COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: December 28, 2009
Decided: January 27, 2010

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RE: *Frank Sloan and Jack Sloan v. Louis Segal*
C.A. No. 2319-VCS

Dear Counsel:

This case was remanded because the Supreme Court held that it was improper for me to exclude certain deposition testimony.[1] That testimony, the deposition of the petitioners' expert, Dr. Ayden Bill, was not offered into evidence during the petitioners' case-in-chief. As the Supreme Court noted, in the pre-trial stipulation, respondent Louis Segal had agreed that Dr. Bill's deposition could be admitted despite the fact that the deposition had not been conducted as a trial deposition.[2]

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[1] *Sloan v. Segal*, No. 289, 2009 (Del. Nov. 24, 2009) (ORDER).
[2] *Sloan v. Segal*, No. 2319-VCS, at 13 (Del. Ch. Jan. 13, 2009) (ORDER) (stipulating that Dr. Bill's testimony would be presented either "live or by deposition transcript"); Trial Tr. 392, Jan. 14, 2009 ("Mr. Carucci: . . . [a]s I told Mr. Jacobs, I didn't know if we were going to use [Dr. Bill]. And I told him if we were going to use him, it would be only in rebuttal. I have said that, I think, since at least the pretrial conference."); *Sloan v. Segal*, No. 289, 2009, at 3 (Del. Nov. 24, 2009) (ORDER) ("Specifically, the Pre-Trial Stipulation of the parties permits Appellants to introduce Dr. Bill's expert opinion testimony 'live or by deposition transcript.")**.**

By the end of the petitioners' case-in-chief, however, the petitioners had not proffered Dr. Bill's deposition and, in fact, had led the respondent Segal's counsel to believe that Dr. Bill would be present in person at trial.[3] The failure to put Dr. Bill on the stand during the petitioners' case-in-chief was not a surprise, because the petitioners' counsel had indicated at the pre-trial conference that he was probably going to only use Dr. Bill as a rebuttal witness.[4] This statement followed a colloquy in which the respondent had objected to the use of Dr. Bill's actual report as evidence.[5]

At the very end of trial, when both the petitioners (Frank and Jack Sloan) and respondent Segal had finished their cases, the petitioners sought to use Dr. Bill's deposition in rebuttal. By that time, respondent's counsel had been led to believe that Dr. Bill would be present and testify live at trial, if he appeared at all. The petitioners' counsel did not indicate that Dr. Bill had any availability problem until the last day of trial, when the petitioners sought to introduce his testimony by deposition.[6]

Although it is no doubt true that the petitioners indicated at the pre-trial conference that they would only use Dr. Bill as a rebuttal witness and that the pre-trial

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[3] Trial Tr. 391 (respondent's counsel had asked if Dr. Bill would be testifying at trial, and petitioners' counsel replied that Dr. Bill might testify as a rebuttal witness); 393 (petitioners' counsel admitting that he never told respondent's counsel that there was a problem with Dr. Bill's availability).
[4] Pre-Trial Conference Tr. 49, Jan. 12, 2009 ("I'm not sure about Dr. Bill at all. If we use him, it will be in rebuttal, not in our case in chief.").
[5] *Id*. at 48.
[6] Trial Tr. 389-91 (petitioners' counsel indicating, on the last day of trial, that Dr. Bill was not available to testify and that petitioner sought to use his deposition testimony for rebuttal).

stipulation said that Dr. Bill's testimony could come in live or by deposition, respondent's counsel drew the same impression I had from the pre-trial conference. That is, because a rebuttal witness rebuts what is presented in another party's case, it is usually the case that a rebuttal witness appears live and addresses the other party's case. Dr. Bill, however, did not come to trial and his deposition was taken before the respondent's case was presented at trial. Now, I suppose it can be the case that previous deposition testimony might address the evidence presented by another party's trial case, but that is usually the evidence that is core to one's case in chief and not reserved for rebuttal.

Like the respondent's counsel, I perceived that Dr. Bill would come to trial if he were to appear as a rebuttal witness. When the respondent's counsel complained on the last day of trial that he had just been informed that Dr. Bill would not be present and that he should not be confronted at the last moment with a change of course, I thought that a just cause to exclude the deposition because: (1) respondent's counsel would not get the chance he reasonably believed he would have had to address Dr. Bill's response (his rebuttal testimony) to the actual case presented by the respondent; and (2) leading an adversary to believe that a witness will appear live causes the adversary to deploy precious time in anticipation of that witness's appearance.

Nonetheless, the Supreme Court held that the original pre-trial stipulation regarding Dr. Bill's deposition had never been altered and extended to the use of that deposition in rebuttal. Therefore, I now address whether that deposition would have

affected my previous decision. Because the petitioners did not use the deposition in their case in chief, that deposition cannot help them on any issue on which they bore the burden of proof and only has relevance in rebutting the respondent's attempt to meet his burden of persuasion.

