IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In the Matter of the Estate of JOHN A. ERDMAN, JR.	) C.A. No. 3037-MA)

MASTER'S REPORT

Date Submitted: May 3, 2010
Draft Report: December 17, 2009
Final Report: November 30, 2010

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AYVAZIAN, Master

Petitioner Janis M. Irwin and Respondent Grace E. Grant are the daughters of the late John A. Erdman, Jr. ("Decedent"). They are also co-executrices of Decedent's estate. On June 19, 2007, Irwin filed a Petition to Compel Return of Assets. In her petition, Irwin seeks to compel Grant to return to the estate: (1) a certificate of deposit ("CD") in amount of $50,000 opened in the names of Decedent and Grant as joint tenants with right of survivorship; (2) $48,500 as the outstanding balance of loans made by Decedent to Grant and her husband; and (3) Decedent's wedding ring.

The parties submitted pre-trial briefs on the issue whether the statute of limitations governing debt collection matters, 10 Del. C. § 8106(a),[1] applied to the alleged loans to Grant and her husband. A trial was held on November 17, 2009, followed by post-trial arguments on December 17, 2009. After hearing the parties' arguments, I issued a draft report from the bench in which I found that: (1) the ring had been given to Grant by Decedent shortly before his death and was not an asset of the estate; (2) the CD had been funded with money from Decedent's convenience accounts and, therefore, belonged to the estate; and (3) Decedent had lent $48,500 to Grant and her husband which had not been repaid. I also concluded that the statute of limitations did not bar the return of funds to the estate because Decedent's Last Will and Testament

[1] 10 Del. C. § 8106(a) provides:

(a) No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

("Will") that was executed on September 26, 1996, expressly provides that the outstanding balance of any loans made to a daughter or daughter's spouse is to be deducted from that daughter's share of the estate. Grant has taken two exceptions to my rulings. This is my final report after consideration of the arguments for and against Grant's exceptions.

Factual Background

Decedent was born in 1917, and worked as an inspector for the Internal Revenue Service in the Alcohol, Tobacco and Firearms division until 1973. He also held a second job in the credit and automotive departments at Sears in Wilmington, Delaware. Decedent and his wife had two daughters. Grant is the older of the two sisters. After she graduated from high school and attended a one-year business course, Grant got married and became a housewife. Decedent and his wife could not afford to send Irwin to college after she graduated high school. Irwin thereafter worked in various fields, including marketing and real estate law. Currently, Irwin is an interior decorator.

Decedent and his wife lived frugally and managed to accumulate some savings. After his wife's death in 1993, Decedent lived alone in an apartment on Naaman's Road in Wilmington. As the years passed, Decedent continued to live independently and drive his car, much to Irwin's consternation because, among other things, he was suffering from memory loss. Grant, who lived a few miles away from her father's apartment, saw Decedent on a weekly basis. She cleaned his apartment, ran errands, and helped with his bills. Irwin lived further away, in West Chester, Pennsylvania, but she called her father and visited him as much as her work schedule allowed. Decedent passed away on December 6, 2005, at age 88, after suffering an aneurysm.

In 1994, Decedent deposited about $16,000 into a money market account at Discover Bank that he opened with Irwin. According to Irwin's testimony, Decedent told her that he also had opened a savings account at Wilmington Trust with Grant, and had deposited the same amount of money into that joint account.[2] Decedent told his daughters that the funds in these joint accounts were available for them if they should need anything. About the same time, Decedent added Grant's name to his checking account at Wilmington Trust.

In 1996, Decedent asked Irwin to prepare a will for him. According to Irwin's testimony, she was cleaning her father's apartment when he went to his safe and withdrew an envelope labeled "Bill and Grace."[3] He told Irwin that he wanted her to have the envelope in case something happened to him. Inside the envelope were two uncashed checks made payable to Decedent, two withdrawal slips and two deposit slips for the Grants' bank accounts, and an IOU note handwritten by Grant's husband.[4] Decedent told Irwin that the documents represented outstanding loans he had made to her sister and brother-in-law over the years, and he asked Irwin to address the loans in his will. Irwin prepared a draft will for her father, which he executed on September 26, 1996. The Will named Grant and Irwin as co-executrices, and bequeathed all of Decedent's property to his two daughters in equal shares. The Will addressed the loans in Paragraph VI as follows:

> VI. *Management Provisions*:
>
> In the interest of fairness, all outstanding balances of any and all loans given to my daughters or their spouses, without exception, shall be deducted from their respective share of my estate to make repayment of the loan(s) to my estate

[2] In 2004, Decedent transferred the money in his Wilmington Trust savings account to a premium money market account in order to earn more interest.
[3] Trial Testimony of Janice Irwin on November 17, 2009, at p. 7.
[4] Respondent's Trial Exhibit Nos. 9-13.

