IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE ESTATE OF)
SYLVIA SUE BICKLING, DECEASED) C.A. NO. 20002

MEMORANDUM OPINION

Date Submitted: June 8, 2004
Date Decided: August 6, 2004

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STRINE, Vice Chancellor

This is a will contest brought by the sons of the decedent against the husband of the decedent, who is not their father. At the end of this not unfamiliar family dynamic, I conclude the decedent's will — which left most of her estate to her husband — and a deed she executed the same day are valid. I also dismiss the sons' claim under a separation agreement executed between the decedent and their father, but impose a constructive trust upon certain insurance proceeds received by the decedent's husband pursuant to a beneficiary designation that the husband now concedes did not reflect the decedent's wishes.

I. Factual Background

The petitioners, Steven, Jeffrey and David Moore ("the sons"), are the sons of the decedent, Sylvia Sue Bickling ("Sylvia"), from her first marriage. Steven was born in 1958; Jeffrey in 1959; and David in 1963. In 1967, Sylvia and the sons' father, Harold Moore, entered into a separation agreement, discussed in more detail below, and ultimately divorced. Sylvia remarried in 1968, a marriage that also ended in divorce in 1979. In 1981, when all three sons had already reached the age of 18, she married respondent Ralph Bickling, Jr. ("Ralph"), a marriage that lasted for 21 years until the end of her life in 2002.

Regrettably, after her death, Sylvia's sons have entered into litigative battle with Ralph over money matters. Essentially, the sons contend that Sylvia must not have been of sound mind when she signed a will leaving the bulk of her estate to

her husband and a deed placing her home in a tenancy by the entirety with Ralph. Sadly, the sons' litigation strategy has largely involved an attempt by them to disparage their mother's feelings for and relationship with Ralph and to contrast those supposedly cool feelings with her love for them.

Rather than recite the back and forth between the parties in all its awkward detail, I instead simply set forth the key facts as I find them.

At trial, all agreed that Sylvia was an independent, assertive woman. She always handled her own financial matters and took pride in the success she had experienced in her career at Hercules, Inc., where she worked with computers. She was very generous with her sons and their families, supporting David and Steven in particular with significant financial contributions. For example, in the period from the 1990s until her death Sylvia paid approximately $76,000 worth of credit card bills for Steven and his wife, Sandra Moore.[1] Sylvia noted her desire that her grandchildren get a good education. At some point, at least two of her sons came to assume that they were among the objects of her testamentary intentions although she made no unambiguous statements to that effect and, indeed, never executed a formal will until May 8, 2001.

By the late 1990s, Sylvia was the primary breadwinner in her household and held a good position at Hercules. In 1999, Ralph, who was then approximately 63,

[1] Trial Tr. at 184-85.

retired. She and Ralph lived in a home that Sylvia had occupied since her marriage to Harold Moore, the sons' father. Sylvia had owned that house mortgage-free in her own name since 1994. Although Sylvia did well at work, she was not a wealthy woman.

As noted, the sons attempted to denigrate the emotional significance of Sylvia and Ralph's twenty-plus year relationship. Their witnesses described the two as more akin to roommates than a married couple. They even put on witnesses suggesting that Sylvia would have divorced Ralph if she could have done so without having to give him half of everything she had accumulated throughout her life. For example, Steven's wife, Sandra, testified about a conversation some time in 1996 or 1997 that she had with Sylvia regarding Ralph's involvement in a legal dispute over his father's will. Sandra said that Sylvia told her she was hoping that a favorable settlement for Ralph, who at that time was receiving only Social Security payments, would give him enough money to live on, so that she could leave him.[2]

Candidly, I was unimpressed by this testimony, most of which was both motivated by keen self-interest and seemingly uninformed by human experience in marital relationships. While I have no doubt that the Bickling marriage was not a

[2] *Id.* at 133-34.

perfect one, marriages rarely are. Only the foolhardy — and some testified at trial[3] — spout forth with certainty about the emotional bonds between a married couple with a relationship as lengthy as that of the Bicklings. Whatever the ebbs and flows of the Bickling marriage, it endured for many years and a strong-willed woman like Sylvia would not have persisted with it, unless it came with certain comforts and rewards.[4]

In this regard, I must note a part of the record. Witnesses for the sons testified that Sylvia gushed about her grandchildren and was open about her love for her children, but that she was never so effusive about Ralph. The sons find this highly probative. I find it mundane and not particularly illuminating. It is common for mature adults to be openly enthusiastic about their love for their children and grandchildren and to be more discreet and withholding about their feelings for their spouse. Romantic relationships, especially marital ones, are sensitive, intimate aspects of human lives and a reticence to describe feelings does not mean they do not exist.

As to this, it must be remembered that although Ralph was married to Sylvia for many years, he remained at best a late arriving stepfather to the sons. The idea

[3] A neighbor of the Bicklings — put on by the sons — testified that Ralph and Sylvia did not vacation together. Other testimony of witnesses for the sons refuted this contention, which was contained within a stream of gossip-minded opinion that I find of little utility or credibility.
[4] Sylvia had already been divorced from two husbands before she married Ralph, including the sons' father. Her relationship with Ralph was much longer than either of her previous marriages.

that Sylvia would therefore emphasize her positive feelings for Ralph to the sons or their significant others is not intuitively an obvious one. Rather than belabor this issue, suffice it to say the following: As of early 2001, the Bicklings were a married couple of long-standing, living under the same roof, and under no compulsion to stay together. The record gives me no reliable basis to infer that Sylvia did not care deeply for her husband and have a sincere regard for his well-being.

