IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DIANE ADAMS, an individual, and)
EARLA ADAMS and THOMAS F.)
ADAMS, as Trustees of the DIANE)
ADAMS FAMILY TRUST,)
)
Petitioners,)
)
v.) C.A. No. 1337-MA
)
ALBERT H. FRENCH, an individual,)
BAY AREA WOMEN'S CARE,)
LLC, a Delaware limited liability)
Company, and ADAMS AND)
FRENCH, LLC, a Delaware)
Limited liability company,)
)
Respondents.)

MASTER'S REPORT

Date Submitted: November 14, 2008
Draft Report: March 31, 2009
Final Report: February 5, 2010

Thomas F. Adams, P.O. Box 672, Caribou, ME 04736, *pro se*
Earla Adams, 221 Palo Verde Drive, Leesburg, FL 34748, *pro se*
Diane Adams, 937B Kingsbury Drive, Clarksville, TN 37040, *pro se*
Petitioners

And

David N. Rutt, Esquire, Moore & Rutt, P.A., 122 West Market Street,
Georgetown, DE 19947,
Attorney for the Respondent

AYVAZIAN, Master

This is my final report on a Motion to Enforce Mediation Settlement Agreement that was filed by Respondents Albert H. French ("Dr. French"), Bay Area Women's Care, LLC, and Adams and French, LLC. Petitioners are Diane Adams ("Dr. Adams"), and Earla Adams ("Mrs. Adams") and Thomas F. Adams ("Mr. Adams") as Co-Trustees of the Diane Adams Family Trust ("Trust").[1] A hearing on Respondents' Motion to Enforce was held on November 14, 2008. I have now concluded that the mediation settlement agreement signed by parties on April 12, 2007, is enforceable and, therefore, that Respondents' Motion should be granted.

1. Factual Background

According to Petitioners' Complaint, in 1999 Dr. Adams and Dr. French formed Bay Area Women's Care ("BAWC"), a Delaware limited liability company, to operate a medical practice. Both doctors are members of BAWC, and each member owns a fifty percent interest in the company. In 2000, Dr. Adams and Dr. French formed Adams and French, a Delaware limited liability company, to own, manage, lease, and operate a certain parcel of property improved by a medical office building in Milford, Delaware. The current members of Adams and French are the Trust and Dr. French.[2] Each member owns a fifty percent interest in the company. The Complaint sought the dissolution and winding up of the two companies and an accounting, and alleged breaches of: (1) contract; (2) fiduciary duty; and (3) the covenant of good faith and fair dealing. Respondents denied the allegations and, in a counterclaim, alleged breaches of fiduciary duty on the part of Dr. Adams.

[1] Mr. and Mrs. Adams are the parents of Dr. Adams. Transcript of November 14, 2008 Hearing at 26. The Trust was created primarily as a shelter at the time when Dr. Adams was going through a divorce. *Id.* at 33. The beneficiaries of the Trust are Dr. Adams' four children. *Id.* at 30.

[2] Dr. Adams assigned her interest in Adams and French to the Trust. *Id.* at 33-34.

By letter dated January 16, 2007, counsel for Petitioners requested my assistance in obtaining a mediator for this matter.[3] By letter dated January 24, 2007, counsel confirmed that the parties had agreed to mediate their controversy with Master Sam Glasscock.[4] By Order dated January 25, 2007, I appointed Master Glasscock as mediator in this action.[5] A mediation hearing took place on April 12, 2007, that culminated in a written settlement agreement signed by Dr. Adams, individually, and by Mrs. Adams for Petitioners, Dr. French for Respondents, counsel for both parties, and the mediator. On May 29, 2007, counsel for Petitioners notified the Court in writing that the matter had settled, the parties were "documenting" the settlement, and a Stipulation of Dismissal would be filed shortly.

No stipulation was filed and, on October 15, 2007, counsel for Petitioners wrote the Court requesting that mediation be reconvened to address concerns raised by Petitioners regarding the outcome of the mediation. Accompanying counsel's letter was a Motion to Withdraw. On October 22, 2007, Respondents filed the pending Motion to Enforce Mediation Settlement Agreement. During a teleconference on October 24, 2007,

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[3] All the documents referred to herein can be found in the record of Civil Action No. 1337-MA.