> so that equal shares of my estate are ultimately made. It is my intention that any loans made to my daughters or their spouses were to be made in a fair manner and repaid to me or my estate so that both daughters shall have received equal shares of my financial assistance – both in life and after death. Should repayment of these loans be claimed, valid, legal proof of funds reentered into my checking accounts, savings accounts or investment accounts, as acceptable to a court of law, must be provided or repayment shall be considered ***not*** to have been made. ***Canceled*** checks, appropriately verified by the bank upon which they were drawn, showing deposit into my account shall be considered proof. Checks written to me prior to death and ***not cashed and deposited*** to my aforementioned accounts shall not be deemed repayment of loans.
>
> Should a beneficiary of my estate dispute this Will, that beneficiary's share shall be reduced by one-half of its total and that half given to the other beneficiary, i.e., the 50% share shall be reduced to 25% and the 25% reduced share shall be given to the other beneficiary, making that beneficiary's share 75%. It is my intention that the estate be equally divided, but only if it can be amicably agreed and the Will be undisputed.[5]

At her father's request, Irwin kept the loan documents at her home. She never discussed the documents with her sister or brother-in-law until after her father's death. It was only then that Irwin learned her father had a joint CD with Grant at Wilmington Trust. According to Grant's testimony, Decedent had expressed a desire to open a nine-month CD in the amount of $50,000 after she told him about a special CD interest rate she had obtained for herself and her husband at Wilmington Trust. Although Grant tried to dissuade her father from putting such a large sum of money into a CD, Decedent instructed her to transfer funds totaling $50,000 from the joint checking and saving accounts at Wilmington Trust to open the new CD. On October 31, 2005, Grant went to the bank and was given a personal application form for a CD to be established in the names of "John A. Erdman Jr. and or Grace E. Grant."[6] Two lines underneath their typed names on the application form were the typed letters "JTROS."[7] Grant brought the application form home from the bank, and Decedent signed it when he came over to her

[5] Respondent's Trial Exhibit No. 6.
[6] Petitioner's Trial Exhibit No. 5.
[7] *Id.*

house for dinner that night. The following day, Grant returned the completed application form to the bank, and the CD account was opened. Decedent died approximately five weeks later.

After Decedent's death, Grant used the joint checking and savings accounts at Wilmington Trust to pay Decedent's debts and estate administration expenses. However, in July 2006, Grant cashed out the CD, and retained $50,000 and accrued interest for herself. According to Grant's testimony, the bank had told her that the account was hers. Irwin, however, believed the CD should be treated as an asset of the estate. The parties also disputed ownership of Decedent's wedding ring, which he was wearing when he died. At a meeting with the Grants and the estate attorney in August 2006, Irwin produced the documents Decedent had given her regarding the loans.[8] The Grants neither acknowledged nor denied the existence of outstanding loans at that time. During this meeting, Irwin also presented the estate attorney with two checks for a total of $16,500 in repayment of monies she had borrowed from the joint money market account at Discover Bank for a new roof. Irwin directed that the checks not be deposited until resolution of all matters between the parties.[9] This litigation followed unsuccessful attempts by the parties to resolve their dispute.

Exceptions

Grant has taken exception to my determination that the CD was not a joint account with right of survivorship whose ownership passed to her as a matter of law upon Decedent's death. According to Grant, the application and statement card for the CD unambiguously create a joint tenancy with right of survivorship account, as do the

[8] Petitioner's Trial Exhibit No. 4. Respondent's Trial Exhibit Nos. 9-13.
[9] Petitioner's Trial Exhibit No. 4.

signature cards for the checking and savings accounts at Wilmington Trust. Therefore, according to Grant, parol evidence should not be considered. Even if parol evidence were considered, Grant argues, the evidence indicates that Decedent had multiple joint accounts at Wilmington Trust over decades, and had ample opportunity to understand the effect these accounts would have on his estate plan. Grant also argues that if there is ambiguity as to whether a joint tenancy has been created, then at the very least Grant would hold a one-half, undivided interest in the funds in the accounts, and the other half would be estate property.