With this background in mind, I now turn to the events that led more directly to the current dispute.

On February 6, 2001, Sylvia came into work at Hercules and began experiencing seizure-like systems. She was hospitalized for three days and given anti-seizure medication. Her condition deteriorated, and she was hospitalized again just a short while later on February 18. On March 31, 2001, an MRI revealed that Sylvia had a malignant brain tumor. Brain surgery was ultimately scheduled for May 9, 2001.

The period between February 6 and May 9 was a difficult one for Sylvia. She had her good days, but complaints of memory problems and difficulty with speech were not uncommon. She also became more dependent upon Ralph during that period — as would be natural of any spouse experiencing a serious medical ailment. Ralph also responded in the hoped-for manner by being attentive to her

needs and being around to help Sylvia when that was required. Her increased physical and emotional dependence was accompanied by more expressions of physical affection, not only towards Ralph but also towards other members of her family.

On May 8, 2001, the day before her scheduled brain surgery, Sylvia and Ralph visited the offices of Thomas Ferry, Esquire, to prepare their wills and other documents. Sylvia had never drawn up a will before that time. At that meeting, Sylvia and Ralph signed reciprocal wills, with each leaving their entire estate to the other, with the exception of certain specific bequests of personal property.[5] They also prepared powers of attorney for healthcare for each other and Sylvia gave Ralph a durable power of attorney.[6] Finally and importantly, Sylvia executed a deed gifting her home from her alone to her and Ralph as tenants by the entirety.[7] The effect of that deed was to give Ralph a right of survivorship, so that if Sylvia died before him, the property would vest in his name.

At trial, Ferry testified that Sylvia "did a good bit of the talking"[8] that day and that, as between her and Ralph, she was "clearly the much more dominant."[9] He also stated that Sylvia did not express any desire to provide for her adult

[5] JX 1-2.
[6] JX 3-5
[7] JX 6.
[8] Trial Tr. at 247.
[9] *Id.* at 258.

children in the will,[10] and that he talked to her about her impending visit to the hospital.[11] Finally, Ferry stated that in his professional opinion, Sylvia was coherent and had the requisite testamentary capacity to execute her will,[12] and that he did not get any sense that Sylvia was under any pressure from Ralph to prepare the documents in any particular manner.[13] Although the sons make much of the fact that Ferry, who has prepared hundreds of wills over his lengthy career, could not remember some of the details of his dealings with the Bicklings, his testimony on these points was crystal clear and I found him credible and convincing.

On the evening of May 8, 2001, Sylvia's family gathered at her home. David and Steven testified that in their view Sylvia was uncharacteristically quiet that evening and had difficulty completing sentences. But not all the witnesses shared this view. Jeffrey testified that Sylvia was aware that she was having surgery the next day and was not confused about who anyone in the room was.[14] Rather, he interpreted her general silence that night as simply displaying a "game face" in advance of major surgery, and believed that she was simply focused on what she had to confront. Steven's wife, Sandra Moore, as well, testified that Sylvia appeared "scared" and "apprehensive" that night but also seemed to be

[10] *Id.* at 250.
[11] *Id.* at 278-89.
[12] *Id.* at 257-61, 297-98.
[13] *Id.* at 257-58.
[14] *Id.* at 225.

trying to make light of the situation; she further testified that Sylvia was able to recognize her family and to have a conversation, and knew that she was in her house.[15]

At trial, two documents were produced dated May 9, 2001 and bearing Sylvia's name. First, Sylvia executed a memorandum in the form required by 12 *Del. C.* § 212 indicating her wishes with regard to the disposition of her personal property.[16] Second, Sylvia drafted the "May 9 Letter" on her computer, which began as follows:

> To: Steven, Jeff and David.
> Please see that the following is done without any bickering, arguing or friction.
> Please keep in touch with one another, no matter how busy life gets.
> Keep in touch with Ralph and help him through the rest of his. If he remarries, he is on his own.
>
> There is a will, Power of Attorney and Living Will recently written up. The following is not in any particular order. I am to be cremated and ashes scattered at the C&D Canal. All services are private. Do NOT have any type of public, stand-in-line viewing. There is an attachment to the standard Will itemizing things that are to stay in the Moore Family and things that will stay in Ralph's family. Hopefully this will keep disagreements to a minimum like what has happened over the past few years with Ralph's father's situation.[17]

The May 9 Letter then went on to list a variety of personal items that she wanted to "Keep In Family and [have] everyone agree upon disposition," followed

[15] *Id.* at 150-51, 187-89.
[16] JX 9.
[17] JX 8.

by a list of things that would be "Ralph's" and a line stating, "Remember that Ralph will need some of these things to live with but if he moves or dies, these are the places these things should go." The Letter then provided a detailed list of burial instructions, and ended with her name above the date, May 9, 2001. The burial instructions in the May 9 Letter were very similar to those in Mr. Ferry's notes.[18] It appears that Sylvia did not send this letter to any of her sons at that time, however. Rather, it appears to have been Sylvia's desire that the letter be presented to the sons upon her death in the hope that they would accede to her wishes.