[4] Petitioners took exception to this statement on the basis that "ALL Petitioners" did not agree to mediate pursuant to Chancery Court Rule 174(c). Pet'rs Except Br. 2 (emphasis supplied). Only Dr. Adams and the Trust are Petitioners in this action. There is no question Mrs. Adams was present and participated in mediation on behalf of the Trust. No one has questioned that Mrs. Adams, in her capacity as trustee, agreed to mediate on behalf of the Trust. Whether Rule 174 was satisfied depends upon the ultimate issue whether Mrs. Adams, as trustee, could act independently.

Here, I also note that Respondents partially misconstrue Petitioners' exceptions. Petitioners take issue with the formation of the mediation settlement agreement, not with the binding effect of a filed mediation settlement agreement under Chancery Court Rule 174. Resp't Except. Br. 11.

[5] Petitioners' exception to this statement is unfounded. The Court does not communicate directly with parties represented by counsel. At the time I appointed Master Glasscock as mediator, the Court properly notified Petitioners' counsel.

counsel for Petitioners represented that their clients had consented to the withdrawal motion, and were requesting an opportunity to demonstrate, either with new counsel or *pro se*, why the executed settlement agreement was not enforceable.[6] Counsel for Respondents had no objection to the withdrawal request, but objected to any attempt to reconvene the mediation, arguing that the parties had reached an agreement in mediation that was signed by all parties pursuant to Chancery Court Rule 174.[7] I allowed counsel for Petitioners to withdraw, and gave Petitioners time to obtain new counsel and to respond to the Motion to Enforce Mediation Settlement Agreement.[8]

Petitioners did not obtain new counsel. The Court subsequently received a *pro se* "Answer" to the Motion from Mr. Adams, alleging that he had been denied the opportunity to appear at the mediation hearing by his former counsel. Mr. Adams alleged that he had not been notified in advance that the mediation hearing was to take place on April 12, 2007, and that his former counsel had made several false statements to the Court.[9] According to Mr. Adams, the Trust requires two trustees for all actions, and one

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[6] Transcript of October 24, 2007 teleconference at 3-4.
[7] *Id.* at 4-6.
[8] *Id.* at 11-12
[9] Petitioner's exception to this statement is unfounded for two reasons. First, the action before the Court is an improper forum for disputes and allegations of misrepresentations by former counsel. Second, as Respondents correctly note, the attorney-client privilege between Petitioners and their

trustee may not act without the other. Mr. Adams therefore asked that the "failed mediation" be rendered moot and to re-open the mediation with an opportunity for additional discovery prior to mediation. In their Reply, Respondents argued that the Trust was represented at the mediation by Mrs. Adams, who held herself out as having full authority to represent the Trust. [10] In addition, nearly six months had elapsed after mediation before any objection was raised to the mediation, during which time Respondents had changed position in reliance upon the settlement agreement. According to Respondents, Petitioners' request to reconvene the mediation was barred by the doctrine of laches.

Petitioners subsequently filed a *pro se* "Objection to Motion to Enforce Mediation Settlement Agreement, Motion to Re-Open Mediation, Motion for Trial." Attached to this document were, among other items, a redacted copy of the Confidential Mediation Statement sent to the mediator by Petitioners' former counsel prior to the mediation hearing, and a copy of the Diane Adams Family Irrevocable Trust agreement dated September 1, 1997. In their "Objection to Motion to Enforce Mediation Settlement Agreement," Petitioners argued that Mr. Adams had attempted for many months to work with former counsel "to craft a formal mediation agreement," but the task was impossible "without first hand information as to the discussions that took place in the mediation."

2. The Hearing

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former counsel effectively precludes Respondents from determining the credibility of the alleged false statements. Resp't Except. Br. 11.

[10] Petitioners also took exception to this statement. The record supports an inference that Mrs. Adams did hold herself as Trustee of the Trust, with the requisite authority to bind the Trust to the settlement agreement. *See* Mediation Settlement Agreement, April 12, 2007 at 4 (Mrs. Adams signed "as Trustee"); Resp't Except. Br. 8 (Respondents relied in good faith on Petitioners' assertion of valid authority). Again, to the extent this exception relates to matters between Petitioner and former counsel, the current action is an improper forum. Nonetheless, I was mindful of the seriousness of the allegations, which is why I allowed sworn testimony in this regard. Transcript of November 14, 2008 Hearing at 17-18.