Irwin opposes this exception by arguing that the checking and savings accounts used to fund the CD were clearly convenience accounts since they were used by Grant to pay Decedent's bills both before and after his death. Since the signature documents creating the joint accounts were ambiguous, Irwin argues that it is necessary to examine the circumstances surrounding the creation of these accounts. According to Irwin, Grant's name was added to the existing checking account after the death of Decedent's wife for the sole purpose of assisting him with his bills. The evidence shows that neither Grant nor Decedent understood that the CD application was for a joint tenancy with right of survivorship account, and that depositing $50,000 in such an account was contrary to Decedent's testamentary intent to divide his entire estate equally between his two daughters.

Grant has also taken exception to my determination that Decedent had lent money to her and her husband, and my ruling that collection of the loans by the estate was not barred by the statute of limitations. Grant argues that my ruling essentially treats the loans as advancements against an inheritance, and that Irwin is seeking a set-off for the

advancements. Grant argues that the Court should apply 12 Del. C. § 509 by analogy, and rule that such advancements should have been declared as advancements in a contemporaneous writing acknowledged by either Grant or Decedent.[10] To require such a contemporaneous writing would avoid contentious estate disputes where, as in this case, the full facts surrounding the alleged loans are not known. Grant also argues that the Court should apply Delaware's three-year statute of limitations to bar the estate from collecting on the loans because the loans are contractual obligations subject to 10 Del. C. § 8106(a) and, thus, time-barred. Finally, Grant also argues that the IOU note, by its own terms, is not due, and that the other documents, i.e., the signed checks, withdrawal slips, and deposit slips, are not evidence of actual loans.

Irwin opposes this exception by arguing that the Court, as fact-finder, appropriately used its discretion to find Grant's testimony regarding the loan documents to be incredible. Irwin also argues that 12 Del. C. § 509 only applies to intestate succession and here, Decedent died testate. Decedent's Will does not treat the loans as advancements or gifts, and provides for the deduction of any outstanding loans from the beneficiary's share to make repayment of the loans to his estate. Finally, Irwin argues that this case does not involve a contractual dispute, but an estate. As co-executrices, both Irwin and Grant have a fiduciary duty to ensure that Decedent's wishes are carried out concerning the distribution of his estate. Irwin is attempting to do so, while Grant has failed to act in the best interest of the estate.

Analysis of Issues

[10] 12 Del. C. § 509 provides in part:

> If a person dies intestate as to all the estate, property which the person gave in the person's lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement.

A. CD Account

In my Draft Report, I found the language in the financial document creating the CD account, i.e., the personal application form, to be ambiguous. It contains the letters "JTROS" in a location that appears, at first glance, to be the line for the applicant's street address.[11] These letters would have no meaning to someone who had not studied law or finance.[12] The application also contains the phrase "and or" between the names of Decedent and Grant, which is facially ambiguous given that the only address listed on the application is Decedent's address. Viewing this application as a whole, I find the CD application to be ambiguous. Therefore, I shall examine the extrinsic evidence to show the context in which this account was created, and what was intended. *See Walsh v. Bailey*, 197 A.2d 331 (Del. 1964); *In re Gedling*, 2000 WL 567879 (Del. Ch. Feb. 29, 2000) (Master's Report).

