the related evaluation of whether the exercise of jurisdiction over the nonresident defendant is constitutionally permissible by performing the required minimum contacts analysis.[41]

Segal engaged in many acts within the state of Delaware that are relevant to this litigation. Most notably, Segal began a recent pattern of working with Patricia Sloan in executing documents relevant to this litigation while Patricia Sloan was a Delaware resident. For example, Segal came to Delaware and engaged a psychiatrist to examine his mother in connection with having her execute the August 2002 Will that is essentially the same as her final will, the October 2002 Will. Perhaps most importantly, Segal undertook to move his mother out of the State of Delaware to Florida in October 2002 under circumstances that will undoubtedly be an important focus of this lawsuit. At that time, there already existed a serious question about Patricia Sloan's competence and susceptibility to designing persons. Indeed, the very month that Segal moved his mother out of Delaware, he filed suit on her behalf in this court using a Delaware power of attorney.

[39] *E.g.*, *id.* at 438; 10 *Del. C.* § 3104.
[40] *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480-81 (Del. 1992).
[41] *E.g.*, *AeroGlobal*, 871 A.2d at 438; *see also International Shoe*, 326 U.S. at 316 (setting forth the federal minimum contacts test).

Even after he moved his mother to Florida, Segal engaged in Delaware-directed conduct relevant to the Trust and this litigation. During the course of the prior litigation he filed in this court over the Martin Sloan Trust, Segal never made clear that he had moved his mother to a residential treatment center for Alzheimer's patients. The Sloans have argued, with record support, that Segal misled the other parties and the court about Patricia Sloan's condition during that litigation. In that litigation, Segal also bargained for and obtained a settlement whereby he was named as one of the trustees of the Martin Sloan Trust, a Trust with a Delaware situs and governed by Delaware law. In addition, after Patricia Sloan was moved by Segal to Florida, Segal came to Delaware to collect her possessions and to arrange for the sale of her condominium in Delaware.

This lawsuit centers largely on when Patricia Sloan became incapable of making knowing and uncoerced decisions regarding the Martin Sloan Trust. Segal's acts in Delaware relating to estate planning for Patricia Sloan and moving her residence easily qualify under both subsections (1) and (3) of § 3104.[42] As to subsection (1), Segal essentially orchestrated Patricia Sloan's execution of the August 2002 Will, and the delivery of certain professional services in connection with that act, and also arranged for her to move to Florida. Given the liberal manner in which § 3104 is to be interpreted, these acts certainly involve "services" or "work" of "any character" in Delaware and they were an important part of a pattern of ongoing conduct by Segal directed toward having

[42] 10 *Del. C.* § 3104(c)(1),(3) ("As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident . . . who . . . (1) Transacts any business or performs any character of work or service in this State [or] . . . (3) Causes tortious injury in the State by an act or omission in this State.").

his mother appoint the proceeds of the Martin Sloan Trust to him. Likewise, as to subsection (3), if Segal knowingly caused Patricia Sloan to execute estate planning documents when she was incompetent or moved her to Florida under the false pretense that she would live with him when he was in fact intending to put her in an institution, he could be viewed as having committed actions in the nature of a tort — a breach of fiduciary duty, an equitable obligation — in Delaware by acts in this State. Therefore, service of process under § 3104 was proper.

The second issue is even clearer. Segal's continuous course of Delaware-directed conduct makes it obviously reasonable for this court to exercise jurisdiction over him.[43] Indeed, this state has an important interest at stake in this case. Patricia Sloan was a Delaware resident for virtually her entire life. Segal appears to have moved Patricia Sloan from this state at a time when she had started to display the symptoms of Alzheimer's and may have been unable to make an informed, uncoerced judgment about departing. In a situation such as this, Delaware has a legitimate interest in applying its law to determine whether its longtime resident exercised her right of appointment over a Delaware-based trust in an uncoerced and knowing manner. Having repeatedly engaged in conduct in Delaware relevant to the Martin Sloan Trust and having brought suit in this very court to obtain a position as one of the trustees of that Trust, Segal has no colorable

[43] *See International Shoe*, 326 U.S. at 316 (holding that before a forum state may exercise jurisdiction over a nonresident without her consent, due process requires that the nonresident have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"); *see also Asahi Metal Indus. Co. Ltd. v. California*, 480 U.S. 102, 112 (1987) ("The 'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.") (internal citations omitted).

basis to claim that his due process rights will be violated if he has to defend this lawsuit in this court.

D. Improper Venue

Segal's forum non conveniens argument also lacks force. To obtain a dismissal on the grounds that this court is an unduly inconvenient and therefore improper venue, Segal must demonstrate that he faces overwhelming hardship if this case continues in this court, by reference to the so-called *Cryo-Maid* factors.[44]

Segal has not come close to making such a showing. As discussed previously, his view that this is primarily a Florida law case that ought to be decided by a Florida court is incorrect. Delaware law is central to this case, and therefore the *Cryo-Maid* factor dealing with the applicable law weighs in favor of this court as the forum. Nor is Segal correct that all the witnesses are residents of Florida. There are also likely witnesses who are resident in Delaware, as well as documentary evidence bearing on Patricia Sloan's mental condition and wishes. And as to the Florida-based witnesses, there are commonly used methods of obtaining their testimony, if they refuse to cooperate and voluntarily testify in Delaware. Even if the *Cryo-Maid* factor addressing the availability of witnesses tips somewhat in favor of Florida, which is doubtful, it hardly supports a finding of overwhelming hardship. Finally, there is no pending action in Florida between the Sloans and Segal, a *Cryo-Maid* factor cutting in favor of the Sloans. As an overall matter of expedience and efficiency, there is simply no credible basis to find that Segal faces

[44] *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964); *see also Ison v. DuPont de Nemours*, 729 A.2d 832, 837-38 (Del. 1999).

undue hardship of any kind if this suit proceeds. The court has already protected him by requiring the Sloans to take his deposition in Florida. The modest burden to Segal of traveling to Delaware for a short trial does not constitute overwhelming hardship nor is it an unjust burden for Segal to have to retain Delaware counsel to litigate a case involving Delaware law issues.

IV. Conclusion

For the foregoing reasons, the defendants' motion to dismiss under Court of Chancery Rules 12(b)(1)-(3) is DENIED. IT IS SO ORDERED.