COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Buck v. The Estate of Eileen P. McCaffery, et. al.*,
2021-0405-SEM

Dear Counsel:

Pending before me is a dispute regarding the estate of Eileen P. McCaffery. Ms. McCaffery was survived by four adult children. In the wake of her passing, her sons, James and John, are at odds—James was favored in Ms. McCaffery's last will, while John was disinherited.[1] John seeks to invalidate that will and enforce an alleged agreement that he would inherit forty percent of his mother's estate, because he helped develop a portion of her Sussex County property. James moved to dismiss John's complaint for failure to state a claim. In this final report, I recommend James'

[1] James and John share the surname "Buck" and are referred to by their first names in this introductory paragraph for clarity purposes; no disrespect is intended.

motion be granted in part and denied in part, such that the will contest is dismissed but John's contract claim survives.

I. BACKGROUND[2]

Eileen P. McCaffery (the "Decedent") passed on January 14, 2021.[3] She left behind four adult children (James T. Buck, III, Mary Anne Dillon, John T. Buck, and Karen Bowen) and a last will and testament executed on December 2, 2020 (the "Will").[4] The Will is short and unambiguous.[5] It explains that the Decedent revokes all prior wills and wishes to be cremated.[6] It further appoints an executor, James T. Buck, III (the "Executor"), and directs that the Executor is the sole beneficiary of the Decedent's estate (the "Estate").[7] But John T. Buck (the "Plaintiff") avers the Decedent wanted—and agreed to—a different distribution particularly regarding the Decedent's property in Sussex County.

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[2] Unless otherwise noted, the facts recited herein are taken from the complaint. Docket Item ("D.I.") 1.

[3] D.I. 1 ¶ 6.

[4] D.I. 1 ¶ 14, Ex. A; *In the Matter of Eileen P. McCaffery*, ROW 22394 ("ROW") D.I. 1. "Because the Register of Wills is a Clerk of the Court of Chancery, filings with the Register of Wills are subject to judicial notice." *Arot v. Lardani*, 2018 WL 5430297, at *1 n.6 (Del. Ch. Oct. 29, 2018) (citing 12 *Del. C.* § 2501; Del. R. Evid. 202(d)(1)(C)).

[5] *See* D.I. 1, Ex. A.

[6] *Id.*

[7] *Id.*

For some time before 2013, the Decedent and her family, including the Plaintiff, operated a family campground business on the Decedent's Sussex County property.[8] But some of the property was later developed for a subdivision (the "Property").[9] From 2012-2013, the Plaintiff assisted the Decedent in developing the Property.[10] The Plaintiff paid "substantial sums" of his own money in managing and subdividing the Property.[11] Among other investments, the Plaintiff constructed "a large, approximately 5000 square foot pole building" on the Property.[12]

"In or around 2013, the campground business was closed."[13] Around that same time, the Plaintiff and the Decedent agreed that the Plaintiff would be compensated for his investment in the Property through his inheritance from the Estate.[14] The Plaintiff further avers that the Decedent maintained a will that provided forty percent of the Estate would pass to the Plaintiff, including the

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[8] D.I. 1 ¶ 8.

[9] The Property is defined in the complaint as parcel number 134-10.00-30.01. *Id.* ¶ 7. The Decedent also owned Sussex County parcel numbers 134-9.00-679.01-2302, 134-10.00-30.00, 134-10.00-30.01, 233-11.00-109.00, and 233-11.09-4.00. *Id.*

[10] *Id.* ¶ 9.

[11] *Id.*

[12] *Id.* ¶ 10.

[13] *Id.* ¶ 8.

[14] *Id.* ¶ 10.

Property.[15] Thus, from 2013 until the Decedent's death, the Plaintiff treated the Property "as his own and maintained the land and pole building as if it were his own."[16]

But after the business closed and the Plaintiff invested in the Property, the Plaintiff's relationship with the Decedent grew strained. During that same time, the Executor rekindled his relationship with the Decedent.[17] For approximately two years before the Decedent's death, the Executor supported the Decedent and she, in turn, relied on him.[18] It was during this time that the Decedent was admitted to Harbor Healthcare (without the Plaintiff's knowledge). While the Decedent was in Harbor Healthcare, the Executor prepared and presented the Will for the Decedent to sign.[19]

The Decedent executed the Will on December 2, 2020, before two witnesses.[20] Shortly thereafter, on January 14, 2021, the Decedent passed. On February 4, 2021, the Executor petitioned the Register of Wills for authority to act as administrator of

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[15] *Id.* ¶ 11.