The May 9 Letter was not the first one of this variety. Sylvia was not particularly comfortable traveling, and so would prepare and send such letters to Steven before major trips. The May 9 Letter itself appears to be an updated version of a letter written by Sylvia on October 18, 1998 (the "1998 Letter").[19] The 1998 Letter also had a list of things to "Keep In Family," a list of things that would be "Ralph's," and burial instructions. As to the lists of personal items, there are some slight differences between the 1998 and May 9 Letters, suggesting that Sylvia reviewed and updated the 1998 Letter in detail before adding the new paragraph about her will, quoted above. The 1998 Letter also had an additional list

[18] *Compare id. with* JX 17.
[19] JX 7.

entitled "Facts," which contained an item stating, "House paid for and in name Sylvia Sue Moore." The May 9 Letter, however, contained no such list at all, and no reference to the house.[20] As with the May 9 Letter, the 1998 Letter ended with Sylvia's name above the date, October 18, 1998. Unlike the May 9 Letter, however, Sylvia did send the 1998 Letter to Steven.

Sylvia had brain surgery on May 9, 2001. Unfortunately, that surgery was not successful in curing her ailment. Sylvia's condition continued to deteriorate, and she complained about losing control over her life. She continued to pay the household bills for a while, as she had always done, until some time in mid-June 2001, when she developed sepsis and was hospitalized yet again. A wheelchair ramp had to be installed at her home to enable her to enter and exit. At one point, Steven spoke to Sylvia and Ralph about bringing his mother to his house, so that Steven and his family could take care of her. Steven testified that "it was clear that [Ralph] did not want that to happen" and that Ralph "wanted to try to take care of her."[21]

The picture that two of the sons paint of the time period following Sylvia's surgery is one in which Sylvia became increasingly vocal about a vague concern

[20] At trial, the sons' counsel suggested that the presence of the house on this list indicated that Sylvia intended the house to go to her children, but the problem with that argument is that the very next line says "Hercules savings — 200,000." The sons' counsel himself stated at trial that this amount represented moneys that would ultimately go to Ralph because she made him the primary beneficiary of her 401-K. Trial Tr. at 584.

[21] *Id.* at 467.

that Ralph would “steal” everything she had worked for, including her home. David apparently spoke with Sylvia about what would happen to her estate if she died and caught on that there was a will in place and so he questioned Ralph about it. David contends that Ralph first lied about the existence of a will, then misrepresented that the sons were taken care of, then revealed its true contents but promised to take care of the sons in his own will by making sure that some of Sylvia’s estate reverted back to them. Eventually, Ralph showed the will to David at a time when both Steven and Sylvia were present. David and Steven asked their mother whether she really wanted her estate to go to Ralph, assertedly not out of self-interest but out of a genuine desire to ensure that the will reflected her wishes, which she (according to David and Steven) said it did not.

In general, the sense that one gets is that David put his mother under intense emotional pressure during this period and directed a lot of animus at Ralph, putting him in a very difficult situation. David was obsessed with the monetary implications for him of his mother’s possible demise and by his conduct made it difficult for Sylvia to tell him that he was not an object of her testamentary intent without having him (implicitly or explicitly) accuse her of not loving him and her other sons. David and Steven made Ralph feel that he would be acting improperly and selfishly if he simply stood by the estate plan that Sylvia implemented on May 8.

In essence, David conflated the question of whether his mother loved him with the question of whether she was leaving him money. In this behavior, David was joined by Steven. Although at trial, they indicated that they only wanted to know what their mother actually wanted, their behavior and demeanor belies that and it seems to me extremely likely that their overtures to their mother put her in a very awkward situation whereby the communication of her genuine testamentary intentions to them would anger and hurt them, as they apparently placed a high value on their mother's attentiveness to their economic needs. They forced a situation in which Sylvia had to disclose her will to them during a time period when her health and, in particular, her mental abilities were far worse than on May 8, 2001. Frankly, I find it hard to — and do not — credit David and Steven's testimony about events of this period as it is clear to me that their anger at the contents of the will impairs their ability to recall events in a fair and balanced way.[22] In this regard, it is notable that they — and their significant others — credit Sylvia's lucidity at various times when it is to their advantage but not when it is

[22] With reluctance, I indicate my view that the testimony of David, Steven and their significant others was so colored by their own desires that it was unreliable and not a helpful guide to discerning the truth. Even accepted at face value, the testimony does not support their claims as it fails to demonstrate undue influence by Ralph or a lack of testamentary capacity by Sylvia on May 8, 2001. Rather, it involves at best a rosy-eyed reading of ambiguous statements by Sylvia about her financial wishes for them and an inconsistent and exaggerated perspective on her mental state and relationship with Ralph. Although Ralph's own testimony was hardly a model of clarity or directness, I discerned no convincing evidence of improper conduct or influence on his part.

not. All in all, I find it much more likely that Sylvia wished to keep the sons in the dark about the will until she died precisely to avoid the emotional pain Steven and David's intense actions began to cause her (and Ralph). I do not believe she ever freely and rationally told them the will and deed did not reflect her true intent. I also find no evidence that Ralph improperly concealed the will; instead, his behavior is consistent with Sylvia's seeming desire to keep the sons out of her hair about financial matters.

Notably, Jeffrey stayed out of this simmering family drama. He cared about his mother's serious health problems and did not want to trouble her with disputes about money at a time when she was fighting for her life.

After increasing pressure from David and Steven, an entourage of family members visited Tom Ferry's office on September 18, 2001. David, Ralph, Sylvia, Steve's family and one of Ralph's daughters (from a prior marriage) went to Mr. Ferry's office. David and Steven wanted to have Sylvia change her will.