A hearing on the Motion to Enforce Mediation Agreement was held on November 14, 2008. At issue was whether a valid mediation settlement agreement was formed between the Trust and Respondents when one co-trustee was absent from the mediation hearing.[11] Counsel for Respondents argued that the agreement was enforceable because under Maine trust law, if a co-trustee is absent, the other co-trustee has authority to act unilaterally and bind the trust.[12] While conceding that he had been absent from the mediation hearing, Mr. Adams argued that the agreement was unenforceable because he had been available despite not having been informed of the hearing. Mr. Adams argued that Maine law follows the Uniform Trust Code which requires two trustees to bind the Trust.[13]

Petitioners provided the following testimony. Mrs. Adams testified that she was divorced from Mr. Adams, and that she was not routinely in touch with her ex-husband, who had subsequently remarried.[14] Mrs. Adams testified that she had not spoken with Mr. Adams about the status of the case prior to the mediation, but she had been surprised when she realized that Mr. Adams was not a part of the mediation.[15] Nevertheless, she had assumed that their attorney knew what authority was needed, and she had relied upon their attorney's "information" to guide her actions.[16] Mrs. Adams testified that she "went … with the flow of things," and had not questioned Mr. Adams' absence.[17]

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[11] As my draft report stated, and Respondents make clear in their response to Petitioners' exceptions, whether a valid settlement agreement was formed between Dr. Adams and Respondents is not at issue here. Resp't Except. Br. 5. Dr. Adams had the authority and competence to bind herself to this agreement.
[12] Transcript of November 14, 2008 Hearing at 6-9. Mr. Adams is licensed to practice law in Maine, and specializes in tax issues. *Id.* at 11, 29. He drafted the trust document which is governed by Maine law. *Id.* at 30-31. Trust, Article VII; *see* 18-B M.R.S.A. § 703(4) (2009).
[13] Transcript of November 14, 2008 Hearing at 11-12.
[14] *Id*. at 22.
[15] *Id*. at 21, 24-25.
[16] *Id.* at 22-23.
[17] *Id.* at 24.

Mr. Adams testified that he had spoken with former counsel early in the case before the complaint was filed, and had advised former counsel that he would be useless as a witness because he had no firsthand knowledge of the transactions, particularly those transactions involving BAWC, which were accounting questions that his ex-wife and daughter could answer.[18] Mr. Adams was aware that discovery was being conducted because he had received copies of the interrogatories and requests for production. Mr. Adams testified that he had been given no advance notice of the scheduled mediation hearing.[19] Mr. Adams testified that he only learned that mediation had taken place when Mrs. Adams called him approximately a week afterward, and requested his help on tax issues related to the settlement agreement.[20] Mr. Adams responded to her request by saying, "It's either too early or too late for me to get involved."[21] However, Mr. Adams did become involved and he attempted to "unscramble the egg," but he found the agreement to be inequitable from a tax perspective.[22]

Dr. Adams testified that she had received only two days notice of the scheduled mediation hearing and, although she had gotten in contact with her mother, she had been unable to reach her father.[23] She had assumed that her father either would be

[18] *Id.* at 26, 34-35.
[19] *Id.* at 27-28.
[20] *Id.* at 28-29.
[21] *Id.* at 29.
[22] Id. at 29-30, 38-41. Mr. Adams testified it is not possible for both Dr. Adams and Mr. French to pay taxes—an inequitable outcome according to Mr. Adams—under the mediation settlement agreement as written. *Id*. at 40-41. Currently, the entire settlement payment is allocated to Dr. Adams with nothing to Dr. French, thus according to Mr. Adams, the entire tax liability for the settlement falls on Dr. Adams. *See id*. at 39. Moreover, Dr. Adams is deprived of a portion of the settlement (approximately 11%) that must be held in escrow. *See* Mediation Settlement Agreement at 1.
[23] *Id.* at 43-44, 49-50. Petitioners also took exception to this statement because they believe "the mediation hearing was sprung suddenly." Pet'rs Except. Br. 4. The Draft Report stated Dr. Adams received "only two days notice." That Petitioners characterize "only two days" as "sprung suddenly" is not a meritorious exception.

participating in the mediation, or had made other arrangements and had discussed the matter with her attorney.[24] When her attorney told her that Mr. Adams would not be attending the mediation, she had assumed that Mr. Adams was aware that the mediation was taking place.[25] Dr. Adams also testified that she was concerned at the time of the mediation because she was not competent to settle the complicated tax issues involved in the litigation.[26] It had been her understanding from counsel that the mediation agreement was not a final binding "arbitration", but rather a framework from which a final agreement would be structured, and that Mr. Adams would participate in structuring a final agreement from the tax point of view.[27]

