COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

January 9, 2004

Mary M. Culley, Esquire
Morris James Hitchens & Williams LLP
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899-2306

Thomas E. Hansen, Jr., Esquire
Morris James Hitchens & Williams LLP
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899-2306

Richard P.S. Hannum, Esquire
Swartz Campbell & Detweiler
One South Church Street, Suite 400
West Chester, PA 19382

Re: *Estate of Michael Turner*, C.A. No. 20108

Dear Counsel:

In this dispute over which of two competing documents should have been admitted to probate, there are two motions pending: Karen Lennox's Motion for Summary Judgment and the Estate's Cross-Motion for Summary Judgment and/or Motion to Dismiss. This letter constitutes the Court's rulings on those motions.

The background facts related to both motions are undisputed. Michael Turner (the "Decedent") died of a self-inflicted gunshot wound on June 26, 2002. Three separate documents purportedly representing wills were presented to the Register of Wills shortly thereafter. Those documents were dated December 19, 2000, June 6, 2002 and June 24, 2002, respectively. The June 6th will was admitted to probate on July 31, 2002 and Wanda Lynch ("Lynch"), the Decedent's sister, was granted Letters of Administration with Will Annexed. By the June 6th will, the Decedent left all of his assets to Lynch with certain assets to pass in the future to his niece, Shamir (Lynch's daughter).

By September, 2002, Karen Lennox ("Lennox") had submitted for probate the June 24, 2002 writing ("June 24th document"), contending it was the Decedent's last will and testament. On November 22, 2002, the Register of Wills declined to admit the June 24th document to probate, after concluding that the Decedent lacked the requisite testamentary capacity when he made it.

Lennox's Motion For Summary Judgment

Lennox has moved for summary judgment in her favor that the June 24th document should be probated and thereby supercede the June 6th will as the last will and testament of the Decedent. Lennox argues that both the June 6th and June 24th documents were executed in Pennsylvania with the same level of formality and that there is no evidence of any change in the Decedent's mental capacity in the intervening three

weeks. She argues that the June 6th will was admitted to probate and the June 24th document subsequently was rejected for probate, both without any evidentiary hearing.[1]

In support of her motion, Lennox filed an Affidavit in which she avers that the Decedent was "a close personal friend and confidant," that the June 24th document was executed in Pennsylvania, that she did not observe any change in the Decedent's mental capacity from June 6th to 24th, 2002, that Decedent "was in complete control of and responsibly managing all his personal and business affairs until the time of his death," that "[i]n preparation for the [Decedent's] planned suicide, the [Decedent] informed me [Lennox] of his planned suicide, gave me his car, and informed me of his new June 24, 2002 Will," and that she believed him to be mentally competent.[2]

In its response to Lennox's motion for summary judgment, the Estate of Michael Turner (the "Estate") denies that the June 24th document constitutes a will, agreeing with the Register of Wills that it is more properly characterized as a "suicide note." The Estate also denies that the June 24th document was prepared in Pennsylvania, and has submitted an Affidavit of the Decedent's sister, Lynch, in support of its position.[3] The only evidence currently in the record to support a finding that the June 24th document

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1 Appellant Karen Lennox's Motion for Summary Judgment ("Lennox's Motion") at **??** 4-6, 9.

2 Affidavit of Karen Lennox, Appellant, filed October 31, 2003 ("Lennox Aff.").

3 Affidavit of Wanda Lynch, attached as Exh. D to the Estate of Michael J. Turner's Response to Karen Lennox Motion for Summary Judgment.

was prepared and signed in Pennsylvania are two affidavits of Lennox,[4] who clearly has an interest in the outcome of this litigation. In addition, the Estate argues that several disputed issues of fact exist as to whether the Decedent had testamentary capacity on June 24, 2002, and whether Lennox exercised undue influence over him.