Ferry questioned Sylvia about whether that was what she really wanted, and eventually asked everybody other than Sylvia to leave so he could interview her in private. During that interview, Ferry asked numerous questions of Sylvia. First, he tried to determine what it was that she wanted to do. Although many of Sylvia's answers to Ferry's questions were unresponsive, he stated at trial that "[i]f I got any sense at all about what she wanted to do, it's that she didn't want to

change anything."[23] Ferry's notes from that meeting support that conclusion,[24] and include a "note to file" stating that "Sylvia is not competent in my opinion at this time to make any change in her will even if she could tell me what she wants. My impression is that she does not want to make any changes."[25] When Ferry brought the family members back into the room to explain that conclusion, they were "rather annoyed" and "got up and left."[26] Again, I find Ferry's testimony entirely credible.

On September 17, 2001, the day before the meeting with Mr. Ferry, Sylvia and Ralph met with a representative from MetLife. The representative explained the impact of Sylvia's retirement on her life insurance benefits. Before that time, her policy provided death benefits of $150,000. Because of her retirement from Hercules in July 2001, the benefits went down to $5,000. The representative further discussed the option of purchasing additional coverage. Two primary options were discussed: a policy with $150,000 in benefits for which the premium was approximately $7,000 per year, and a policy with $50,000 in benefits for which the premium was approximately $2,700. Ralph testified that Sylvia told the representative that she wanted the $50,000 policy because the $7,000 premium was

[23] Trial Tr. at 265.
[24] His notes from that meeting support that conclusion. *Id.*; JX 17.
[25] JX 17.
[26] Trial Tr. at 268.

"too much."[27] But, when the conversation turned towards beneficiary designations, the representative asked Sylvia what she wanted, and "she didn't respond."[28] Ralph then suggested that he be the primary beneficiary, with the three sons being the alternate beneficiaries. Ralph further stated that he suggested this designation because he mistakenly believed that this was how her previous policy was set up, even though in fact Sylvia had made Ralph and the sons equal primary beneficiaries, and that if he had known at the time that that was how her policy had been set up, he would have suggested that to the MetLife representative.[29] The beneficiary designation was made in accordance with Ralph's suggestion, although Ralph testified that the representative confirmed with Sylvia that that was what she wanted.

Sylvia Sue Bickling passed away on October 30, 2002. Between the time of the last visit to Tom Ferry's office and her death, relations between Ralph, on the one hand, and David and Steven, on the other, were extremely strained. David and Steven continued to be angry about the fact that Sylvia's written will left the bulk

[27] *Id.* at 547.
[28] *Id.* at 549.
[29] *Id.* at 589. In this one respect, Ralph might be thought to have acted improperly, knowing that Steven and David were pushing Sylvia — at a time when her capacities were greatly diminished in comparison to May — to change her will. After all, Ralph had a self-interest in maximizing his share of the insurance proceeds, especially if the deed and will were to be revised. But, if this was Ralph's motive, he should have encouraged Sylvia to select the higher benefit level, which he did not, and therefore I am not convinced Ralph acted with bad faith.

of her estate to Ralph and that she had added Ralph's name to the deed to her house.

II. Legal Analysis

On or about November 1, 2002, the sons began this litigation. They sought to invalidate Sylvia's will and the deed, on the grounds of lack of testamentary capacity and undue influence. They further sought to impose a constructive trust on certain of the proceeds paid under the life insurance policy purchased on September 17, 2001, and to obtain a judgment against Ralph Bickling for half the appraised value of the home that passed to Ralph, as the surviving tenant by the entirety, on the basis of the separation agreement executed between Sylvia and the sons' father.

In addressing this case, the parties have focused largely on Sylvia's will. This is shorthand for also attacking the deed which placed Sylvia's home — which was appraised at $126,000 as of the date of her death — in the name of her and Ralph. In truth of fact, most of the wealth Ralph received from Sylvia flowed outside the will, from the deed, joint bank accounts, and Sylvia's 401-K, of which Ralph had been the primary beneficiary for many years before May 2001. As a result, what Ralph received under the will was relatively modest, by comparison. Indeed, if Sylvia had not changed her deed and had not executed a will, under the

intestate succession statute Ralph would have received a life estate in the house[30] and the sons a remainder interest.[31]

A. The Sons Have Not Established That Sylvia Lacked Testamentary Capacity

Under Delaware law, a will should not lightly be set aside on the grounds of lack of testamentary capacity. As the Supreme Court stated:

> Here, the standard is that one who makes a will must, at the time of execution, 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. Thus, the law requires [a person such as Sylvia Sue Bickling] to have known that she was disposing of her estate by will, and to whom.
>
> Delaware law presumes that the testatrix had sufficient testamentary capacity when executing her will, and the party attacking testamentary capacity bears the burden of proof. It is important to note that only a modest level of competence is required for an individual to possess the testamentary capacity to execute a will.[32]

Stated otherwise,

> Testamentary capacity in this jurisdiction has been defined to mean that one who makes a will must, at the time of execution, be capable of exercising thought, reflection and judgment, and must know what he is doing and how he is disposing of his property. He must have sufficient memory and understanding to comprehend the nature and character of his act. Was the person able to understand that he is disposing of his estate by will, and to whom he is disposing of it? Was he capable of recollecting what property he was disposing of and

[30] *See* 12 *Del. C.* § 502(4).
[31] *See id.* § 503(1).
[32] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).