Since the funds for the CD were transferred from Decedent's other two joint accounts at Wilmington Trust, I must also look at the context in which these accounts were created and what was intended at the time. It is undisputed that these joint accounts were funded solely with Decedent's monies. Decedent had been a customer of Wilmington Trust for approximately 50 years. The signature card for Decedent's checking account that was signed by Decedent and Grant on July 26, 1994, had a small box checked that stated "Made Joint." Allison Berl, records custodian of the bank, testified that "made joint" indicated that the checking account originally had been a

[11] Respondent's Trial Exhibit No. 7 contains a letter dated February 26, 2008, from Allison Berl, records custodian at Wilmington Trust, to a previous attorney in this case. Berl apparently had the same mistaken impression because her letter states: "On the CD application 'JTROS' appears on the address line which indicates the CD was established as 'Joint Right of Survivorship.'"
[12] In her letter, Berl mistranslated "JTROS" as "joint right of survivorship" instead of joint tenancy or tenants with right of survivorship. *Id.*

single account. Small print at the bottom of the card stated that by signing the card, the signer acknowledged receipt of the Wilmington Trust Deposit Account Agreement and Disclosure. Berl testified that a deposit agreement booklet was provided to a new client the first time an account was opened, but she did not know the procedure when an established client opened another account at the bank. The card itself says nothing about the type of joint account being created, but Berl testified that all joint accounts at Wilmington Trust for the past 15-20 years were considered by the bank as joint tenancies with right of survivorship.[13] However, Berl testified that during an earlier time period, the bank may have offered convenience or other types of accounts.

There was no evidence presented at trial that Decedent was given a deposit agreement booklet when he signed the signature cards for the joint checking and money market accounts at Wilmington Trust in 1994 and 2004. There was no evidence that any bank employee explained to Decedent in 1994 and 2004 what a joint account meant in terms of ownership of the account. Thus, there was no evidence from which I can infer that Decedent understood he was creating or that he intended to create a co-tenancy of any type when he signed the cards, i.e., joint accounts to which he and Grant would have equal access and equal rights. *Compare Speed v. Palmer*, 2000 WL 1800247, at *5 (Del. Ch. June 30, 2000) (Master's Report) (co-tenancy created where bank employee discussed co-ownership of the account with the applicants in terms of both individuals being able to make deposits and withdrawals). On the other hand, a reasonable inference to be drawn from Irwin's uncontraverted testimony is that Decedent established his joint savings account with Grant at Wilmington Trust in 1994, like his joint money market

[13] Decedent and Grant signed a similar card in 2004 when they opened a joint money market account at Wilmington Trust. The only significant difference was that the small box labeled "joint" was checked instead of the box labeled "made joint." Respondent's Trial Exhibit No. 7.

account with Irwin at Discover Bank, simply as a fund to which his daughter might have recourse if she ever needed anything. In other words, the Wilmington Trust savings account was not a present gift to Grant; it was Decedent's property, but Grant might have access to the account if she needed funds. Irwin understood the nature of her joint account with Decedent. Irwin asked permission to use Decedent's funds at Discover Bank for a new roof for her house, and he gave it. Later, when Irwin sold her house and offered to repay the account, Decedent declined Irwin's offer of repayment of the loan. Decedent explained to Irwin that he had already provided funds to her sister, i.e., he had helped pay for the construction of Grant's house.

This inference is also supported by evidence showing that after the Wilmington Trust joint savings account was opened, Decedent treated the account as his sole property. It was Decedent who, according to Grant, decided to close the joint savings account and open a new joint money market account in 2004 because he wanted to earn more interest. It was Decedent who decided to open a nine-month CD in 2005, and who gave explicit instructions to Grant as to the amount of funds to be withdrawn from the joint money market and checking accounts and deposited in the new CD.

I also find that Decedent's joint checking account at Wilmington Trust was established simply as a convenience account. The evidence shows that for many years after it was opened, Decedent maintained complete control over the account. Decedent wrote his own checks. If Grant purchased groceries or medications for her father, she would present him with the receipt and he would write a check to cover her purchase. Grant never looked through her father's checkbook until a year or two before his death, when she discovered that her father had received a second notice of a bill. Decedent

thought he had already paid the bill, so Grant asked her father's permission to look through his checkbook to see if she could find evidence of such payment. Instead, she found that he had written two checks, each in the amount of one thousand dollars, to a lady friend. Grant then started to write checks on the joint account for her father's personal expenses and his favorite charities. She also hid his checkbook underneath his sofa cushion so he would not lend any more money to his lady friend.

