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Re: Stone v. Stant
C.A. No. 890-VCN
Date Submitted: August 5, 2010

Dear Counsel:

Both sides have moved for reargument. They contest various conclusions reached in the Court's Post-Trial Memorandum Opinion¹ which considered numerous challenges brought by Plaintiffs against the Defendants, their sister Marian and her husband Stant, arising out of the Defendants' handling of mother

¹ *Stone v. Stant*, 2010 WL 2734144 (Del. Ch. July 2, 2010). References to the Memorandum Opinion will be to the slip opinion and styled as "Mem. Op. at ____." Defined terms in the Memorandum Opinion will be used here.

Helen's financial affairs in the last years of her life and Marian's serving as a trustee and executrix in the years following their mother's death. The record in this case could support a range of reasonable inferences. One could conclude that the Defendants pervasively abused their close, personal relationship with Helen to enrich themselves at her expense and the expense of the sibling plaintiffs. One could also conclude that Helen cared so deeply for her defendant daughter and son-in-law that she would have willingly made every challenged transfer (or gift) to them and would have been appalled to learn that some of her other children would even question the conduct. One cannot help but understand why each side has such starkly contrasting views of the other. It is within the range of these wildly divergent, but generally held in good faith—perhaps aided by a dose of retrospective rationalization on the part of some—positions that the Court must work. Cases like this one rarely lead to a doctrinally comfortable and precise outcome.²

² The Defendants note that the Memorandum Opinion is inconsistent as to when Helen is to be considered of weakened intellect. *Compare* Mem. Op. at 19 *with* Mem. Op. at 20. In one instance, the time is “the end of 1999” and in the other instance, it is “as of January 1999.” The latter reference is a typographical error. Helen is to be considered of weakened intellect and therefore susceptible to undue influence as of January 2000. Whether “susceptibility”

A. *The Standard Governing a Motion for Reargument*

Under Court of Chancery Rule 59(f), reargument serves to prevent injustice and will be granted only when the movant demonstrates that the Court's decision rested on a misunderstanding of a material fact or a misapplication of law.³ With this formulation of the Rule 59(f) standard in mind, the Court turns to the pending motions.

B. *Defendants' Motion*

The Defendants question two conclusions of the Memorandum Opinion: first, that certain payments to Stant and one of his children for the benefit of the business, Stone & Stant, Inc., should be characterized as loans and not as gifts; and second, that Defendants are not entitled to payment of their defense costs with funds drawn from the Revocable Trust.

1. Business Loans versus Individual Gifts

By renewing their claim that Helen's funds used to support the restaurant business should be treated as individual gifts and not as business loans, the

commenced in January 1999 or January 2000 would not affect the outcome of the Court's undue influence analysis.

³ See, e.g., *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).

Defendants have asked the Court to revisit a factual finding.⁴ At the time of the transfers, they were not treated as other gifts had been treated—they were not listed on gift tax returns. Other support of the business by Helen was understood (and treated) by all as loans. Although the distinction between supporting the restaurant business and helping out the Stant family might seem artificial, there are material differences between the two, both in substance and in family history, that support the Court’s finding.

2. Attorneys’ Fees and Costs Paid from the Revocable Trust⁵

Marian did not become a trustee of the Revocable Trust until Helen’s death. Although most of the challenged conduct traces to events during Helen’s life, Marian has, nonetheless, used assets of the Revocable Trust to fund not only her defense costs, but also those of her husband.⁶

⁴ Mem. Op. at 27, 35.

⁵ Mem. Op. at 45-46.

⁶ The Defendants note that the Plaintiffs asked the Court on several occasions to halt the payment of Defendants’ attorneys’ fees from the Revocable Trust. The Court declined to do so on the record as it existed when those applications were made. Those decisions certainly do not bind the Court from concluding with the benefit of a full record that the fee payments should be returned to the Revocable Trust and future fees should not be paid from Revocable Trust.

It is true that some of the Plaintiffs' claims involved Marian's work as a fiduciary after Helen's death: the request for a Revocable Trust accounting, the collection of loans made to siblings, and the return of improvidently billed attorneys' fees. These, however, comprise but a very minor part of the disputes addressed in this proceeding.