At the conclusion of the hearing, I reserved decision until I could hear from Petitioners' former counsel regarding Petitioners' allegations.[28] In a letter dated December 16, 2008, Petitioners' former counsel offered to respond to their allegations, on the condition that Petitioners acknowledge that the exception to the attorney-client privilege based upon an alleged breach of duty applied to all communications relating to counsel's engagement by Petitioners, the filing of the petition, and the efforts to settle the litigation. In the absence of such an acknowledgement, counsel requested that I hear their testimony or review their affidavit *in camera*.

After reviewing the law and the evidence presented at the November 14, 2008 hearing, I determined that there was no need to hear from former counsel before I resolve the issue of the validity and enforceability of the mediation settlement agreement between the Trust and Respondents. Under Maine law, Mrs. Adams, as the only co-trustee present

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[24] *Id.* at 44.
[25] *Id.*
[26] *Id.* at 45.
[27] *Id.* at 46.
[28] *Id.* at 26-27, 54-58.

at the mediation hearing, had the authority to bind the Trust when she signed the mediation agreement; thus, the agreement was valid and enforceable as to all parties.

3. Analysis

Delaware law favors the voluntary settlement of contested suits. *Neponsit Investment Company v. Abramson*, 405 A.2d 97,100 (Del.1979). In this case, I have a settlement memorialized in writing that appears to comply with Rule 174, but which Petitioners argue is invalid under Main Uniform Trust Code—the governing law—because it is only signed by one co-trustee.[29] The irrevocable trust agreement itself is silent on the issue of the authority of co-trustees to act jointly or severally.[30] The Maine Uniform Trust Code provides that where a co-trustee "is unavailable to perform duties because of absence, illness, disqualification or other temporary incapacity, the remaining cotrustee . . . may act for the trust." 18-B M.R.S.A. § 703(4). This language is unambiguous, and requires no interpretation. *See* In re *Kent County Adequate Public Facilities Ordinances Litigation*, 2009 WL 445611, at *6 (Del. Ch. Feb. 11, 2009) ("A court will not engage in judicial interpretation of a statute where the statute is unambiguous because, in those instances, the plain meaning of the statutory language controls its meaning.") (footnote omitted). Mr. Adams was unavailable to perform the

[29] Petitioners appear to have taken exception not only to the Draft Report's statutory interpretation but also to the law which governs the Trust. Pet'rs Except. Br. 6. Mr. Adams asserts that "[u]nanimous decision by Trustees is the presumed standard and therefore not necessary to incorporate in a Trust written under the Uniform Trust Code." *Id.* The Trust is clearly governed by Maine law, not the Uniform Trust Code. Article VII. Furthermore, though the Maine legislature has adopted the Uniform Trust Code in part, it expressed a clear intent to depart from the Uniform Trust Code with regard to Section 703(4). *See* 18-B M.R.S.A § 703, comment.

[30] *Id.* at 31. Moreover though Article III of the Trust, enumerates the specific powers of the trustee, is entitled "Trustees", the provisions contained within Article III refer only to "Trustee" in the singular. *See* Attachment to Petitioners' Objection to Motion to Enforce Mediation Settlement Agreement, Motion to Re-Open Mediation, Motion for Trial. Because the Trust does not address co-trusteeship, the Trust is governed by the default rules under 18-B M.R.S.A. 105(1). That provision states: "Except as otherwise provided in the trust, this Code governs the duties and powers of the trustee, relations among trustees and the rights and interests of a beneficiary."

duties of a trustee at the mediation hearing because he was absent; therefore, Mrs. Adams, as remaining co-trustee, had the authority to act for the Trust.[31]

Mr. Adams testified in effect that he would have been available to attend the mediation if he had been notified in advance of the hearing. Mrs. Adams testified that she had never spoken about the status of the case with Mr. Adams before the mediation occurred.[32] A reasonable inference to be drawn from her testimony is that Mrs. Adams had delegated to counsel the responsibility of providing notice to her co-trustee of the upcoming mediation hearing.[33] Section 703, subsection 4 places no requirement on a co-trustee to inquire into the reason for the other co-trustee's absence. It thus appears that the Maine legislature intended to confer broad authority upon the remaining co-trustee to act ***in any case*** in which the other co-trustee is absent. *See* Maine Comment to 18-B M.R.S.A. ("Section 703, subsection 4 deletes the requirement in the Uniform Trust Code that the remaining trustees or a majority thereof may act if a cotrustee is otherwise unavailable only if prompt action is necessary to achieve the purposes of the trust or to