To allow the parties to address the Remand Order, I gave each party leave to submit a letter pointing out the parts of the deposition they regarded as relevant and why. The exchange of letters was completed on December 28, 2009.[7]

For the sake of context, I set forth this summary of my prior conclusions, quoting the post-trial decision:

> This is a dispute over the distribution of the assets of a trust created by Martin Sloan shortly before his death in 1989 (the "Martin Sloan Trust"). The parties are Martin Sloan's three stepsons: petitioner Frank Sloan, petitioner Jack Sloan, and respondent Louis Segal. Frank, Jack, and Louis are brothers and the sons of Patricia Sloan, Martin Sloan's wife. Under the terms of the Martin Sloan Trust, Patricia had a power of appointment over the distribution of the Trust among her children after death (the "Power of Appointment"). If Patricia did not exercise the Power of Appointment, the Trust was to be split evenly between Frank and Jack, the two sons whom Martin helped raise, and none was to go to Louis, who had lived with Frank, Jack, and Louis' father, Sidney Segal, who was Patricia's first husband, after his parents separated.

[7] This was a later time than I had hoped. In my order requesting supplementary letters from counsel, I originally requested petitioner's letter by December 15, 2009 and respondent's reply by December 22, 2009. *Sloan v. Segal*, No. 2319-VCS (Del. Ch. Dec. 7, 2009) (ORDER). In a letter dated December 8, 2009, respondent requested that the deadline for their reply be pushed back until December 29, 2009. Letter from Robert Jacobs to the Honorable Leo E. Strine, Jr. (Dec. 8, 2009). Given the lack of exigency and the holiday season, I granted the extension because the requested delay seemed reasonable.

The dispute between Frank, Jack, and Louis is whether Patricia validly executed a codicil dated July 1, 2003 that was drafted by Louis and purports to exercise the Power of Appointment entirely in favor of Louis (the "July 2003 Codicil"). The July 2003 Codicil amended a will Patricia executed on August 28, 2002 (the "August 2002 Will"). At the time of both the August 2002 Will and the July 2003 Codicil, Louis was the only one of Patricia's sons who was involved in her life. In the early 1990s, Frank and Jack had a painful falling out with Patricia. Frank and Jack told Patricia that she needed psychiatric help and that if she did not seek help, they would not help her if she got sick or go to her funeral if she died. From 1992 until her death in 2006, neither Frank nor Jack ever had any contact with his mother. But, in 2003 Patricia was also suffering from mild to moderate Alzheimer's dementia. When she executed the Codicil, Patricia was living in the locked wing of an assisted living facility near Louis' home in Florida.

Based on these circumstances, Frank and Jack contend that Patricia lacked testamentary capacity and was under the undue influence of Louis when she executed the Codicil, making it an invalid exercise of the Power of Appointment. Frank and Jack further contend that the August 2002 Will, which the parties agree was validly executed, does not exercise the Power of Appointment, so the Martin Sloan Trust should be distributed to Frank and Jack under the default terms of the Trust.

Louis responds that Patricia's condition was not so debilitating that she lacked testamentary capacity and that the July 2003 Codicil, far from being the product of undue influence, reflected Patricia's long-held intent to not leave any money to Frank and Jack. Alternatively, Louis argues that, when all of the circumstances are considered, it is clear that Patricia exercised the Power of Appointment in the August 2002 Will in favor of Louis, who otherwise received the bulk of Patricia's estate.

In this post-trial opinion, I find that the assets of the Martin Sloan Trust should be distributed to Louis because the July 2003 Codicil was a validly executed testamentary instrument. First, I conclude that the August 2002 Will does not exercise the Power of Appointment because,

> under the terms of the Martin Sloan Trust, Patricia was required to make specific reference to the Power of Appointment to exercise it, and she failed to do so in the August 2002 Will. Turning to the July 2003 Codicil, I find that Louis has the burden of proving that Patricia executed the Codicil at a time when she possessed testamentary capacity and was free from undue influence. Louis bears this burden because Patricia was in a state of weakened intellect due to her dementia, Louis occupied a confidential relationship with her because Louis had been handling all of Patricia's affairs since 2002, and Louis drafted a testamentary instrument that created a substantial benefit for himself. When these factors are present, our law requires that the drafter-beneficiary prove, by a preponderance of the evidence, that the execution of the instrument was valid.[8]

The prior post-trial decision has many pages of fact findings, which I continue to stand behind. For context, the following analysis bears reiteration:

> I conclude that it is more probable than not that Patricia had testamentary capacity on July 1, 2003. Patricia's medical records and the testimony of Dr. Dowie and Dr. Tavani all support the conclusion that Patricia's mental abilities on July 1, 2003 were not materially different from her mental abilities on August 28, 2002, when she executed the uncontested August 2002 Will. Louis has thus provided sufficient evidence that Patricia's level of mental impairment when she executed the July 2003 codicil was mild enough that it would not have interfered with her ability to make decisions about her estate. . . .
>
> Importantly, however, Louis has demonstrated that he most likely did not influence Patricia and that there is no result suggesting undue influence. Our Supreme Court has made clear that the existence of the opportunity to exert undue influence and a motive to do so is not enough to invalidate a will; there must also be actual exertion of improper influence and a result demonstrating its effect. This requirement reflects our law's hesitation to invalidate a will where doing so might frustrate the testator's intent.