Having reviewed the submissions of the parties and considered their arguments at the hearing on December 18, 2003, the Court is convinced that there are genuinely disputed issues of material fact as to at least some of the questions raised by the Estate. This case is still at a very preliminary stage. Even where discovery has been completed, "it would be a rare case which would call for the granting of summary judgment in a situation such as the one here presented, namely one involving alleged incompetency and undue influence in which the demeanor of the witnesses . . . is of supreme importance." *In the Matter of Oberle*, 1979 WL 26233, at *2 (Del. Ch. 1979). Accordingly, the Court will deny Lennox's motion for summary judgment.

The Estate's Cross Motion for Summary Judgment or to Dismiss

The Estate bases its cross-motion on its contentions that the appeal filed by Lennox was improper and that both it and any other form of review regarding the legally effective will of the Decedent is barred by the applicable statute of limitations, 12 *Del. C.* § 1309(a).

4 Karen Lennox's Reply Brief in Support of Her Motion for Summary Judgment ("LRB"), Exhs. A, B.

The following additional background facts related to this motion, to the limited extent they have been developed thus far, are largely undisputed.[5] On September 13, 2002, after Lennox sought probate for the June 24th document, the Chief Deputy Register of Wills sent a memorandum to counsel for all the interested parties ("the September 13th Memo"), which stated:

> The purpose of this letter is to advise that, as counsel for the family [Lynch] already did in connection with the document now identified as the penultimate will [*i.e.*, the June 6th will], Mr. Kern [counsel for Lennox] has followed up on his proffer of a last will in the same fashion. I enclose copies of his papers with Ms. Culley's and Mr. Hansen's copies of this letter. I have requested that the paper work be drawn up to recognize it [the June 24th document] as the last and therefore operative will. Mr. Kern has not asked that the personal representative c.t.a. already appointed be removed, so she is still the person administering the estate, but subject to the last will. I presume that this matter will be a subject of on-going concern, and that any future proceedings will have to do with filings in the Register in Chancery in the nature of a will contest.[6]

On or about October 16, 2002, the Register of Wills, the Chief Deputy and Lennox's counsel had a telephone conference in which the Register indicated an intention

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[5] Unless otherwise noted, the facts recited here are taken from the Estate of Michael J. Turner's Opening Brief in Support of its Cross-Motion for Summary Judgment and/or Motion to Dismiss ("EOB").

[6] EOB, Exh. H. The Estate suggests that this document "notified counsel for Ms. Lennox of the necessity of filing a will contest" as to the June 6th will admitted to probate on July 31, 2002. EOB at 2. The implication of the Estate's argument is that the September 13th Memo clearly notified Lennox that, in view of the June 6th will's having been admitted to probate on July 31, her only recourse for challenging that action based on the existence of the June 24th document was to file a petition for review with the Register in Chancery under 12 *Del. C.* **?** 1309(a). In the Court's opinion, the September 13th Memo is ambiguous, at best, on that point. Indeed, on the current state of the record, whether the September 13th Memo provides notice of the need to follow the procedures of 12 *Del. C.* **?** 1309(a) appears to present a disputed issue of fact.

not to admit the June 24th document for probate. On or about November 8, 2002, Lennox's counsel sent a letter to the Register requesting that she enter a formal order reflecting her decision, "to preserve the record for appeal."[7]

On November 22, 2002, the Register of Wills issued an Order stating her conclusion that there had been an insufficient showing that the Decedent had testamentary capacity at the time he prepared the June 24th document.[8] Therefore, the Register denied Lennox's request to admit the June 24th document to probate.

On or about December 9, 2002, counsel for Lennox filed a Notice of Appeal, together with a short cover letter, with the Register of Wills. The document stated in its entirety:

> The Appellant, Karen Lennox, by her attorney, George W. Kern, V, Esquire, respectfully appeals the Order of, Diane Clarke Streett, Register of Wills in and for New Castle County, dated November 22, 2002, which denied probate of the decedent's Will dated June 24, 2002.

Lennox's counsel evidently also sent a copy of the cover letter and the Notice of Appeal to the Register in Chancery.[9] The Register in Chancery's file indicates that the

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[7] The facts in this paragraph are drawn from the Brief in Support of Appellant's, Karen Lennox, Motion for Summary Judgment ("LOB") at 1, and do not appear to be disputed.