Grant used the joint checking account to pay her father's bills not only during his life, but also after his death. Grant paid Decedent's last rent, utility bills, and funeral expenses with funds from the joint checking and savings accounts. According to the estate attorney's August 2006 letter,[14] Grant and Irwin had agreed that Decedent's joint checking and savings accounts at Wilmington Trust were estate assets. At trial, however, Grant testified that the estate attorney never told her about being a joint tenant on the checking account, and simply instructed her to put the money into the estate account. According to Grant's testimony, after she notified the bank that her father had died, bank personnel told her that the funds in those accounts were hers as a joint tenant with right of survivorship.

These two bank accounts were the source of the funds for the CD. Grant's own testimony demonstrates that when the CD was opened, there was no expressed or apparent intent on Decedent's part to create a co-tenancy of any type. Grant testified that the reason Decedent opened the nine-month CD was to obtain a better interest rate for his money. Decedent did not go to the bank to obtain the CD application nor did he ever discuss the CD application with a bank employee. Thus, he would not have known how the account was titled except by reading the application form itself or discussing the

[14] Petitioner's Trial Exhibit No. 4.

matter with Grant. The application form, as was addressed earlier, was facially ambiguous. Grant testified that she herself had no idea what "JTROS" meant, and did not even observe those letters on the application. Nor had she instructed the bank employee how to title the CD account. Most significantly, Grant testified that she believed that the CD was Decedent's property until she changed her mind on this issue several months after Decedent's death.

Irwin testified that Decedent always treated his daughters equally when it came to making them small gifts or providing them with financial assistance. Grant's initial belief that the CD was Decedent's sole property was consistent with Decedent's disposition of his property during his lifetime and after his death, as expressed in his Will. The funds for the CD came from the joint savings and checking accounts which were owned solely by Decedent even though Grant's name was on the accounts. As a result, I find that Grant was not a joint tenant with right of survivorship or even a tenant in common on the CD account. Upon Decedent's death, the CD became an asset of his estate. This exception is denied.

B. Loans

The parties dispute whether Decedent ever made loans to Grant and her husband. They also dispute whether collection of any outstanding loans is time-barred under 10 Del. C. § 8106(a). The resolution of the first issue depends upon the credibility of the witnesses. In my draft report, I did not find Grant's testimony on this issue to be credible. After reviewing the trial transcripts, my opinion about Grant's credibility has not changed.

Evidence of the existence of outstanding loans consists in part of Irwin's testimony that in 1996, Decedent told her that over the years he had made loans to Grant and her husband, and that these loans were still outstanding. According to Irwin, Grant had written Decedent checks in repayment of the loans, but had told her father not to cash the checks because she might need the money. Instead, Grant had provided her father with withdrawal slips from her bank account in case something happened to her or her husband. Decedent gave Irwin the documents evidencing these loans. He also asked Irwin to address the outstanding loans in a will she was to draft for him. The Will executed by Decedent included language requiring a canceled check as proof of repayment of any loan.

The documents that Decedent gave Irwin in 1996 were admitted into evidence at trial. The first was a handwritten note dated June 13, 1984, and signed by Grant's husband, William E. Grant, Jr. The note acknowledges an outstanding loan in the amount of $10,000 from Decedent for construction of the Grants' residence.[15] Next were two checks payable to Decedent that had been written and signed by Grant. The first check was in the amount of $13,500 and dated July 2, 1991. Grant had written on the memo line at the bottom of the check: "REPAID LOAN – THANKS."[16] The second check was in the amount of $10,000 and dated July 15, 1994. At the bottom of this check Grant had written: "REPAYMENT OF LOAN."[17] There were corresponding deposit slips on the same dates and in the same amounts for the Grants' checking account at Wilmington Trust. There was also a withdrawal slip from the Grants' savings account at Wilmington

[15] Respondent's Trial Exhibit No. 9.
[16] Respondent's Trial Exhibit No. 10.
[17] Respondent's Trial Exhibit No. 12.

Trust dated August 1992 in the amount of $15,000,[18] and a second withdrawal slip dated July 15, 1994 in the amount of $10,000.