[8] *Sloan v. Segal*, 2009 WL 1204494, at *1 (Del. Ch. Apr. 24, 2009) (citations omitted).

> I find it improbable that Louis would have had to exert *any* influence *at all* in order to get Patricia to sign the July 2003 Codicil. If he had simply told her that the August 2002 Will had failed to exercise the Power of Appointment, meaning Frank and Jack would inherit the Martin Sloan Trust, but that if she signed the July 2003 Codicil, the Martin Sloan Trust would go to Louis, along with the rest of the assets at Patricia's disposal, I have no doubt that Patricia would have willingly signed — nay, demanded to sign — the Codicil.
>
> In essence, Frank and Jack admit that if Patricia knew what she was doing, she would have cut them out of her testamentary dispositions. And there is, in my view, no plausible explanation for why Patricia would have included Frank and Jack in her testamentary dispositions given the emotionally charged way their relationship ended and the fact that Frank or Jack never tried to contact Patricia once during the last fourteen years of her life. As a result, the fact that the July 2003 Codicil eliminates Frank and Jack's gift under the Martin Sloan Trust Agreement does not reflect undue influence. Rather, it most likely reflects Patricia's own genuine desire to make sure that all of the wealth at her testamentary disposal — including the assets of the Martin Sloan Trust — went to Louis and not to Frank or Jack.
>
> Because I find no indication of actual exertion of improper influence or a result reflecting undue influence, I decline to invalidate the July 2003 Codicil. Louis may have had the motive and opportunity to exert influence over Patricia at a time when she was susceptible to such influence, but that is not sufficient reason to invalidate a testamentary document that comports with the wishes Patricia expressed for disposing of her property at a time when it is undisputed that she possessed testamentary capacity and was free from undue influence.[9]

With this context in mind, I briefly explain why Dr. Bill's deposition testimony does not alter my conclusions.

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[9] *Id*. at *16-17 (citations omitted).

As indicated, I read the entirety of Dr. Bill's testimony. Nothing in it persuades me that the measured conclusions I previously reached were erroneous. At best, Dr. Bill speculates that Mrs. Sloan might have had some unexpressed change of heart and desired to leave wealth to petitioners Frank and Jack Sloan despite: (1) the total absence of any effort on their part to resume contact with her; and (2) the total lack of any effort by Frank and Jack to foster a relationship between their children and their grandmother, Mrs. Sloan.[10] Indeed, Dr. Bill admits he is speculating in this regard.[11]

As important, a fair reading of Dr. Bill's testimony overall tends to support, not rebut, my conclusions. Dr. Bill concedes that there is no substantial basis to believe that Mrs. Sloan's mental state was materially different between August 2002 (when Frank and Jack Sloan admit she was competent) and July 2003 when she executed the Codicil.[12] Dr. Bill concedes that he has no reason to doubt that Mrs. Sloan expressed a clear desire to Dr. Weisberg to leave nothing to Frank and Jack.[13] Dr. Bill also testified as to his high regard for Dr. Tavani, whose testimony buttressed the conclusions I previously reached, and whose testimony is consistent, unlike Dr.

[10] Bill Dep. 29, 32, 33, 35 (admitting that Frank and Jack did not do anything to reconnect with their mother or foster a relationship with the grandchildren); 53 (engaging in speculation about what Mrs. Sloan might have felt).
[11] *Id.* at 70-73.
[12] *Id.*. at 10, 61-62, 91.

Bill's, with the physician, Dr. Dowie, who was in close contact with Mrs. Sloan during the relevant time.[14]

All in all, Dr. Bill provides no rational basis to conclude Mrs. Sloan had any intention to leave wealth to two sons who abandoned her and whose sole reaction to her aging and change of residence to Florida involved maneuvering to try to secure wealth at her disposal.

The reality remains that Mrs. Sloan's decision to sign the Codicil makes complete sense. By that means, she ensured that the only of her children, respondent Segal, who cared for her during the last two decades of her life received her wealth, and that two sons who cut off relations with her did not. The testimony of Dr. Dowie, Dr. Tavani, and Dr. Weisberg all support a finding that the Codicil was a product of Mrs. Sloan's true wishes, as do the medical records, the petitioners' concessions that Mrs. Sloan had no reason to reward them and that Mrs. Sloan was competent as of August 2002 when she expressed a clear intent to leave them nothing, as well as the overall circumstances.

For all these reasons, I adhere to my previous decision.

Very truly yours,

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[13] *Id.* at 30.

/s/ Leo E. Strine, Jr.

Vice Chancellor

LESJr/eb

[14] *Id*. at 94-95 (calling Dr. Tavani the best psychiatrist "in Delaware and in the country" and saying "her evaluations and the report is excellent, very good. She somehow makes the wrong conclusions").