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[31] Mr. Adams took exception to the Draft Report's characterization of him as "absent". Pet'rs Except. Br. 5. His disagreement over the meaning of the word "absence", as found in 18 M.R.S.A. 703(4) , is unwarranted for the same reason as stated in the Draft Report: the statute is unambiguous and thus the plain meaning of the statutory language controls. Furthermore, that parties differ on the meaning of a statute does not render it ambiguous. *Stop and Ship Companies, Inc. v. Gonzales*, 619 A.2d 896, 899 (Del. Supr. 1993). To the extent Petitioners believe their former counsel did not inform Mr. Adams, in his capacity as Trustee, of the pending mediation hearing, that matter is not before this Court. Issues between clients and their former counsel are properly determined through disciplinary proceedings or malpractice actions. Mr. Adams' due process exception is also without merit. *See* Pet'rs Except. Br. 4-5. Petitioners do not argue that Mrs. Adams did not have notice of the mediation hearing. As co-trustee of the Trust, notice to Mrs. Adams was sufficient to provide requisite notice to the Trust. Additionally, Dr. Adams testified that she had two days notice of the hearing. Thus, both Petitioners had notice and were not deprived of due process.

[32] Transcript of November 14, 2008 Hearing at 24-25.

[33] Though no exception has been taken to this statement, the "responsibility of providing notice" flows from a co-trustee's § 703(3) obligation to participate in performance of the trustee's function unless the co-trustee is unavailable. 18-B M.R.S.A. § 703(3). Pursuant to § 703(5), a trustee may delegate the performance of functions that the settler did not reasonably expect the trustees to perform jointly. *See* 18-B M.R.S.A. § 703(5). Providing notice to one's co-trustee is a task that cannot be performed jointly when there are only two co-trustees. Thus, Mrs. Adams could properly delegate the responsibility of providing notice to counsel.

avoid injury to the trust property. Section 703, subsection 4 allows the remaining trustees or a majority thereof to act in any case in which a co-trustee is unavailable to perform his or her duties because of absence, illness, disqualification or other temporary incapacity.”).

Mrs. Adams as co-trustee of the Trust had the authority to act for the Trust in Mr. Adams’ absence during the mediation hearing on April 12, 2007. Under Maine law, a trustee “shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.” 18-B M.R.S.A. § 811. Pursuant to Article III, section 1 of the Diane Adams Family Trust Agreement, the trustee has the power “[t]o compromise, settle, compound, or adjust, submit to arbitration, or abandon on such terms as Trustee may deem advisable, any claim or demand by or against the trust estate and to agree to any rescission or modification of any contract or agreement[.]”[34] During the mediation hearing, Mrs. Adams performed the duties of a trustee. It was within Mrs. Adams’ power to reject the proposed settlement agreement if she did not deem it advisable to accept the terms of the settlement offer. Mrs. Adams chose instead to sign the settlement agreement. While her co-trustee may question whether Mrs. Adams acted reasonably in settling the Trust’s claims, that issue is not before me. Similarly, while Petitioners may have a cause of action for malpractice against their former counsel whom they blame for Mr. Adams’ absence, any claims they may have against their former counsel have no bearing on my conclusion that Mrs. Adams had the legal authority to settle the litigation on behalf of the Trust in Mr. Adams’ absence.

4. Conclusion.

[34] *See* Attachment to Petitioners’ Objection to Motion to Enforce Mediation Settlement Agreement, Motion to Re-Open Mediation, Motion for Trial.

The mediation settlement agreement that Mrs. Adams signed on behalf of the Trust is a valid and enforceable agreement. Therefore, Respondents' Motion to Compel Enforcement of Settlement Agreement should be granted. Although Petitioners place no onus on Respondents for what transpired before, during or after mediation, I have decided against shifting costs at this time because I have not seen any evidence of bad faith on the part of Petitioners in seeking to reconvene the mediation. An order to this effect shall be signed when this report becomes final.