IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE LAST WILL ANDTESTAMENT OF BENJAMIN DALAND, DECEASED.	))))	C.A. No. 2920-MA

MASTER'S REPORT

Date Submitted: February 4, 2008
Draft Report: April 6, 2009
Final Report: February 15, 2010

David J. Ferry, Esquire and Rick S. Miller, Esquire, Ferry, Joseph & Pearce, 824 Market Street, Suite 904, Wilmington, Delaware 19899
Attorney for the Petitioner, Elizabeth P. Daland

And

Richard E. Berl, Jr., Esquire, Smith O'Donnell Feinberg & Berl, LLP, 406 South Bedford Street, Georgetown, Delaware 19947
Attorney for the Respondent, Timothy Daland

W. Jeffrey Whittle, Esquire and Eric M. Andersen, Cooch and Taylor, P.A., 824 North Market Street, Suite 1000, Wilmington, Delaware 19899
Attorneys for PNC Bank, N.A., Trustee of the Elliott Daland Trust dated February 3, 1965 and Trustee of the Katherine M. Daland Trust Under Will Dated February 8, 1965

AYVAZIAN, Master

The issue before me is whether a validly executed will can be reformed by inserting language intended to exercise testator's powers of appointment over his parents' trusts, language which is alleged to have been omitted mistakenly by the scrivener during the process of drafting the will. If the court grants the requested reformation, testator's surviving spouse will receive the net income from testator's share of the trusts for the rest of her life and, after her death, testator's share of the principal will go to testator's grandson. If the court denies the requested relief, then, in default of the exercise of the powers of appointment, testator's son will receive the principal of testator's share of the trusts outright and free from trust. Testator's son opposes the petition to reform the will, and pending before me are cross-motions for summary judgment. I have concluded that under Delaware law a court does not have the power to reform a will by inserting language omitted allegedly from the will as a result of scrivener's error.

1. Factual Background

Benjamin Daland ("testator") died on November 25, 2005, a resident of Sussex County, Delaware. He was survived by his spouse, Elizabeth Daland ("testator's surviving spouse" or "Petitioner"), and his son Timothy Daland ("testator's son" or "Respondent"). Testator had another son who had predeceased him, leaving no issue. Testator was a beneficiary of two

trusts established by his parents ("trusts").[1] According to the terms of the trusts, testator was to receive the net income from his share of the trusts for life. In addition, testator was given a limited power of appointment over the "income and/or principal of" his share of the trusts, including the power to appoint the net income to his spouse for life. The trusts provided that in default of the exercise of the powers of appointment, upon testator's death, the principal of testator's share of the trusts passed to his descendants, *per stirpes*, outright and free of trust.

Testator executed his Last Will and Testament on April 1, 2003 ("2003 Will"). In the 2003 Will, testator revoked all former wills or codicils made by him. Testator had executed a previous will on August 10, 1992 ("1992 Will"). The 1992 Will expressly referred to testator's powers of appointment over the trusts, and in the 1992 Will, testator exercised those powers, appointing an income interest to his surviving spouse for life and, upon her death, appointing the remaining principal to his grandson Benjamin Robert Daland ("testator's grandson" or "Benjamin").[2] Under the terms of the 1992 Will, Respondent was to receive a small bequest of $1,000.00.

[1] The Trusts consist of the Elliot Daland Trust dated February 3, 1965, and the Katherine M. Daland Trust Under Will dated February 8, 1965. Testator's parents are deceased. PNC Bank, N.A. a co-trustee of the Trusts, entered an appearance, but has taken no position in this litigation.
[2] Benjamin is a child of Respondent Timothy Daland.