[16] *Id.* ¶ 12.

[17] *Id.* ¶ 13.

[18] *Id.* ¶ 20.

[19] *See id.* ¶ 22.

[20] *See id.* Ex. A.

the Estate and submitted the Will for probate.[21] The Will was admitted to probate by the Register of Wills and letters testamentary were issued to the Executor on February 12, 2021.[22]

Nearly three months later, on May 10, 2021, the Plaintiff filed the underlying complaint against the Executor and the Estate (together, the "Defendants").[23] On June 14, 2021, after proper service, the Defendants filed a motion to dismiss the complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim (the "Motion").[24] The Motion was fully brief on October 18, 2021,[25] and argument was held on December 22, 2021.[26] During argument, I asked the parties about my recent final report, adopted by the Court, in *Sweeney v. Sweeney*, and directed the parties

[21] ROW D.I. 1.

[22] ROW D.I. 2-3. It appears little progress has been made to probate the Estate, likely because of this litigation.

[23] *See* D.I. 1. The complaint also named the Decedent's two daughters, Mary Ann Dillon and Karen Bowen, as notice parties. *Id.* ¶ 4. The notice parties filed answers on June 17, 2021 and June 21, 2021, respectively, but have not otherwise been involved in this litigation. *See* D.I. 14-16.

[24] D.I. 11. *See also* D.I. 2-10 (reflecting service efforts).

[25] D.I. 25.

[26] *See* D.I. 28. Citations to the oral argument transcript (D.I. 29) are in the form "Tr. #."

to submit supplemental briefing addressing the analysis therein.[27] That briefing was filed on January 24, 2022, at which time I took this matter under advisement.[28]

II. ANALYSIS

The Defendants seek dismissal under Court of Chancery Rule 12(b)(6). The standard for my review is settled:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[29]

Although I will grant the Plaintiff "all reasonable inferences that may be drawn from the [c]omplaint, [I am] not 'required to accept every strained interpretation of the allegations proposed by the [P]laintiff.'"[30] Further, I "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.'"[31]

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[27] *See* Tr. 31:13-32:11, 36:3-14. *See also Sweeney v. Sweeney*, 2021 WL 5858688 (Del. Ch. Nov. 30, 2021), *adopted*, (Del. Ch. 2021).

[28] D.I. 30-31.

[29] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (citations omitted).

[30] *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *4 (Del. Ch. Mar. 5, 2010) (citation omitted).

[31] *In re Hurley*, 2014 WL 1088913, at *3 (Del. Ch. Mar. 20, 2014) (citation omitted).

The Defendants seek to dismiss the entire complaint, wherein the Plaintiff pled four counts seeking to invalidate the Will based on incompetency (Count I) or undue influence (Count II), enforce the oral agreement to make a will (Count III), and impose a constructive or resulting trust (Count IV). I address the will contests together. I then address the alleged oral agreement to make a will. And, finally, I address the requested relief (a constructive or resulting trust) as plead in Count IV.

A. The Plaintiff failed to plead sufficient facts supporting his will contest claims.

To state cognizable claims to invalidate the Will, the Plaintiff was required to plead facts making it reasonably conceivable that the Decedent was incapacitated, susceptible, or otherwise of weakened intellect at the time the Will was executed. He failed to do so and, as such, Counts I and II should be dismissed.