A trustee, under certain conditions, may be reimbursed for attorneys' fees necessitated by actions taken as trustee.⁷ Here, the conduct that generated essentially all of the difficult issues posed by this litigation occurred before Marian became trustee. Apparently recognizing this, the Defendants argue that much of their challenged conduct occurred when they have been deemed to have been acting in a capacity akin to that of a formal fiduciary because of Helen's impaired condition. They contend that a decision denying them their defense costs would deter family members from helping elderly relatives during their last years. If this case really were about steps taken to assist Helen, then perhaps some merit could be found for this argument. Admittedly, there was some disagreement

⁷ See, e.g., *Bankers Trust Co. v. Duffy*, 295 A.2d 725, 726 (Del. 1972).

about the use of Helen's funds as a benefit to her. The addition to the Stant home is an example of this limited area of debate. Again, however, the bulk of the dispute involves the disbursement of Helen's funds for the benefit of the Defendants and their children.⁸ Whether those particular payments were appropriate is a question that should not ordinarily result in the shifting of defense costs to other beneficiaries of a trust. This case, at its core, is about justifying benefits paid to the Defendants, and the Court sees no reason, at least on these facts, to shift fees to the Revocable Trust.

C. Plaintiffs' Motion

The Plaintiffs' motion for reargument presents issues that may be summarized as follows: (1) that that Court should have ordered a full accounting by the Defendants of all of Helen's funds from January 1999 until her death in 2002; (2) that Marian should be ordered to recover all loans to siblings and the overpayment of attorneys' fees charged during the administration of Helen's

⁸ The Defendants have not suggested (even though they were invited to do so in the Memorandum Opinion, *see* Mem. Op. at 45-46) that their attorneys' fees and expenses could somehow be allocated between the bulk of the defense work and the relatively minor portion that might qualify for payment from the Revocable Trust.

estate; (3) that interest should be charged on the loans at the statutory legal rate; (4) that the Court, in the context of “day trading” claims, focused on the trading methodology when it should have been concerned with the unexplained difference between the amount taken to fund that activity and the sum of losses recognized and amounts returned to Helen’s account; and (5) that the power of attorney should be voided with the consequence of setting aside all gifts made under its authority. The Court turns to these contentions.

1. Request for a Full Accounting

An accounting would ordinarily be an appropriate remedy in a case of this nature. As the result of extensive discovery (discovery made more difficult than necessary because of recalcitrance exhibited by Defendants’ counsel (not their trial counsel)), the records, such as they are, have been produced. No additional discovery was sought by Plaintiffs and no additional motion to compel was filed by Plaintiffs. There are gaps in the records, some perhaps of significance, but

ordering an accounting would not cure this shortcoming. To order an accounting that will not, and cannot, be complete or helpful serves no discernable purpose.⁹

2. Recovery of Loans and Overpayment of Attorneys' Fees

The Court concluded that Marian is not personally liable for these amounts because of her failure as trustee of the Revocable Trust to collect these debts.¹⁰ The Plaintiffs now argue that the Court should order her to undertake to collect these amounts. In the Memorandum Opinion, the Court made clear that Marian should evaluate whether to pursue these claims. Collection efforts, because of the passage of time, or otherwise, may not be justified. In retrospect, given the relationship which she has with the law firm that apparently collected an excess fee and her relationship with certain siblings who owed their mother on certain loans, the more prudent remedy would have been to have directed Marian to undertake to recover these amounts. The Court has assumed, perhaps improvidently, that with the guidance provided in the Memorandum Opinion, Marian would undertake to

⁹ It is not clear that Plaintiffs properly preserved their request for a broad accounting. Although the Pretrial Stipulation references an accounting at ¶¶ 1(A), 4(A), Plaintiffs' Opening Post-Trial Brief does not pursue such a claim.

¹⁰ Mem. Op. at 31-32, 37-39.

pursue these obligations. Given the tenor of her response to Plaintiffs' motion for reargument, this effort now seems unlikely in the absence of Court order. Thus, Marian will be directed to seek to collect these obligations.

