IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF PAUL F. ZILL, DATED MARCH 26, 2006, AND STATUS OF BARBARA ZILL, EXECUTRIX OF WILL OF PAUL F. ZILL	)))))))	C.A. No. 2593-MA

MASTER'S REPORT

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AYVAZIAN, Master

Sharon Zill, Roger Zill, and Paul A. Zill ("Petitioners") brought this petition for review of proof of will,[1] including in the petition a request for the removal of Barbara Zill ("Respondent" or "Barbara") as executrix of the estate of Paul F. Zill ("Decedent"). In a related matter, claims for an elective share and a surviving spousal allowance were filed on behalf of the Decedent's widow ("Widow") in the New Castle County Register of Wills Office by her son and guardian, Lawrence Zill.[2] On December 26, 2007, Respondent moved to dismiss the petition for review of a will and Widow's claims for elective share and spousal allowance as untimely.[3] On January 7, 2008, a court-appointed guardian *ad litem* for Widow moved to join the petition for review of a will. This is my draft report on the pending motions.

1. Facts and Procedural History

[1] The document is actually entitled "Caveat against the Allowance to Probate and Objection to the Probate of the Purported Last Will and Testament of Paul F. Zill." Because Decedent's will had already been probated before this document was e-Filed, I shall refer to it as a petition for review of proof of will or, more simply, petition for review of will. *See* 12 Del. C. § 1309. *See also In re Estate of Nelson*, 447 A.2d 438 (Del. Ch. 1982).

[2] Since the parties and Lawrence Zill bear the same last name, I shall refer to them by their first names to avoid unnecessary repetition. No disrespect is intended.

[3] In response to the motion to dismiss Widow's claims for elective share and spousal allowance, Guardian *ad Litem* argued that Widow was incompetent at the time of the Decedent's death, thus the applicable statutes of limitations were tolled until the appointment of her guardian. Since Widow's claims for elective share and spousal allowance were filed within three months of her guardian's appointment, Guardian *ad Litem* argued that the two claims were timely filed. Guardian *ad Litem*'s assertion that Widow's incompetence tolled the statutory limitations periods of 12 Del. C. §§ 906(a) and 2308(b) was conceded by Respondent in her Reply. Therefore, I find that the issue of the timeliness of Widow's claims for elective share and spouse allowance is no longer before me.

Decedent died on April 30, 2006, and was survived by his widow and their five children: Sharon, Paul, Rodger, Lawrence, and Barbara. Shortly before he died, Decedent executed a will dated March 24, 2006, in which he named Barbara as executrix and sole beneficiary of his estate. Decedent's self-proving will was admitted to probate on June 5, 2006. Letters testamentary were issued the same day to Barbara. A petition for review of will was e-Filed on December 6, 2006, purportedly on behalf of the "Spouse and children of Paul F. Zill." It alleged that the will had deprived Decedent's spouse and children of their lawful inheritance and was the product of undue influence by Barbara.

The procedural history of this case was complicated by a related guardianship proceeding. Ten days before the Decedent's death, on April 20, 2006, Barbara filed a *pro se* petition to be appointed guardian of her mother, who was suffering from senility. The petition was contested by some of Barbara's siblings. Thereafter, Barbara retained counsel and, during a hearing on January 17, 2007, the parties agreed that Lawrence should become their mother's guardian. On January 22, 2007, a final order was signed that appointed Lawrence as guardian of the person and property of Widow. Two days later, Barbara filed an answer to the petition for review

denying, among other allegations, that Widow and all of the Decedent's children were contesting the will. On April 11, 2007, Lawrence, as Widow's guardian, filed a request for elective share pursuant to 12 Del. C. § 906, and a claim for a surviving spousal allowance pursuant to 12 Del. C. § 2308. At the time, Lawrence was represented by the same attorney who was representing Barbara. This attorney was removed by my Order on August 1, 2007, and another attorney subsequently entered his appearance on Barbara's behalf. On December 10, 2007, I appointed a guardian *ad litem* for Widow. Thereafter, on December 18, 2008, an amended petition for review was filed which identified the individual petitioners as Rodger, Sharon, and Paul. An amended answer was filed on December 21, 2007, followed by Respondent's two Motions to Dismiss on December 26, 2007, and Guardian *ad Litem's* Motion for Joinder on January 7, 2008.