At trial, Grant repeatedly denied that her father had lent her money. According to Grant, neither she nor her husband had ever needed to borrow money from her father. Grant admitted writing the checks, deposit slips, and withdrawal slips. She also admitted that her husband's 1984 note was her idea.[19] According to Grant, the note was written shortly before the couple went on a short vacation. They did not have a will, and Grant was concerned that if they were killed, she did not know who would be handling their estate. She wanted her parents to get $10,000 in appreciation for all the help they had provided when the Grants had built their home.[20] She thought whoever handled their estate would have to give this money to her parents if she made it look like a loan. Grant also testified that when the couple went on long vacations, she would write out a check to her father, a withdrawal slip, and a deposit slip, all in the same amounts and dated the same dates. In the event Grant and her husband were involved in an accident and hospitalized far from home, her father would have been able to pay the Grants' mortgage or insurance premiums with funds from the Grants' bank accounts. In the worst-case scenario, if the Grants had been killed, funds from their accounts would have been

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[18] Respondent's Trial Exhibit No. 11. The handwritten date has only the month ("8") and the year ("92"). The space for the day is blank.

[19] The note states:

To whom it may concern:

I, William E. Grant, Jr. still owe ten thousand dollar ($10,000.00) loan to John A. Erdman, Jr. and/or Freda R. Erdman of 121 Harbour Dr., Apt 11, Claymont, Delaware 19703. This loan was for construction of the Windybush Residence.

This loan should be repaid first from any monies in accounts or from sale of residence.

June 13, 1984

/s/ William E. Grant, Jr. /s/

[20] Grant testified that after she and her husband moved into their Windybush home in 1981, her mother sewed drapes and slipcovers, and her father helped with the woodwork. Trial Testimony of Grace E. Grant on November 17, 2009, at p. 86.

available to pay for their funerals. Grant testified that she wrote "repaid loan – thanks" on the check because once she had observed a bank customer who had not been allowed to cash a large check, and she thought her father would have no difficulty cashing the check if it said "repaid loan - thanks" on it.

Grant testified that each time she returned home safely from vacation, she resumed her busy life and forgot about the check she had given to Decedent. On cross-examination, Grant admitted that she never calculated her monthly expenses at the time she wrote out these checks. Grant testified that it did not matter what amount she wrote on the check; she just "wrote it out willy-nilly."[21] She also did not worry that the check might be cashed because it was in her father's safe, and she knew that he would never cash it because it was not a loan. She denied that she had ever asked her parents for money, and denied that the handwritten note from her husband reflected an outstanding loan even though the word "loan" was used three times in the document.

Grant's categorical denial of the existence of any loans was unconvincing. Grant was unable to justify the dollar amounts of the checks with her ostensible purpose for writing them, i.e., to pay her monthly expenses in the event she and her husband were hospitalized far from home. Instead of calculating her monthly expenses, Grant simply plucked these numbers out of thin air. The frivolity of such a method for addressing what should have been a serious matter completely undermines Grant's credibility on this issue. Nor was her rationale for writing "repayment of loan" or "repaid loan" plausible. In the unlikely event that Wilmington Trust would have refused to cash a check for a long-time customer, the check instead could have been deposited in Decedent's account at Wilmington Trust.

[21] *Id.* at p. 76.

Grant's explanation for the 1984 IOU note was unconvincing for the following reasons. First, the note explicitly acknowledges the existence of an outstanding loan in the amount of $10,000 for the construction of the Grants' residence. Second, it seems utterly preposterous that if Grant and her husband were so worried about their possible demise, they would write an IOU note instead of a will to ensure that Grant's parents received some money from their estate. Finally, three years before the note was written, Grant and her husband moved into an unfinished residence. In her testimony, Grant only acknowledged her parents' physical assistance in finishing and decorating the Grants' home. However, $10,000 appears excessive as a token of appreciation for some drapes, slipcovers, and woodwork. The note makes more sense as evidence of an outstanding construction loan to be repaid when the Grants had sufficient funds or their house was sold.

Irwin's testimony about the loans to the Grants was credible because it was corroborated by the documents themselves and by Decedent's 1996 Will that specifically addresses loans to his daughters or their spouses, and requires proof of repayment of loans by canceled checks and not checks written out to him prior to death. Although Grant now tries to argue that the 1992 savings withdrawal slip in the amount of $15,000 is not evidence of any loan because there is no corresponding deposit slip or check, at trial Grant testified that she always prepared three documents when she went on vacation: a check, a deposit slip for her checking account, and a withdrawal slip from her savings account. The absence of a corresponding check and deposit slip in the amount of $15,000 does not nullify or undermine Irwin's testimony that Decedent gave her this slip as proof that he had made a loan to Grant. When faced with the documents and Irwin's

testimony, Grant denied the existence of all of the alleged loans, not just one or two. Since I have found Grant's explanations for the creation of these documents to be unworthy of belief, I find that a balance of $48,500 in loans made by Decedent to Grant and her husband was outstanding at Decedent's death.