The 2003 Will makes no specific reference to the trusts or to testator's powers of appointment over the trusts. The 2003 Will contains a clause stating testator's intention at the time of execution of the 2003 Will that testator's son and his issue, with the exception of Benjamin, "be omitted as beneficiaries under this document."[3] The 2003 Will also contains a clause confirming testator's intention that the beneficial interests in all assets held at the time of his death jointly in his name and the name or names of any other persons should pass by right of survivorship or operation of law outside of the terms of his will. In the 2003 Will, testator bequeaths his solely-held assets and personal property to his spouse, provided she survives him, if not then to his grandson Benjamin. In the 2003 Will, testator also directs that his solely-held real estate be sold, and he gives 50 percent of the net sale proceeds to his grandson Benjamin, and 50 percent to his spouse's four children, in equal shares, *per stirpes*, or to the survivors thereof. The 2003 Will does not contain a residuary clause.

2. Procedural History

The 2003 Will was never probated. Instead, Petitioner filed a small estate certificate in the Sussex County Office of the Register of Wills. On

[3] Respondent has two children.

April 25, 2007, Petitioner filed a Petition to Reform the 2003 Will.[4] The petition alleges that, despite testator having specifically told his Delaware attorney that he wanted to exercise the powers of appointment as he had done in the 1992 Will, the attorney failed to include the exercise of the powers of appointment in the final draft of the 2003 Will. According to the petition, testator executed the 2003 Will in the mistaken belief that it did, in fact, exercise the powers of appointment as he had requested. Attached to the petition was an affidavit from the attorney who drafted the 2003 Will, attesting that testator had informed her that he wanted to exercise the powers of appointment over the trusts to provide his wife with income for life and for the remaining principal to go to his grandson Benjamin, and that he did not want his son to receive anything from his estate including the trust interests. The affidavit further stated that initial drafts of the will contained language by which testator exercised his powers of appointment, but last minute changes were made to the document having nothing to do with the exercise of the powers of appointment, as a result of which the exercise of the powers of appointment was inadvertently deleted from the document. Petitioner's requested relief is an order reforming the 2003 Will to include the exercise of the powers of appointment in order to provide Petitioner with

[4]Petitioner subsequently filed a First Amended Verified Petition to Reform Will on December 7, 2007.

the net income from the trusts for life, and at her death for the remaining principal to be given to Benjamin.

In his Answer filed on December 14, 2007, Respondent admits that the 2003 Will fails to refer to or exercise the testator's powers of appointment, but denies that testator intended his son to receive nothing from his estate. Respondent opposes Petitioner's request to vary the terms of the 2003 Will with what he contends is inadmissible parol evidence, including inadmissible evidence of scrivener's error. Respondent also raises several affirmative defenses. The parties subsequently filed cross-motions for summary judgment.

3. Legal Standard

The legal standard for cross-motions for summary judgment is well known. *Bank of New York Mellon v. Realogy Corporation*, at * 4, 2008 WL 5259732 (Del. Ch. Dec. 18, 2008). In order to prevail, a moving party must show that there is no genuine issue of material fact in dispute and that the party is entitled to judgment as a matter of law. *See id.* (citing Chancery Court Rule 56(c); *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)). Where the parties have not argued that there is an issue of fact material to the disposition of either motion, the Court shall deem the cross-motions to be

the equivalent of a stipulation for decision on the merits based on the record submitted with the motions. *See* Ch. Ct. R. 56(h). Nonetheless, a court must deny summary judgment if a material factual dispute exists. *See Bank of New York Mellon*, mem. op. at *4, *supra* (citing *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003); *Empire of Am. Relocation Servs., Inc. v. Commercial Credit Co.*, 551 A.2d 433, 435 (Del. 1988)).

4. Parties' Contentions

Respondent's argument is straightforward and to the point. He contends that the 2003 Will is clear and unambiguous and, therefore, not subject to interpretation by a court. Since there is no ambiguity, the argument goes, none of the extrinsic evidence of testator's intent, including the scrivener's affidavit, should be admissible to vary the terms of the 2003 Will. Furthermore, according to Respondent, the type of attorney mistake that occurred in this case does not permit a court to reform a will.

Petitioner contends, on the other hand, that there is no factual dispute that testator intended to disinherit his son and intended for his 2003 Will to exercise the powers of appointment to ensure that his son would not receive assets from the trusts. According to Petitioner, the failure of the 2003 Will to exercise the powers of appointment was due solely to scrivener's error.