2. The Petition for Review of Will

a. The Parties' Contentions

Respondent argues that the petition for review of will is untimely. Pursuant to 12 Del. C. § 1309, the petition had to be filed no later than six months from the date that the Decedent's will was admitted to probate. Decedent's will was admitted to probate on June 5, 2006, and this action was e-Filed on December 6, 2006, one day after the six-month statutory period

had run. According to Respondent, this action is therefore barred by the statute of limitations and must be dismissed.

In their response to the motion to dismiss, Petitioners contend that Respondent waived her right to assert a statute of limitations defense because not only did her first attorney fail to seek dismissal of the petition on that ground, her first attorney also argued that Widow's claims for a spousal allowance and elective share of the Decedent's estate were timely because the applicable statutes of limitation had been tolled by Widow's incompetence. Second, Petitioners argue that Chancery Court Rule 79.1 provides an extra three days for service so that the filing was not untimely. Finally, Petitioners assert that the petition was filed on December 5, 2006, and it was an official filing even though the Register of Chancery "rejected" parts of the filing due to the need for additional formatting of exhibits.

b. Analysis

The standard of review of a motion to dismiss under Chancery Court Rule 12(b)(6) is well known. A motion to dismiss will only be granted "where it appears to a reasonable certainty that a plaintiff could not prevail on any set of facts that can be inferred from the pleadings when the well pleaded facts and factual inferences are viewed in the light most favorable to the plaintiff." *In re Rich*, 2004 WL 136678, at *1 (Del. Ch. June 15, 2004)

(footnote omitted). *See also Forsythe v. ESC Fund Management Co. (U.S.), Inc.*, 2007 WL 2982247, at *14 (Del. Ch. Oct. 9, 2007).

In this case, Petitioners cannot prevail on their waiver argument because the record clearly shows that Respondent asserted the statute of limitations as an affirmative defense in her Answer filed on January 27, 2007. Petitioners have not provided any legal authority for the proposition that Respondent waived her affirmative defense because her former attorney subsequently argued on behalf of another client that the statutory limitations periods for elective share and surviving spousal allowance claims were tolled by incompetence. Petitioners' second argument that Chancery Court Rule 79.1 allows an additional three days for service by electronic means is correct, but irrelevant in this matter. Rule 79.1(i) provides that "the electronic service of a document, in accordance with the eFile administrative procedures, shall be considered service under Court of Chancery Rule 5." At issue in this case, however, is not the service of any pleadings or papers subsequent to the filing of the complaint. The question of timeliness here depends upon when the action was commenced. Under 12 Del. C. § 1309(a) and Chancery Court Rule 3(a), that question depends upon when the petition for review of will was filed with the Register of Chancery *vis a vis* the entry of the order of probate.

Decedent's will was admitted to probate on June 5, 2006; thus, the six-month statute of limitations ran on December 5, 2006. The record shows that the petition for review was e-Filed on December 6, 2006, one day after the six-month period expired. "Delaware courts strictly construe the requirement that a petition for review of a will be filed in a timely manner under Section 1309(a) because it reflects a special public policy in favor of prompt settlements of decedents' estates." *Tunnell v. Stokley*, 2006 WL 452780, at *3 (Del. Ch. Feb. 15, 2006), citing *In re Estate of Turner*, 2004 WL 74473, at *6 (Del. Ch. Jan. 9, 2004); *In re Rich*, 2004 WL 1366978, at *2 (Del. Ch. June 15, 2004). *See also Shuttleworth v. Abramo*, 1991 WL 160260, at **3-4 (Del. Ch. Aug. 15, 1991). Petitioners, however, contend that they filed the petition on December 5th, only to have parts of the filing rejected by the Register in Chancery due to the need for additional formatting of exhibits. According to Petitioners, their petition for review of a will was officially filed on December 5, 2006, which would have been the last day of the limitations period.