Grant argues that because there is no contemporaneous writing declaring these loans as advancements acknowledged by either herself or Decedent then, by analogy to 12 Del. C. § 509, there can be no set off from her share of Decedent's estate. Section 509, however, is inapplicable because Decedent did not die intestate. Grant also argues that the three-year statute of limitations has run, and any attempt to collect on the debts is time-barred. This argument, however, ignores that fact that this case is about the administration of Decedent's estate. The touchstone of this case is Decedent's Will. It was Decedent's intent, as expressed in his Will, to deduct any outstanding loans made to his daughters or their spouses from their respective shares of his estate to implement his testamentary plan to treat his daughters equally. As a result, I do not need to decide whether Grant's outstanding loans should be viewed as debts which, under 10 Del. C. § 8106(a), were time-barred on the date of Decedent's death. Under the doctrine of equitable retainer, the loans to Grant and her husband can be offset against Grant's share of her father's estate even if they are time-barred as debts.

The theory behind the doctrine of equitable retainer or equitable right of retainer is that:

> the indebtedness of an heir of the estate should be regarded as assets of the estate already in his hands, and that his legacy or share is to that extent satisfied. It would be grossly inequitable to allow an heir to obtain his full share of an estate while he was withholding a portion of the same that was already in his hands. It has been said 'it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his

> hands, as a debtor to the estate.' This is not a mere question of set-off, but of equitable lien and right of retainer. (*Smith v. Kearney*, 2 Barb.Ch. (533) 548.) Our statute of limitations is one of repose and does not raise a presumption of payment, as in some of the states. The lapse of time does not extinguish an obligation nor satisfy a debt, but the statute simply bars the remedy and prevents the use of the obligation or debt as a cause of action or affirmative defense. Some of the courts have held that the statute of limitations applies, and that there can be no deduction from a distributee's share on account of an indebtedness which is barred. (*Milne's Appeal*, 99 Pa. 483; *Allen v. Edwards*, 136 Mass. 138.) But the better, and probably the greater number of, authorities hold to the contrary view.

Holden v. Spier, 70 P. 348, 349 (Ka. 1902), quoted in *Estate of Wernet*, 596 P.2d 137, 146-47 (Ka. 1979). *See also Cook v. Cook*, 99 Cal. Rptr.3d 913, 919 (Cal. App., 2d Dis. 2009) (interpreting trust document as authorizing trustee to offset time-barred loans against beneficiary's distribution where there was an expressed intent to offset unpaid loans to implement a testamentary plan to treat each beneficiary equally). In this case, there is an express direction in Decedent's Will to deduct the outstanding balance of any loans given to a daughter or her spouse against the daughter's respective share of his estate. *Compare In re Riley's Will*, 121 N.Y.S.2d 394 (N.Y.Supr.Ct., App. Div. 1953) (denying the executor, in the absence of evidence in the will to the contrary, any right of set-off or 'retainer' against a legacy, of a debt barred by the statute of limitations at the death of the testator). Thus, it does not signify if the loans to Grant and her husband are time-barred because this case is not about the collection of a debt, but rather the construction of a testamentary instrument to give effect to the expressed intent of the testator. *See Cook*, 99 Cal.Rptr.3d at 919. This exception is therefore denied.

Conclusion

For the reasons stated above, the exceptions to my Draft Report are denied. When this report becomes final, Respondent shall turn over to the estate the funds from the CD

account, together with the accrued interest. When this report becomes final, the parties also shall notify the Court of any outstanding issues that need to be resolved.[22]

[22] I previously reserved decision on Irwin's Petition to Remove Grant as Co-Executrix and on Irwin's request to shift her attorney's fees to the estate. It is my sincere hope, however, that the parties will be able to finalize this small estate without the expense of further litigation.