Petitioner argues that she is entitled to reformation as a matter of law because the scrivener mistakenly omitted the language from the 2003 Will that would have expressed testator's intention with regard to the exercise of the powers of appointment. She further argues that reformation is available even if the document is not ambiguous, citing *Miller v. Electrical Equip. Co.*, 1997 WL 76272 (Del. Ch. Feb. 18, 1997), *Emmert v. Prade*, 711 A.2d 1217 (Del. Ch. 1997); *James River-Pennington, Inc. v. CRSS Capital, Inc.*, 1995 WL 106554 (Del. Ch. March 6, 1995); 66 Am.Jur.2d, Reformation of Instruments § 6 (2007); and Restatement (Third) of Property: Wills & Other Donative Transfers § 12.1 (2003).[5]

5. Analysis

It is undisputed that the 2003 Will does not specifically refer to the powers of appointment that testator had been given over the trusts. Since testator's parents required that he exercise his power "by Will or instrument in the nature thereof, by specific reference therein to this power,"[6] testator failed to comply with the necessary formalities for exercising the powers of appointment in the 2003 Will. *Sloan v. Segal*, 2009 WL 120449, at *12

[5] Petitioner had argued also that the 2003 Will contained a latent ambiguity, and that extrinsic evidence was admissible to interpret the will as an exercise of testator's powers of appointment. Petitioner has acknowledged in her Opening Brief in Support of Petitioner's Exceptions to Master's Draft Report that the decision in *Sloan v. Segal*, 2009 WL 1204494, at *12 (Del. Ch. April 24, 2009), issued after my draft report, precludes this argument and she has now waived it.
[6] Appendix to Petitioner's Opening Brief in Support of Her Motion for Summary Judgment, Tab B.

(Del. Ch. April 24, 2009) ("[A] donor may specify greater formalities for the execution of a power of appointment than are required by the law.") (footnote omitted). Assuming for the sake of argument that language specifically referring to and exercising testator's powers of appointment was omitted from the 2003 Will by mistake, the ultimate issue is whether the court can reform the 2003 Will by inserting such language into the document. Petitioner argues that the court has such authority, citing *Roos v. Roos*, 203 A.2d 140 (Del. Ch. 1964), a case where the court reformed a trust instrument on the basis of unilateral mistake on the part of the settler occasioned by scrivener error.

Petitioner is asking the Court to reform a validly executed will by adding a provision which specifically exercises testator's powers to appoint the net income from his share of the trusts to his surviving spouse for life, and the principal to his grandson Benjamin after her death. The problem with Petitioner's request is twofold. First, it appears to undermine the principle on which the *Sloan* decision was based: that a donor may specify greater formalities for the execution of a power of appointment than are required by law and that a donee must abide strictly by those requirements. In *Sloan*, the court accorded great respect to donors who impose additional ways of assuring that their donees intended to exercise the power of

appointment they were given. *Sloan*, mem. op. at *12, *supra*. Petitioner acknowledges that testator failed to exercise his powers of appointment in the 2003 Will; yet Petitioner would have me ignore, rather than respect, the donors' intended disposition of their trusts in default of the exercise of the powers of appointment. In the event of default, testator's parents intended that testator's issue, i.e., Respondent, receive the principal of testator's share of the trusts outright and free from trust.