> and to whom he was leaving it? If so, the will is valid regardless of whether or not the dispository scheme might seem improvident to others and regardless of the mental condition of the testator at times either prior or subsequent to the execution of the will.[33]

Under these principles, the sons have failed to show that Sylvia lacked the testamentary capacity necessary to execute her will on May 9. Their primary evidence in this regard consists of 1) medical records containing diagnoses and statements by doctors to the effect that Sylvia's tumor was having an effect on her ability to think clearly and 2) testimony by certain witnesses that Sylvia often seemed distant or confused. For several reasons, that evidence does not convince me that Sylvia lacked testamentary capacity.

First, there is other evidence in the record contradicting the picture that the sons are attempting to paint of their deceased mother, which is of a woman who had lost all control over her life. The medical records contain statements by doctors indicating that the decline in Sylvia's mental faculties was not as dire as the sons suggest. Nothing in the records indicates that Sylvia could not or did not understand the terms of the will she signed. Indeed, it appears that Sylvia took the lead role in managing her own interaction with her physicians and in considering what treatment options to pursue. And her medical records, when read carefully, support rather than refute the fact that she had capacity to make her May 8, 2001 will. Moreover, even after her surgery, Sylvia personally signed an informed

[33] *Matter of Langmeier*, 466 A.2d 386, 402-03 (Del. Ch. 1983) (citations omitted).

consent for her physicians, an important document that suggests her continued lucidity for a period after May 8, 2001.

In that same vein, Sylvia continued to handle important matters, such as managing the checkbook and paying the bills, until the month after her surgery. Tom Ferry, an experienced attorney without a dog in this fight, was present when she executed her will. Ferry credibly testified that in his professional opinion, she had the ability to comprehend her actions and had testamentary capacity. David and Steven themselves apparently believed that Sylvia was lucid enough to express her desires as late as September 2001, when they took her to that same attorney in an attempt to have her will changed. The best evidence of her intent as of that date was Ferry's testimony, which supported her intent to adhere to the decisions she made on May 8.

Second, the majority of the evidence upon which the sons rely is of limited probative weight given that it is not specifically addressed to Sylvia's mental state on May 8, 2001, when she executed the will. Although David and Steven testified that on that night their mother appeared confused and distracted, the obvious explanation for that is that she was facing major surgery and the possibility that her life was coming to an end, a situation that might make even the most strong-willed and gregarious person turn inwards and reflect. Jeffrey himself testified that he interpreted Sylvia's behavior that night in this manner.

Moreover, the other documents that Sylvia executed around that time confirm that she had her wits about her. The personal property memorandum and May 9 Letter both recognized the import of the will she executed on May 8, and provided detailed instructions regarding how her personal assets should be distributed. In their post-trial reply brief, the sons suggest that those documents might be forgeries and therefore are of no probative value with respect to the issue of whether Sylvia was of sufficiently sound mind on May 8, 2001.

Put bluntly, I find this accusation unsupported by the evidence. The May 9 Letter, on its face, is an updated version of the 1998 Letter with some minor adjustments. The items listed as "Ralph's" on both Letters are almost identical, with just a few more items going to Ralph in the later Letter but no change of any real significance. Since the terms of the May 9 Letter themselves would not have made Ralph substantially better off than the 1998 Letter, the only reason he would have had to draft the May 9 Letter himself would be to make it appear that Sylvia was more coherent than she actually was at that time, just in case her will was later challenged for lack of testamentary capacity. I have no basis to find that Ralph executed such a deceitful plan.

Furthermore, for a computer-savvy person like Sylvia, it would not have taken much time to write the May 9 Letter, and the notion that she might have written the letter while unable to sleep the night before surgery is a perfectly

plausible one, especially in contrast to the sons' factually unsupported idea that Ralph cooked up the Letter. Indeed, the text of the May 9 Letter itself suggests Sylvia as the author, as it has the ring of authenticity and contains references that would have been odd for Ralph to craft (e.g., the reference to Ralph's relations with the sons if he remarries).[34]

In sum, although Ralph, like the sons, has a self-interest in this matter, the record does not support the inference that Ralph crafted the May 9 Letter over Sylvia's name. Instead, the better reading of the record is that the May 9 Letter was a clear and rational expression of Sylvia's own intentions and wishes.

Third, as I mention later, the testamentary intent reflected in Sylvia's will does not, in itself, provide the sons with any support for an argument of diminished capacity. For example, the will was only the most recent instance of Sylvia's regard for Ralph's future economic well-being. Many years earlier Sylvia had made Ralph the primary beneficiary of her 401-K account, an account that was her

[34] The sons argue that Ralph testified that Sylvia went right to sleep after the family left on the night before her surgery and therefore that she could not have written the Letter that evening. Even if true, this does not mean that Sylvia did not get up later and write the Letter. Moreover, a close review of Ralph's trial testimony contradicts the sons' characterization of it. Ralph stated repeatedly that he did not remember much about the night of May 8, and even stated that he didn't remember whether any of Sylvia's sons came to visit that night at all. *E.g.*, Trial Tr. at 597. When asked directly how Sylvia could have had the time to prepare the documents dated May 9, 2001, he guessed that Sylvia got up before he did the day of the surgery. *Id.* at 601-02. Further, Ralph stated that Sylvia told him that she was "going to take care of that [personal property memorandum]," although it is unclear whether she told him this on May 8 or May 9. *Id.* at 535-36.

single most valuable asset. Furthermore, as I noted before, Sylvia was the primary breadwinner. Ralph was retired. Sylvia was not wealthy. Given the extent of her assets, it might have made sense to her to put first things first and to make sure that her retired husband of 20 years could continue to live comfortably (and be able to afford a good nursing home if that became necessary). In this calculus, she may have taken into account the substantial sums she had already bestowed on Steven and the financial support she had given to David, and figured that as adults in the prime of their earning years, they (and Jeffrey) could fend for themselves. This type of judgment is not at all inconsistent with her expressions of love for her sons and grandchildren; it is simply a function of her not unlimited resources. Indeed, she took care to bestow particular items with emotional meaning on several members of her family.