[8] Lennox's Motion, Exh. B.

[9] The referenced cover letter and Notice of Appeal are included in Docket Item 1 of the record in the Register in Chancery's office. At any stage of a proceeding, the court may take judicial notice of adjudicative facts, whether requested or not, if the fact is not subject to reasonable dispute in that, for example, it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Del. R. Evid. 201. Under Del. R. Evid. 202, judicial notice may be taken, without request of a party, of "records of the court in

documents were received on December 9, 2002. The docket entry for that date in the Register in Chancery reads: "Transfer from Register of Will complaint for appeal of ROW denial to probate, George Kern, V atty. For plt." The Register in Chancery's file also appears to include the Register of Wills' file on this matter.

There appears to be no dispute that Lennox's "Notice of Appeal" was not sent to counsel for the Estate until March 2003.

The Parties' Contentions

The Estate contends that to preserve her rights to challenge the Register of Wills decision to admit the June 6th will to probate on July 31, 2002, Lennox had to file a petition for review and post an appropriate bond under 12 *Del. C.* **?** 1309(a), within six months from the date of the decision – *i.e.*, by January 31, 2003. Section 1309(a) provides in pertinent part:

> (a) Any person interested who shall not voluntarily appear at the time of the taking the proof of a will, or be served with citation or notice as provided in **?** 1303 of this title, shall, at any time within 6 months after such proof . . . have a right of review which shall on the person's petition be ordered by the Court of Chancery; but unless the petitioner or petitioners shall, within 10 days after such review shall have been ordered by the Court, give bond to the State . . . such petition shall be considered as abandoned and shall be dismissed and proceedings may be had in all respects as though no such review had been ordered.

The Estate argues that Lennox's "appeal" is time-barred because she has never filed a "petition for review" or bond as required by **?** 1309(a). The Estate further argues that,

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which the action is pending and of any other court in this State or federal court sitting in or for this State."

even if Lennox claims that the relevant limitations period did not begin to run until the date of the November 22, 2002 refusal to admit the June 24th document to probate, her challenge to that decision is also time-barred for the same reason.

Lennox presents at least two arguments in response. First, she contends that this case does not involve a "will contest." Rather, Lennox characterizes it as an appeal from the Register of Wills' decision not to accept the June 24th document as the Decedent's last will and testament, relying on a provision of the Delaware Constitution.[10] Second, Lennox argues that the Notice of Appeal she filed in December 2002 is both timely and sufficient to meet the requirements of **?** 1309(a).

Analysis

Summary judgment is only appropriate where, viewing the record in the light most favorable to the non-moving party, there are no genuine issues of material fact. *Holladay v. Patton*, 1995 WL 54437, at *3 (Del. Ch. 1995).[11] The movant has the "difficult burden" of establishing entitlement to judgment as a matter of law. *Estate of Rash*, 1983 WL 103255, at *2 (Del. Ch. 1983). Summary judgment may not be granted when the record indicates a material disputed fact or "if it seems desirable to inquire more

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[10] LOB at 4-5.

[11] To the extent the Estate's motion sought a dismissal under Rule 12(b)(6) for failure to state a claim, the Court has treated it as a motion for summary judgment because matters outside the pleadings were presented and not excluded in connection with the motion. Ch. Ct. R. 12(b)(6).

thoroughly into the facts in order to clarify the application of law to the circumstances." *Holladay*, 1995 WL 54437, at *3.

Both the Estate and Lennox agree that the Court of Chancery is the appropriate forum for review of a decision by the Register of Wills in this case, such as the July 31, 2002 decision to admit the June 6th will to probate or the November 22, 2002 decision not to admit the June 24th document to probate. The dispute centers on the form used by Lennox to initiate the review procedure and her efforts or lack thereof to perfect her "appeal."

In December 2002, within six months of the relevant decisions of the Register of Wills, Lennox filed a document labeled "Notice of Appeal" with both the Register of Wills and the Register in Chancery. The Chancery docket indicates that Court personnel promptly transferred the entire file from the Register of Wills office to the Register in Chancery.