Second, in order to reform the 2003 Will so that it contains the alleged intended appointments, the court would have to rewrite the will, which is contrary to Delaware law. *See Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 457 (Del. 1945) ("It is not the function of the Court to make a will for the testator or to improve on the will as found."). Petitioner nonetheless argues that, like trusts, wills can be reformed on the basis of mistake. According to Petitioner, both wills and trusts: (1) are unilateral, donative instruments; (2) are voluntary conveyances, established by the donor to transfer property to one or more beneficiaries under certain terms; (3) employ fiduciaries to administer the donor's conveyance; and (4) do not involve a receipt of consideration for the donor in return for his gift. Petitioner contends that there is no compelling justification to distinguish between a will and a trust when the issue is the reformation of a donative

document on the basis of mistake. Petitioner, however, has ignored a significant distinction between wills and trusts: there are statutory requirements for the execution of wills. *See* 1 Bowe-Parker: Page on Wills, § 13.7 at 672 (1960) ("The majority rule is that … mistakenly omitted terms or provisions can't be added, for to allow such matter to be probated would fly in the face of the requirement that a will must be in writing and must be executed with certain formalities."). *See generally, Last Will and Testament of Palecki*, 920 A.2d 413 (Del. Ch. 2007) (declining to ignore Delaware's statutory signature requirement for a codicil executed in New Jersey). 12 Del. C. §§ 202 *et seq.*

Petitioner never challenged the validity of the 2003 Will. It was executed by the testator in the presence of two witnesses, and each page bears testator's initials, strongly suggesting that testator read each page of the will before he signed it. *See In re Kemp's Will*, 186 A. 890, 894 (Del. Super. 1936) ("(Testator) will be presumed to have known the contents of the instrument which he has signed as his will unless the contrary appears."). The 2003 Will specifically revokes all former wills and codicils, including the 1992 Will which contained a specific reference to and exercise of testator's powers of appointment. If, as Petitioner claims, similar language exercising testator's powers of appointment was omitted by mistake from

the final draft of the 2003 Will, Delaware law nonetheless prohibits the court from rewriting the 2003 Will. *See Miller v. Equitable Trust Co.*, 32 A.2d 431, 436 (Del. 1943) ("If a mistake was made in the writing of the codicil in this case, it is, to say the least, unfortunate …. However, this court has no power to correct a mistake, and it cannot, by the introduction of parol evidence, rewrite the codicil."); *Estate of Gallion*, 1996 WL 422338, at *2 (Del. Ch. Master's Report, June 27, 1996) (citing *Miller*, but recognizing earlier cases where scrivener testimony as to error in will drafting was admitted).

Despite having argued that she is entitled to summary judgment as a matter of law, Petitioner also urges the court to adopt the Restatement (Third) of Property, which authorizes courts of equity to reform wills to correct mistakes:

> A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (2003). The Reporter's Note to the Restatement acknowledges that the above proposition reflects a minority view. *Id.*,

Comment at 11. In my Draft Report, I declined to join the minority of states that have adopted this proposition for the reasons stated by the Supreme Judicial Court of Massachusetts in *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) (declining to follow section 12.1 of the Restatement and allow reformation because it "would open the floodgates of litigation and lead to untold confusion in the probate of wills."). Petitioner takes exception to my stance, accusing me of setting the bar too low and foreclosing consideration of meritorious suits based on the fear of spurious claims. According to Petitioner, the heightened evidentiary burden of clear and convincing evidence should deter plaintiffs with speculative claims and, in meritorious cases, the reformation of a will would promote equity by realizing the testator's intent and preventing unjust enrichment.

Delaware has not yet adopted the Restatement (Third) of Property's proposition on will reformation. As a judicial officer, I am constrained to follow current Delaware law which requires full compliance with the statutory requirements for the execution of wills. *See Matter of Will of Carter*, 565 A.2d 933, 936 (Del. 1989) ("[F]ull compliance with statutory requirements for the execution of wills is necessary to minimize fraud or other improprieties, particularly after the testator's lips are sealed by death or incapacity.") (cited in *Palecki*, 920 A.2d at 425 n.50). Since the 2003

Will was properly executed with all the formalities required by law, it is not within the court's power to insert additional language in the will to correct an alleged mistake of omission.

6. Conclusion

For the reasons discussed above and in my Draft Report, which I adopt as modified herein, I find that Petitioner has not demonstrated that she is entitled to the reformation of the 2003 Will as a matter of law and, thus, that her motion for summary judgment must be denied and Respondent's cross-motion must be granted. Each party shall bear its own costs.