Although Petitioners have provided no evidence of any rejection of an initial filing by the Register in Chancery, there are two documents in the record from which reasonable inferences can be drawn that support

Petitioners' assertion that the petition for review of will was officially filed on December 5, 2006: the petition itself and the accompanying Supplemental Information Sheet that is required to be filed by Chancery Court Rule 3(a)(2). The petition is dated December 4, 2006, which according to the calendar fell on a Monday that year. The information sheet states that the case was filed on December 6, 2006, but on closer examination of this document it appears that the number "6" was typed over the number "5." A reasonable inference to be drawn from these documents, when viewed in a light most favorable to Petitioners, is that the filing date was changed from December 5 to December 6 because the petition for review was initially rejected by the Register in Chancery on December 5, 2006, and then re-filed on December 6, 2006. It is not plausible that Petitioners' attorney would have completed the petition on December 4, 2006 (the date printed on the petition), and then waited two business days to file it when the limitations period was about to expire. Given the more reasonable inference that the petition was initially e-Filed on December 5, 2006 and rejected by the Register in Chancery, the question arises whether the rejection of the initial e-Filing by the Register of Chancery has any legal consequences for limitations purposes. *See Bryant v. Bayhealth Medical Center, Inc.*, 937 A.2d 118, 122 (Del. 2007).

The proceedings in *Bryant* occurred in Superior Court, but the pertinent issues underlying this case and *Bryant* are similar. On May 1, 2006, the last day of the statutory limitation period for Bryant's personal injury claim, his attorney filed a paper complaint and *praecipe* with the Prothonotary, which rejected the documents the next day (May 2) because they had not been e-Filed. *Id.* at 119-20. Later that day (May 2), the attorney e-Filed the same documents that he had paper filed the previous day. *Id*. at 120. On June 21, 2006, Bryant's attorney filed another paper copy of the *praecipe*. *Id.* In ruling on a motion for summary judgment, the Superior Court held that the May 1 filing was sufficient to toll the statute of limitations, but nevertheless granted summary judgment in favor of the defendant because Bryant had admitted by default that the first legally cognizable document requesting service of process had been filed on June 21, seven weeks after the limitations period had expired. *See id.* at 120-21. The Supreme Court upheld the Superior Court's conclusion that the Prothonotary's rejection of the paper filing was irrelevant for limitations purposes, relying in part on Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2003-8, Procedure No. 10, which provides that "[i]f the electronic filing is not filed with the

Prothonotary or served because of … rejection by the Prothonotary … the Court may upon satisfactory proof enter an order permitting the document to be filed or served *nunc pro tunc* to the date it was first attempted to be sent electronically." *Id.* at 122-23. The Supreme Court found that the rationale authorizing a *nunc pro tunc* order to remedy a rejection by the Prothonotary of e-Filings was equally applicable to rejected paper filings. *Id.* Furthermore, the Supreme Court found that Bryant's attorney had acted diligently. The attorney had filed the complaint and *praecipe* within the period of the limitations and, once informed that e-Filing was required, the attorney had corrected the error the next day. *Id.* at 124.

This Court has an identical procedure for electronic filings that are rejected by the Register in Chancery for technical errors. *See* Administrative Directive of the Chancellor of the Court of Chancery of the State of Delaware Amended No. 2003-1, eFile Administrative Procedures No. 10. Thus, even though Petitioners' attorney never requested a *nunc pro tunc* order, this remedy was nonetheless available to him and, as the Supreme Court reasoned in *Bryant*, demonstrates that the adoption of e-Filing requirements in this and other courts of Delaware has no legal consequences for limitations purposes. *Id.* at 123. Viewed in a light most favorable to the Petitioners, the factual inferences drawn from the documents are that

Petitioners' attorney acted with due diligence by filing the petition for review of a will on December 5, 2006, within the applicable limitations period, and then by promptly re-e-Filing the petition on December 6, 2006, presumably after correcting the formatting problems that caused it to be rejected in the first place. Since it cannot be said that under any circumstances the petition for review of will was not timely filed on December 5, 2006, I am denying Respondent's Motion to Dismiss provided that Petitioners' attorney files within fifteen (15) days of the date of this Draft Report an affidavit supporting the assertion that the petition was officially filed on December 5, 2006.

3. Motion for Joinder

Widow, through her Guardian *ad Litem*, has moved for joinder,[4] requesting that she be allowed to join the petition for review of will as a precaution to preserve her interest in the estate of the Decedent. Although neither Respondent nor Petitioners have opposed Widow's motion, I have determined that the motion for joinder should be denied because it is untimely.