The Relevant Statute Is 12 *Del. C.* ? 1309(a)

The Estate argues that this action is a "will contest" governed by 12 *Del. C.* ? 1309(a). Lennox disagrees, but only half-heartedly. In particular, Lennox argues that this case "involves the appeal of a decision of the Register of Wills."[12] In support, Lennox relies on the Delaware Constitution of 1897, as amended on July 25, 1996, Article IV, Section 31, which provides in pertinent part:

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[12] Lennox's Answering Brief in Opposition to Estate's Cross Motion for Summary Judgment and/or Motion to Dismiss ("LAB"), at 4.

> The Registers of Wills of the several counties shall respectively hold the Register's Court in each county. Upon the litigation of a cause the depositions of the witnesses examined shall be taken at large in writing and made part of the proceedings in the cause. This court may issue process throughout the state. Appeals may be taken from a Register's Court to the Orphans' Court.

The functions of the Orphans' Court pertaining to appeals from the Register's Court were transferred to the Court of Chancery by 57 Del. Laws, ch. 402, Sec. 4, effective July 1, 1970. *See Criscoe v. Derooy*, 384 A.2d 627, 630 (Del. Ch. 1978). In addition, prior to December 25, 1974, 12 *Del. C.* **?** 1310(a), the precursor of **?** 1309(a), provided that within six months after proof of a will any interested person had a "right of review which shall on his petition be ordered by the Register [of Wills]." Consequently, under the earlier statute, a petition for review would be filed with the Register of Wills, subject to a right of appeal to the Court of Chancery. *See Criscoe*, 384 A.2d at 629-30.

The parties appear to agree that the Court of Chancery is to hear petitions for review from decisions of the Register of Wills either to accept or reject an application for probate (LAB at 5; ERB at 2 n.2). The caselaw supports that proposition. *See Moore v. Graybeal*, 670 F. Supp. 130, 133 (D. Del. 1987). The cases also support the conclusion that, at all times relevant to this dispute, 12 *Del. C.* **?** 1309(a) set forth the mechanism for pursuing a challenge to such a decision. Lennox has failed to cite any authority suggesting that the Delaware Constitution or any other applicable law creates a basis for an "appeal" to the Court of Chancery from a decision of the Register of Wills of the kind

at issue here other than as a petition for review governed by **?** 1309(a). The Court therefore concludes that there is no such separate right of appeal.

Application of 12 *Del. C.* ? 1309(a) in the Circumstances of this Case

The Estate seeks summary judgment on the ground that Lennox failed to file a petition for review of the July 31, 2002 decision admitting the June 6th will to probate within the six month limitations period. The record is undisputed that Lennox submitted the above-quoted Notice of Appeal to the Register in Chancery on or about December 9, 2002. There is no indication in the Register in Chancery's docket system that the Notice of Appeal was served on anyone. According to the Estate (EOB at 2), on March 11, 2003, counsel for the Estate received a fax from counsel for Lennox advising that Lennox had filed an Appeal with the Register of Wills office of her November 22, 2002 decision rejecting the June 24th document for probate. The fax included copies of the Register's November 22, 2002 decision, Lennox's Notice of Appeal and a letter from Lennox's counsel to the Register of Chancery, dated March 3, 2003, which stated: "Please advise me of the status of the Estate of Michael Turner Appeal. If a hearing has not already been scheduled, I would like to request one at this time."[13]

On or about July 30, 2003, the Register in Chancery sent a letter to Lennox's counsel advising him that in view of former Vice Chancellor Jacobs elevation to the

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[13] EOB, Exh. I, last page.

Delaware Supreme Court, the case would be reassigned to the new Vice Chancellor, once someone was appointed. In or around October 2003, this matter was reassigned.

On October 23, 2003, counsel for the Estate received its Tax Clearance Letter.[14] The Estate contends that the administration should have concluded immediately thereafter and the estate been closed.[15]

On October 30, 2003, Lennox filed a Motion for Summary Judgment requesting that the Court compel the Register of Wills to admit the June 24th document to probate. Lennox's Motion, in effect, also challenges the earlier admission of the June 6th will to probate.