Parties seeking to invalidate a will for lack of testamentary capacity bear a heavy burden. Testamentary capacity is a modest level of capacity and is presumed under Delaware law.[32] The Plaintiff argues, however, that the presumption of capacity should not apply in this case and that I should review his complaint, instead,

[32] *Sloan v. Segal*, 2010 WL 2169496, at *7 (Del. May 10, 2010) ("To possess testamentary capacity, a testator must 'be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is disposing of his or her property. The person must also possess sufficient memory and understanding to comprehend the nature and character of the act.'") (citations omitted).

under the burden shifting articulated in *In re Melson*.[33] In *Melson*, the Delaware Supreme Court explained

> the presumption of testamentary capacity does not apply and the burden . . . shifts to the proponent [of the will] where the challenger of the will is able to establish, by clear and convincing evidence, the following elements: (a) the will was executed by "a testatrix or testator who was of weakened intellect"; (b) the will was drafted by a person in a confidential relationship with the testatrix; and (c) the drafter received a substantial benefit under the will.[34]

In the nearly 24 years since *Melson* was decided, this Court has not applied its burden shifting at the pleading stage.[35] The Defendants argue the absence of pleading-stage authority is because *Melson* can only be invoked on an evidentiary record. The Plaintiff contends this is not an appropriate inference from the dearth of authority. I see merit in both arguments. But I find I need not attempt to answer if *Melson* is an appropriate pleading-stage test, because whether I apply *Melson* or not, my recommendation would be the same—Counts I and II should be dismissed.

Assuming I could and should apply *Melson*, the Plaintiff still needed to plead facts in support of "weakened intellect."[36] "Weakened intellect," although a lower

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[33] *See In re Melson*, 711 A.2d 783, 788 (Del. 1998).

[34] *Id.*

[35] *See* Tr. 29:10-16. *Cf. In re Hurley*, 2014 WL 1088913, at *5 n.25 (referencing *Melson* in a pleading-stage ruling).

[36] *In re Melson*, 711 A.2d at 788.

bar than lack of testamentary capacity, must be supported by nonconclusory factual allegations to withstand a motion to dismiss.[37] This is where the complaint falls short. The same is true for susceptibility, a required element of any claim to invalidate a will for undue influence.[38] "There is no precise definition or defining feature of susceptibility, but the analysis is informed by the subject's capacity and does not require an advanced degree of debilitation."[39] And, although susceptibility may set a lower bar than weakened intellect, it nonetheless requires pleading adequate, non-conclusory facts about the testator's mental state and other circumstances of susceptibility.

The Plaintiff has failed to plead non-conclusory facts from which I can reasonably infer the Decedent was susceptible, of weakened intellect, or without testamentary capacity when she executed the Will. The Plaintiff pleads merely that the Decedent was "not of sound mind", had "weakened mental capacity," and

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[37] *Sloan v. Segal*, 2009 WL 1204494, at *13 (Del. Ch. Apr. 24, 2009) ("Importantly, the court need not find that someone lacked testamentary capacity to find that she was suffering from a weakened intellect") (citation omitted).

[38] "The essential elements of undue influence are: (1) a susceptible testator; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and, (5) a result demonstrating its effect." *In re W.*, 522 A.2d 1256, 1264 (citations omitted).

[39] *In re Dougherty*, 2016 WL 4130812, at *10 (Del. Ch. Jul. 22, 2016) (citation omitted).

"suffered from declining intellect as a result of her advanced age".[40] The Plaintiff further pleads the Decedent was isolated, admitted to Harbor Healthcare, and "had become dependent on [the Executor] for her well-being and financial management."[41] Notably absent is any information about the Decedent's medical diagnoses, medications, ability to reason or make decisions for herself, or the level of care or supervision she required while at Harbor Healthcare.[42]

The Plaintiff's complaint is similar to the complaint dismissed in *Sweeney v. Sweeney*.[43] There I found the petitioner failed to plead non-conclusory facts regarding capacity.[44] But, in *Sweeney*, allegations regarding "Decedent's visual impairments, medical condition, and reliance on Respondent taken together in a light most favorable to Petitioner ma[d]e it reasonably conceivable that Decedent was susceptible to undue influence."[45] The complaint here does not, however, have any non-conclusory facts from which I could reasonably infer weakened intellect or

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[40] D.I. 1 ¶¶ 17, 20.

[41] D.I. 1 ¶ 20.

[42] The Register of Wills docket shows the Decedent passed at the age of 84, from medical conditions that do not have an obvious mental component. ROW D.I. 1. Further, I find it would be unreasonable to infer susceptibility, weakened intellect, or lack of capacity solely from the Decedent's admission to Harbor Healthcare.

[43] 2021 WL 5858688, at *5.

[44] *Id.* at * 3.