3. Interest Rate

The Court directed that loans be repaid with interest but left open the question of the rate of interest.¹¹ The Plaintiffs now argue that the rate of interest must be that set in accordance with statute, 6 *Del. C.* § 2301(a), which establishes the legal rate of interest as the Federal Reserve discount rate plus five percent. Although reliance upon the statutory legal rate of interest would be reasonable, the objective here is to ascertain a rate that is both commercially reasonable and reasonable within the context of Helen's relationship with Stant. The Court deferred specifying a rate in the hope that the parties would agree and, in part, because the parties had offered up no interest rate that would be a reasonable placeholder for a rate that Helen and Stant might have agreed to if it had been negotiated. Now that it is clear that such optimism was unfounded, the Court will turn to the question of an interest rate that is consistent with the equitable purposes

¹¹ Mem. Op. at 25-27.

that a remedy imposed by the Court is designed to achieve. A rate more tied to market conditions would come closer to meeting these objectives. The best marker that the Court can find for an interest rate that would be within the scope of the parties' hypothetical expectations would be a variable prime rate. Thus, interest on the loans will be established by reference to the prime rate of J.P. Morgan Chase & Co.¹²

4. "Day trading" Shortfall¹³

By separate correspondence, the Court will ask counsel to clarify their positions and to provide guidance with respect to the sources in the record for evidence supporting their positions.

5. The Power of Attorney¹⁴

The Plaintiffs base their challenge to the efficacy of the power of attorney on *Schock v. Nash*¹⁵ which addresses when a fiduciary's duty of loyalty has been waived in order to self-deal or to make gratuitous transfers to herself or for her

¹² See J.P. Morgan Chase & Co., Historical Prime Rate, <http://www.jpmorganchase.com/corporate/about-JPMC/historical-prime-rate.htm>.

¹³ Mem. Op. at 39-43.

¹⁴ Mem. Op. at 9-10, 21-22, 24-25.

¹⁵ 732 A.2d 217 (Del. 1999).

own benefit. Marian's gifting of Helen's assets to herself and her children would, in the absence of a waiver, have constituted a breach of her fiduciary duty of loyalty arising out of the relationship established between Helen and Marian by the power of attorney. The question is whether Helen consented to Marian's interested transactions after full disclosure.

Helen did not benefit from what the Court would consider independent legal advice because although Crites gave the impression that he was a Delaware lawyer, he was only licensed to practice in Pennsylvania. Yet, he had advised Helen's late husband for several years. It was natural that Helen would turn to him for advice under the circumstances. It appears that although Marian was aware that Crites was not a Delaware lawyer, she did not appreciate the potential ramifications of his status. Helen was not in any discernable way impaired in 1994 when the power of attorney was executed. Moreover, broad gifting authority in the power of attorney was expressly conferred in clear and easily understood language. In addition, based on the testimony at trial, the Court concludes that Helen was the type of person who would have wanted her attorney-in-fact to carry on her generous gift giving to family members. Thus, the facts here are far from those in *Schock*.

Although *Schock* calls for careful consideration of the power of attorney here, it does not require that it be declared void. In short, all of the circumstances surrounding its execution and the clear text of the Power lead to the conclusion that Helen knowingly and freely—and without any overreaching by Marian (or Stant)—designated Marian as her attorney-in-fact with authority to make gifts to the family.

In the Memorandum Opinion, the Court found that gifting until Helen lost capacity was under Helen’s auspices. After the loss of capacity, gifts to (or for the benefit of) Marian may not be sustained because of the absence of proof of impartial advice and full disclosure.¹⁶ The Power is ineffective only to this extent.

D. *Conclusion*

Accordingly, for the foregoing reasons, Defendants’ Motion for Reargument is denied. In addition, Plaintiffs’ Motion for Reargument is denied except as to Plaintiffs’ claims regarding (i) the setting of an appropriate interest rate and (ii) collection of certain loans to family members and obtaining a refund of overpaid attorneys’ fees which are granted in part as set forth above, and Plaintiffs’ claims

¹⁶ This latter conclusion has not been subjected to a reargument challenge.

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with respect to “day trading” accounting issues for which decision is reserved pending further submissions. An implementing order will be entered when the “day trading” accounting issues are resolved.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K