As the Estate acknowledges, Lennox raises two issues on her appeal: (1) whether the June 6th will was properly probated, and (2) whether the June 24th document was properly rejected from probate.[16] The Estate contends, however, that neither of those issues can be reviewed by this Court without the filing of a petition for review and the posting of an appropriate bond under 12 *Del. C.* **?** 1309(a). The Estate argues that the event triggering the running of the six month statute of limitations was the July 31, 2002 decision to accept the June 6th will to probate.

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[14] EOB at 2.

[15] Id. at 2-3.

[16] *Id.* at 4.

The Delaware courts have strictly construed the requirement that a petition for review be filed in a timely manner under Section 1309(a), because it reflects a "special public policy in favor of prompt settlement of decedent's estates." *See, e.g., Criscoe v. Derooy*, 384 A.2d 627, 629 (Del. Ch. 1978); *Shuttleworth v. Abramo*, 1991 WL 160260, at *3 (Del Ch. 1991); *Moore v. Graybeal*, 1989 WL 17430, at *4 (Del. Ch. 1989). However, none of those or the other cases cited by the Estate is necessarily controlling here, because none of them involved a truly analogous fact pattern. As Vice Chancellor Lamb noted in *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), the Court may, in its discretion, deny summary judgment if it finds "a more thorough development of the record would clarify the law or its application." *Id.*, *quoting In re Dairy Mart Convenience Stores, Inc.*, Del. Ch., C.A. No. 14713, mem. op. at 31, 1999 WL 350473, Chandler, C. (May 24, 1999). Based on a careful review of the limited record developed to date and the authorities cited, the Court has concluded that it would benefit from a more thorough development of the facts and the law as they relate to the statute of limitations issue. Accordingly, the Court will deny the Estate's motion for summary judgment without prejudice, pending further development of the record.

For the benefit of the parties, the following is a non-exhaustive list of subsidiary issues that warrant further development:

1. Exactly what happened, and when, in the proceedings before the Register of Wills.

2. Whether Lennox's Notice of Appeal or any of the other actions taken by Lennox after the July 31, 2002 decision and before the filing of her December 2002 Notice of Appeal should be treated as the equivalent of a petition for review under **?** 1309(a)?

3. Whether the Estate had actual knowledge prior to January 31, 2003, that the Notice of Appeal had been filed? And if so, whether that fact would have any legal significance?

4. Assuming arguendo that the unserved Notice of Appeal was untimely with respect to the July 31, 2002 decision, can it still satisfy the requirements of 12 *Del. C.* **?** 1309(a) as to the November 22, 2002 decision? And what would be the effect of such an appeal on the July 31, 2002 decision?

5. What significance, if any, does the fact that Lennox may not have been put explicitly on notice of the requirements of **?** 1309(a) during the limitations period have?

6. What significance, if any, should be attributed to the lack of activity by either side between early March 2003, when the Notice of Appeal was sent to the Estate, and October 2003?

Conclusion

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Lennox's Motion for Summary Judgment is DENIED;

2. The Estate's Cross-Motion for Summary Judgment and/or Motion to Dismiss is DENIED; and

3. For purposes of ensuring the orderly progress of this action toward a final resolution, and without prejudice to the Estate's statute of limitations defense, the Court will treat Lennox's Notice of Appeal as a petition for review under 12 *Del. C.* **?** 1309(a), challenging the Register of Wills' decision to admit the June 6th will to probate on the ground that the June 24th document is the last will and testament of the Decedent and that the Register of Wills erred in denying probate to the June 24th document. Within ten days of the date of this letter opinion and order: (a) the Estate shall file its response to the petition, as construed above; and (b) Lennox shall post a bond in the amount of $5,000, secured, for the payment of any and all costs occasioned by the review.

4. The Court will hold a conference with counsel on February 4, 2004 at 10:00 a.m., or such other day as may be agreed upon by counsel and the Court, to discuss a schedule for the completion of pre-trial activities and for trial, if necessary.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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