[45] *Id.* at *4.

susceptibility. With that element unsupported, the undue influence claim should be dismissed.

The Plaintiff argues that he was unable to pled non-conclusory facts because of the Decedent's isolation in the years before her death. But I find the burden imposed on a will contest plaintiff is appropriately balanced to protect the "cherished right" in this State "to discharge one's property by will".[46] Otherwise, the estate planning of elderly Delawareans and Delawareans who lean on certain family members, friends, advisors, or agents for support will invariably face contests that cannot be dismissed at the pleading stage.[47]

The Plaintiff argues that, should Counts I and II be dismissed, the dismissal be without prejudice.[48] This argument conflicts with Court of Chancery Rule 15, which imposes upon plaintiffs the strategic choice between amending or standing on their complaint when faced with a motion to dismiss for failure to state a claim.

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[46] *In re Hammond*, 2012 WL 3877799, at *5 (Del. Ch. Aug. 30, 2012). The Plaintiff cites *In re Wiltbank*, 2005 WL 2810725, *5 (Del. Ch. Oct. 18, 2005) in his discussion of the *Melson* test. That decision, however, was issued post-trial, on a procedurally and factually distinct record; it does not support allowing the Plaintiff's claims to survive dismissal.

[47] *See In re Hurley*, 2014 WL 1088913, at *5 (rejecting an argument that the plaintiff should not be required to plead facts is support of each element of their claims because it "is not supported by the well-worn standard of a motion to dismiss, and to accept it would literally open any estate to a claim of undue influence by a dissatisfied beneficiary or disinherited heir").

[48] D.I. 31.

Under Rule 15, a plaintiff may respond to a Rule 12(b)(6) motion to dismiss by amending her pleading.[49]

> In the event [she] fails to timely file an amended complaint or motion to amend . . . and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) . . . , such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.[50]

The Plaintiff acknowledges Rule 15's choice and consequences but argues that dismissal should be without prejudice because my decision in *Sweeney* was issued after the Plaintiff filed his answering brief.[51]

I find the dismissal of Counts I and II should be with prejudice. I did invite the parties to address *Sweeney*. But in *Sweeney*, I merely applied the well-worn pleading standard; I did not alter or create the law.[52] My *Sweeney* decision, and invitation to counsel to address it in supplemental briefing, is not a basis on which to invoke the exception to Rule 15. The Plaintiff has not argued any other bases on which dismissal with prejudice would not be just under all the circumstances. Counts I and II, for invalidation of the Will, should be dismissed with prejudice.

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[49] Ct. Ch. R. 15(aaa).

[50] *Id.*

[51] *See* D.I. 31.

[52] *See Sweeney*, 2021 WL 5858688, at *3-4 (addressing *In re Hurley*, 2014 WL 1088913, at *4-6).

B. The Plaintiff adequately pled a contract claim.

The Plaintiff argues that he had an oral agreement with the Decedent to make a will that would bequeath forty percent of the Estate, including the Property, to the Plaintiff. At first glance, the request appears to violate the Statute of Frauds, which provides:

> No action shall be brought to charge the personal representatives or heirs of any deceased person upon any agreement to make a will of real or personal property, or to give a legacy or make a devise, unless such agreement is reduced to writing, or some memorandum or note thereof is signed by the person whose personal representatives or heirs are sought to be charged, or some other person lawfully authorized in writing, by the decedent, to sign for in the decedent's absence.[53]

But this Court, because it is a court of equity, "may enforce a partly performed oral contract [to make a will] upon proof of clear and convincing evidence of actual part performance."[54]

At the pleading stage, the party seeking enforcement of an oral agreement to make a will must plead sufficient facts supporting a reasonably conceivable claim that (1) the oral agreement existed (there was an offer, acceptance, and consideration), (2) the material terms are definite and certain, (3) the Plaintiff

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[53] 6 *Del. C.* § 2715.

[54] *Hughes v. Frank*, 1995 WL 632018, at *2 (Del. Ch. Oct. 20, 1995) (citing *Shepherd v. Mazzetti*, 545 A.2d 621, 623 (Del. 1988)).

partially performed in reliance on the agreement, and (4) that it would be inequitable not to enforce the agreement.[55] The Plaintiff has plead facts supporting each element. As such, Count III should survive.