Finally, given the lack of persuasive evidence showing that Sylvia was incompetent to execute a will on May 8, it is important to mention the negative policy implications that would flow from a ruling that the sons have satisfied their burden. Sylvia Sue Bickling was not the first person to have been diagnosed with a terminal disease that impaired her ability to think as effectively as she normally did, and she will not be the last. Sadly, it is common for humans to suffer ailments that either directly, or indirectly (e.g., on account of medications that address the ailment), have a negative impact on cognitive functioning. This does not mean,

however, that the law lightly disregards the autonomy of such persons. The fact that a person like Sylvia experienced some diminution in functioning does not mean that she lacked the ability to make informed and voluntary decisions about important matters. To find, on this record, that Sylvia lacked testamentary capacity would be to make a finding that any person diagnosed with a brain tumor, experiencing some new cognitive difficulties, and facing the possibility of death in the immediate future lacks the capacity to make a will. That is not and should not be our law.

Just as it is not unusual for humans to experience medical illnesses with cognitive effect, so too is it not unusual for humans to put off executing a will until they face serious medical conditions that make further deferral obviously imprudent. As a result, if this court were to lightly infer a lack of testamentary capacity from a condition like that suffered by Sylvia, will contests will become more frequent and the wishes of those facing mortality will be too lightly displaced, as it is easy for disgruntled family members to proffer some evidence that the decedent's mind wasn't all it used to be at all times. It is precisely because of concerns like these that our law requires a strong showing of testamentary incapacity. Due regard must be given to the reasonable expectations of people facing times of great personal sadness that their wishes regarding the disposition of their worldly possessions will be respected by our courts, if not by their families,

unless it can be shown that those wishes were not theirs at all. No such showing has been made here, and the sons have not proven that Sylvia lacked testamentary capacity.

B. The Sons Have Not Established That Ralph Exercised Undue Influence Over Sylvia

Like challenges based on alleged lack of testamentary capacity, the standard that a party must meet to set aside a will on the grounds of undue influence is a difficult one:

> Undue influence is an excessive or inordinate influence considering the circumstances of the particular case. The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to impel him to make a will that speaks the mind of another and not his own. It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear or in some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will. The essentials of undue influence are a susceptible testator, the opportunity to exert influence, a disposition to do so for an improper purpose, the actual exertion of such influence, and a result demonstrating its effect.[35]

In pressing their undue influence claim, the sons rely on much of the same evidence that underlies their testamentary capacity claim in order to show that Sylvia was a susceptible testator. In addition, they stress the facts that 1) Sylvia loved her family very much and had in the past made comments indicating that she

[35] *Matter of Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983) (citations omitted).

wanted to make sure the grandchildren would receive a good education and made ambiguous statements that Steven and David interpreted as reflecting Sylvia's desire that the house and certain other assets would stay in the Moore family, and 2) Sylvia's relationship with Ralph did not appear ideal. This evidence is intended to show that Sylvia's actual disposition of her estate in her will cannot have been the product of her own independent thought, but that of Ralph Bickling.

For many reasons, this evidence is insufficient to prove a claim of undue influence.

As noted previously, I hardly find it surprising that a person, even one as strong and independent as Sylvia Sue Bickling, who was suddenly stricken with a deadly disease would turn to her spouse of twenty years for the emotional and physical support necessary to get through such trying times. Nor was it odd for Ralph to respond, as the sons' own witnesses testified, by becoming protective of his wife and caring for her. Whether it was gratitude, generosity, guilt or a realization of how deep her love for Ralph really was, it was not irrational for Sylvia to leave almost all of her accumulated wealth to her husband and not her children, when she had already provided them with significant support throughout their lives and when the youngest of her children was already nearly 40 years of age. It might be true that Sylvia had on occasion led her children to believe that they would receive the bulk of her estate upon her passing. That, too, would have

been unsurprising: it would not be odd for a parent that loved her children to not want to get into difficult discussions about who gets what when she dies. Even if she did truly intend to leave everything to her children before February 2001, the events of that month and the following months obviously provided her with reason to change her mind.

That said, I find it more probable that Sylvia never gave her sons any rational reason to believe that they would share equally in her estate with Ralph. Much more probable is that David and Steven ardently desired that that would be the case and read into their mother's less-than-clear expressions of her future financial desires their own wishes. As things stood on May 7, 2001, Ralph stood to receive most of Sylvia's wealth in net present value terms — her 401-K, her jointly held accounts, and a life estate in her home (which was later valued at $126,000 at the date of her death).[36] The decisions Sylvia made on May 8 can be viewed as moves in the same direction of her prior estate planning.

All in all, the terms of the will simply do not do much to support an undue influence claim. There was nothing inherently suspicious or surprising about the contents of Sylvia's will. Moreover, although Sylvia obviously was suffering from a serious condition in May 2001, her strong personality was not so easily erased as

[36] As of that time, Ralph also would have gotten an equal share with each of the sons of any life insurance proceeds.

to make it likely that Ralph could have overborne her will — even if he wanted to. As of May 8, 2001, Sylvia remained a strong, assertive woman.