[4] Guardian *ad Litem* cited Chancery Court Rules 15, 19, 20 and 21 in support of Widow's Motion for Joinder.

In support of the motion, Guardian *ad Litem* argues that the six-month statute of limitations in 12 Del. C. § 1309 was tolled by Widow's incompetence, and did not begin to run until her guardian was appointed on January 17, 2007.[5] Citing *Yorden v. Flaste*, 374 F. Supp. 516 (D. Del. 1974) and *Marvel v. Clay*, 1995 WL 465322 (Del. Super. June 15, 1995), Guardian *ad Litem* contends that incompetence, incapacity, and certain types of fraud "toll" a statute of limitations. However, neither of the cases cited involved the limitations period applicable to a petition for review of proof of will. *See Yorden*, 374 F. Supp at 518 (two-year statute of limitations for wrongful death action, 10 Del. C. § 8106A); *Marvel*, mem. op. at *2, *supra* (three-year statute of limitations for replevin action found at 10 Del. C. § 8106). Even assuming for the sake of argument that the statute of limitations was tolled by Widow's incompetence, Widow's attempt to join this action is still untimely because the motion was filed on January 7, 2008, nearly one year after her guardian's appointment.

Guardian *ad Litem* also argues that joinder is appropriate under Chancery Court Rule 19 because disposition of this action in Widow's absence might impede her ability to protect her interest.[6] As a practical

[5] The final order appointing the guardian was not signed until January 22, 2007, but this fact is of no consequence to the analysis.
[6] Rule 19(a) provides in relevant part:

matter, however, Widow's interest in Decedent's estate is protected whatever the outcome of the will contest. If the Court upholds the Decedent's will as valid, Widow can pursue her elective share, and if Court finds that the will was the product of undue influence and, therefore, invalid, Widow would be entitled to her intestate share of Decedent's estate under the laws of intestate succession, *see* 12 Del. C. § 502(3), or could seek an elective share by new petition. *See In re: Estate of Tinley*, 2002 WL 31112197 (Del. Ch. Sept. 11, 2002); 12 Del. C. § 907 (a). Therefore, joinder is not needed for a just adjudication in this case.

Finally, Guardian *ad Litem* argues that Chancery Court Rule 15 applies whenever changing or adding a plaintiff. Although the argument is not entirely clear to me, it appears that Guardian *ad Litem* is arguing that Widow's joinder as a plaintiff would relate back to the date of the original petition, thus avoiding any limitations problem. *See, e.g., Child, Inc. v. Rodgers*, 377 A.2d 374 (Del. Super. 1977), *aff'd in part and rev'd in part*, *Pioneer National Title Insurance Co. v. Child, Inc.* 401 A.2d 68 (Del. 1979) (six month claim against deceased attorney's estate asserted by parties when

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A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

they were joined as plaintiffs relates back to date of original complaint under Rule 15(c)). However, no party to the original petition for review has moved to amend the petition by adding Widow as a plaintiff. Under such circumstances, Guardian *ad Litem* cannot rely upon the relation back provision of Rule 15. Contrary to Guardian *ad Litem*'s assertion, it does not appear that Widow was ever a party to the original petition for review of will,[7] and it is too late now for Widow to join in this action.

4. Conclusion

For the reasons stated above, the motion to dismiss the petition for review of will as untimely must be denied. However, Widow's request to join this petition as a plaintiff/petitioner is untimely pursuant to 12 Del. C. § 1309, and must be denied. The period for taking exceptions to this Draft Report is stayed for fifteen (15) days or until Petitioners' counsel files the requested affidavit, whichever comes first.

[7] Although the original petition names Decedent's "spouse" as one of the petitioners, the original petition was not verified, *see* Chancery Rule 3 (aa), and at the time it was filed, Widow was the subject of a contested guardianship proceeding. During a teleconference on December 5, 2007, Lawrence (who was *pro se* at the time) informed me that Petitioners' counsel had never represented him. Transcript of Teleconference on December 5, 2007, at p. 7. Consequently, I ordered Petitioners' counsel to file an amended verified petition which clearly identified the individuals he was representing. *Id.* at p. 12.