The Plaintiff pled that he contracted with the Decedent in 2012 or 2013. At this stage, the Plaintiff's inability to specify the date of the agreement is not dispositive. Further, the Plaintiff avers that under the agreement, the Plaintiff would pay for capital improvements on the Property in return for a forty percent share of the Estate including full ownership of the Property upon the Decedent's death. Under Delaware's notice pleading standard, I find this is sufficient to plead the existence of an oral agreement, with definite and clear terms.[56]

The Plaintiff further pled that he performed his part of the agreement by investing in, and developing and building on, the Property. Although the timing of certain events is less-than clear, under the plaintiff-friendly lens I must apply, I find it reasonably conceivable that the agreement was reached and then, thereafter, was

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[55] *Cf. Eaton v. Eaton*, 2005 WL 3529110, at *3 (Del. Ch. Dec. 19, 2005) (addressing these elements in a post-trial ruling); *McCloskey v. McCloskey*, 2014 WL 1824712, at *7 (Del. Ch. Apr. 24, 2014) (same).

[56] The Defendants argue the Plaintiff failed to plead consideration. I find, again highlighting Delaware's notice pleading standard, the Plaintiff has pled a cognizable bargained-for exchange sufficient to state a claim for an oral agreement. In so holding, I am drawing all reasonable inferences in favor of the Plaintiff. I further find the terms of the alleged agreement are sufficiently definite and clear. Although not pled with particularity, the Plaintiff has given adequate notice of the alleged agreement.

partially performed by the Plaintiff.[57] And, finally, accepting these allegations as true, I find it would be inequitable not to enforce the agreement.[58] Count III should not be dismissed and the Motion should be denied, in part, to that extent.

C. The separate count for equitable relief should be dismissed.

The Plaintiff pled his requested equitable relief of a constructive or resulting trust as a separate count, Count IV. But the Plaintiff conceded that Count IV is not a standalone claim.[59] "This Court has recognized that a party may, on rare occasions, mistakenly plead a remedy as an enumerated cause of action."[60] When this occurs, the Court has two options: (1) permit the remedy count to remain in the complaint,

[57] In the Motion, the Defendants highlighted that the answers from the notice parties contradicted the Plaintiff's averments. *See* D.I. 17. But counsel confirmed at argument that I must take the Plaintiff's allegations as pled, drawing all reasonable inferences in the Plaintiff's favor. *See* Tr. 23:20-24:5.

[58] The Defendants rely on *Eaton v. Eaton* in arguing this claim should be dismissed. 2005 WL 3529110, at *3. But *Eaton* was a post-trial decision, focused on whether the plaintiffs had proven their claims by the required clear and convincing evidence. *See id.* Here, we are at the pleading stage. The standard is reasonable conceivability. Under the plaintiff-friendly lens I must apply, I find the claim reasonably conceivable. Whether the claim can be proven by the required clear and convincing evidence awaits further determination.

[59] *See* Tr. 29:4-9.

[60] *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250, at *6 (Del. Ch. Apr. 28, 2014).

but treat it as part of the prayer for relief rather than an independent claim[61] or (2) dismiss the count as a way of "cleaning up the pleadings[.]"[62] I choose the latter.

Count IV is a remedy that may be available if the Plaintiff prevails on his remaining claim. But, because it is not an independent cause of action, it should not proceed as a separate count. In the interest of clarity as this litigation proceeds, Count IV should be dismissed, without prejudice to the Plaintiff's ability to seek a constructive or resulting trust as a remedy for his remaining claim.

III. CONCLUSION

For the foregoing reasons, I find the Motion should be granted in part and denied in part. Counts I and II should be dismissed with prejudice and Count IV dismissed without prejudice to the Plaintiff's ability to seek a constructive or resulting trust as a remedy for his remaining claim, Count III.

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[61] *Id.*

[62] *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014). *See also iBio, Inc. v. Fraunhofer USA, Inc.*, 2020 WL 5745541, at *12 (Del. Ch. Sept. 25, 2020) (collecting cases).

This is my final report and exceptions may be filed under Court of Chancery Rule 144.

Respectfully submitted,

/s/ *Selena E. Molina*

Master in Chancery