In any event, the sons' undue influence claim fails on one key ground alone: the lack of any actual exertion of improper influence by Ralph. That is, the record is simply devoid of any overreaching by Ralph, regardless of whether Sylvia might be considered a susceptible testator. Nothing convinces me that Ralph pressured or influenced Sylvia in any manner to write her will or the deed in a particular way. Rather, I infer that Sylvia decided for herself how to dispose of her estate and took the lead in having that decision documented before her surgery. In this important regard, attorney Ferry's testimony reinforces my sense that Sylvia knew what she wanted and executed a plan that implemented her intentions. Indeed, if anything, it appears that David and Steven were the persons who later put Sylvia under undue strain at a very difficult time for her by conflating the question of whether she loved them with the separate question of whether she was going to leave them money and assets.

Finally, I acknowledge that the sons may have been shocked and dismayed to learn that their mother had not written them into her will more substantially. People often believe that their share of a loved one's estate reflects how highly they were regarded by the person who passed. But the sons' disappointment and failure to accept their mother's wishes is no substitute for persuasive evidence of

undue influence by Ralph. Lacking such evidence (and also lacking sufficient evidence that Sylvia was without testamentary capacity), the sons' attempt to set aside Sylvia's will fails and their claims attacking the validity of Sylvia's will shall be dismissed.

C. The Separation Agreement Does Not Give The Sons A Right To A Portion Of The Value Of Ralph's Home

Next, I consider the sons' claim based on the separation agreement that Sylvia entered into with their father in 1967. The relevant provisions of that agreement read as follows:

> 3. The husband shall pay to the wife for the support of each child the following sums monthly:
>
> | | |
> |---|---|
> | Steven | $50.00 |
> | Jeffrey | 50.00 |
> | David | 50.00 |
>
> As each child reaches the age of twenty-one (21) years or sooner dies, the sum paid by Husband to Wife for the support of said child shall terminate; it is further provided that Husband shall use his best efforts to secure a college education, with the mother's assistance, for the said children, provided that should Wife remarry upon such remarriage and commencing in the month next following the month of remarriage, Wife shall deposit said monthly support paid to her for the support of said children in a savings account in the name of Wife as guardian for said children, said moneys so deposited to be used by Wife as guardian only for the health, education and welfare of said children and for no other purpose.
>
> . . . .
>
> 5. The parties make the following disposition of their property:
>
> . . . .
>
> (c) Wife shall have as her exclusive possession the marital residence . . . .
>
> Husband shall execute a deed in blank transferring all his right title and interest in said property to wife or to her nominee.

> Wife shall pay all future taxes, mortgage payments and the like on said property.
>
> In the event that wife should sell or otherwise dispose of said marital residence, one-half (1/2) of the net proceeds, if any, after taxes, real estate commission, et ceterae of said sale or other disposition shall be deposited by Wife in said savings account, as aforesaid.[37]

The sons contend that the deed executed by Sylvia on May 8, 2001, which transferred the home that was in her name to her and Ralph as tenants by the entirety, constituted a "sale or other disposition" of the marital residence within the meaning of ¶ 5 of the separation agreement. They claim a right to one half of the appraised value of the home as third-party beneficiaries of that agreement. Their claim fails, for at least two reasons.

First, the best evidence in the record is that the sons' father, Harold Moore, himself did not comply with his obligation to make the support payments required by the separation agreement. Ralph testified that Sylvia told him as much at some point early in their marriage, and that no separate bank accounts or guardian accounts were ever set up for the children.[38] The sons argue that Ralph was perjuring himself but as with their other such accusations there is no reliable basis for that claim. Indeed, both Steven and Jeffrey themselves testified that they had no direct personal knowledge of whether any bank accounts were ever created in

[37] JX 28 ¶¶ 3, 5.
[38] Trial Tr. at 558, 608.

their name or whether their father made any of the required payments, and Jeffrey specifically stated that Sylvia never turned any bank accounts over to him when he reached 21.[39] Simply put, the credible evidence leans entirely towards the conclusion that Harold Moore (who was deceased at the time of trial) never lived up to his contractual support obligations to Sylvia (who was also deceased at the time of trial). None of the sons received any payments at age 21 and none described any recollection of their mother receiving any financial help from their father. On the basis of this record, I conclude that Harold Moore himself materially breached the separation agreement, thus excusing Sylvia from the restrictions of ¶ 5 and precluding the sons from enforcing that provision, which is integrally and inextricably linked with the support provisions the father breached.[40]

Second, the paragraph upon which the sons rely must be read in conjunction with the rest of the separation agreement. When so read, the separation agreement did not create the decade-spanning property right the sons contend it did.

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[39] Trial Tr. at 232-34 (testimony of Jeffrey); *id.* at 491-92 (testimony of Steven). Jeffrey further testified that his father did not help finance his college education in any way. *Id*. at 234. David was not questioned about these subjects at trial. In interrogatory answers, the sons admitted that they have no evidence that Harold Moore lived up to his support obligations and their failure to testify about receiving account funds at age 21 is telling.

[40] *See Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. Super. 1969) ("As a general rule the party first guilty of a material breach of contract cannot complain if the other party subsequently refuses to perform.").

The sons note the fact that there was an addendum to the separation agreement signed in 1969, two years after the original agreement, reducing the support payments for each child to $25 per month. JX 33. At most, this suggests that the sons' father might have made some payments during the first two years after the original agreement, and says nothing about whether he continued to make payments after that time.

Paragraph 5 does not provide that any transaction that results in a situation in which Sylvia is not the sole owner of the home creates a right in the sons to one half of the value of the home. Rather, it requires that the "net proceeds, if any" from any "sale or other disposition" be deposited in the same savings accounts referred to in ¶ 3. Those savings accounts were to be created in the event that Sylvia remarried, as a place to deposit the support payments made by the sons' father, payments whose sole purpose in that event was to provide for the "health, education and welfare" of the sons. In any event, the obligation of the sons' father to make support payments ended when the children reached the age of 21, which even the youngest of them, David, did almost 20 years before the "disposition" of Sylvia's home.

Any right that the sons may have had to one half of the "net proceeds, if any" from a "sale or other disposition" of their mother's home was extinguished when each of the sons reached the age of 21. The sole purpose of the savings accounts required to be created under the separation agreement was to provide a repository for the support payments upon Sylvia's remarriage. As the sons's father ceased to have any obligation to make support payments once the sons reached the age of 21, so too did any obligation that Sylvia might have had to deposit the net proceeds from a sale or other disposition of the home in those savings accounts cease at that same time. That is the best interpretation of the meaning of the

reference in ¶ 5 back to the savings accounts discussed in ¶ 3. Sylvia and the sons' father were agreeing to a scheme by which the children would be taken care of until they reached the age of majority, not to an unqualified and perpetual right to the sons to one half of the value of the home for which Sylvia had the sole obligation to pay taxes and mortgage payments.

Indeed, the file of the lawyer who prepared the separation agreement supports this conclusion.[41] An earlier draft of the agreement would have required the sons' father to make the same support payments to Sylvia, an obligation that would end when the children reached 21. There was no provision, however, requiring the creation of separate accounts upon Sylvia's remarriage. Moreover, Sylvia was to be given the house outright, with no conditions on her ability to "sell or otherwise dispose" of it.

After some negotiation, an additional provision was added in ¶ 3 requiring the creation of separate savings accounts upon Sylvia's remarriage. The most plausible intent of that provision was to ensure that any support payments would be used solely for the "health, education and welfare" of the children in that event, and not as unrestricted funds to be used by Sylvia and her new husband. In exchange for that limitation, Sylvia also agreed to the language upon which the sons rely, which requires any "net proceeds" from the "sale or other disposition" of

[41] JX 33.

the home to be deposited in those same savings accounts. Viewed as a whole, this set of changes was most likely intended to ensure that the children would be taken care of until they reached 21, regardless of how Sylvia's life developed, and not as a change of heart on the part of the sons' father regarding who, ultimately, would have an interest in the marital residence.

For these two independent reasons, I conclude that the separation agreement does not give the sons a right to any interest in Sylvia's home and that it passed to Ralph by right of survivorship pursuant to the deed executed on May 8, 2001.

D. A Constructive Trust Will Be Place Over Certain Of The Insurance Proceeds

Because Ralph has acknowledged that he suggested the life insurance beneficiary designation to Sylvia on September 17, 2001 under the mistaken impression that Sylvia wanted him to receive all the proceeds, it is equitable to place a constructive trust over three-quarters of the $50,000 in proceeds of the policy in the sons' favor. Had Ralph taken responsible steps to investigate Sylvia's prior election he would have discovered that he and the sons were equal beneficiaries. As a result of his own error in contracting — i.e., mistake of fact — Ralph unwittingly benefited himself at the sons' expense at a time when Sylvia's own capacity was greatly compromised. By equitably reforming the contract, the

court can correct his mistake and require Ralph to make the sons whole. That is the equitable outcome.[42]

III. Conclusion

In the May 9 Letter, Sylvia asked that her wishes be carried out according to her will "without any bickering, arguing or friction" in the hope that this would "keep disagreements to a minimum." Sadly, her hopes in this regard did not come true and a bitter fight ensued among the persons she held dearest. Under our law, however, the expressions of testamentary intent set forth by Sylvia in her will and in the deed are to be respected unless the court is persuaded that those documents were not the product of her rational and voluntary desires. Unconvinced by her sons' argument that Sylvia's will and the deed resulted from overreaching by Ralph or diminished capacity on Sylvia's part, I uphold the validity of those instruments.

I also deny the sons' argument that they should be awarded one half of the appraised value of their mother's house under the separation agreement, but do grant their claim for a share in the proceeds of their mother's life insurance policy.

Lastly, I decline Ralph's request to shift fees against the sons. There is some

[42] The provision in the insurance policy governing how proceeds are paid in the event that there is no beneficiary at the time of the death of the insured does not preclude the court from exercising this equitable power. That provision is intended to govern in the situation when a beneficiary predeceases the insured and not when the beneficiary designation itself is deemed subject to reformation by a court of equity.

force behind the argument that the sons made this litigation unduly costly and that they also advanced serious and hurtful accusations of wrongdoing with little, if any, substantiation. But, in my discretion, I conclude that their conduct does not rise to the serious level required to justify invoking the bad faith exception to the American rule that each side bears its own attorney fees. The reality of this decision on fee-shifting is, of course, that Ralph will not ultimately receive all of what Sylvia had intended him to have, but that sort of economic reality is a common effect of the American rule.[43] Each side shall also bear its own costs. Counsel shall collaborate on an implementing final order and submit it within ten days.

[43] For this and other reasons (Ralph's age and the cost of living), the sons' argument that Ralph will live a wealthy man for the rest of his life does not add up to me.