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Re: Capaldi v. Richards
C.A. No. 1966-N
Date Submitted: August 9, 2006

Dear Counsel:

Rose M. Capaldi was the income beneficiary of a trust with a marital subtrust and a residuary subtrust created by her husband Emilio M. Capaldi to care for her and their three children: Defendant Roseanna C. Richards (the "Defendant") and Plaintiffs Lawrence J. Capaldi and Joseph M. Capaldi (collectively, the "Plaintiffs"). Mrs. Capaldi also held a power of appointment over the remainder interest in the marital trust. On April 6, 1995, Mrs. Capaldi

executed a last will and testament that contained the following: "I hereby give, devise, and bequeath all of the rest, residue, and remainder of my estate . . . which I may own at the time of my death or over which may have the power of disposition . . . to my beloved daughter." The Defendant contends that, by this provision, her mother exercised the power of appointment in her favor.

The Plaintiffs now seek a judgment declaring that Mrs. Capaldi's will failed to exercise validly the power of appointment granted to her in the marital trust and that, therefore, the assets of the marital trust should be distributed in accordance with the terms of the trust as if the power of appointment had not been exercised, that is, distributed on a per capita basis among the Plaintiffs and the Defendant. The Defendant invokes the doctrine of judicial estoppel in support of her pending motion to dismiss.

In August 2002, a vigorously contested guardianship was resolved by agreement with the appointment of the Defendant as guardian of the person of Mrs. Capaldi. On December 31, 2002, the Plaintiffs petitioned to have the Defendant removed as a trustee of the trust established by Mr. Capaldi and as the guardian of

the person of Mrs. Capaldi.[1] They also sought to have new trustees appointed and a third-party trustee, Joseph M. Capano, removed, and to invade the principal of the marital trust to pay their attorney's fees incurred in pursuing the guardianship contest.

The Defendant and the Plaintiffs agreed to resign as trustees, an agreement implemented by this Court on June 10, 2004, when it also allowed Mr. Capano to remain, appointed independent trustees, but denied the Plaintiffs' request for attorney's fees.[2] The Plaintiffs' appealed, and the Delaware Supreme Court, on March 4, 2005, affirmed most of the Court's judgment but reversed the denial of attorneys' fees and remanded the matter to this Court for further consideration of Plaintiff's attorney's fees.[3] On remand, the Plaintiffs sought fees and costs in excess of $100,000. On July 22, 2005, this Court awarded fees of $7,500;[4] that decision was affirmed.[5] Mrs. Capaldi had died on June 30, 2005.

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[1] *In the Matter of the Unfunded Insurance Trust Agreement of Emilio M. Capaldi, deceased*, Del. Ch., C.M. No. 6735-NC. That action is sometimes referred to as the "prior action."
[2] *In the Matter of the Unfunded Insurance Trust Agreement of Emilio M. Capaldi, deceased*, Del. Ch., C.M. No. 6735-NC, Bench Ruling (June 10, 2004) ("*Capaldi I*").
[3] *In re Capaldi*, 870 A.2d 493 (Del. 2005) ("*Capaldi II*").
[4] *In the Matter of the Unfunded Insurance Trust Agreement of Emilio M. Capaldi, deceased*, Del. Ch., C.M. No. 6735-NC, Bench Ruling (July 22, 2005) ("*Capaldi III*").
[5] *In re Capaldi*, 2006 WL 305011 (Del. Feb. 7, 2006).

In support of her motion to dismiss, the Defendant argues that the doctrine of judicial estoppel should preclude the Plaintiffs from contending that Mrs. Capaldi failed to exercise properly her power of appointment. In the course of their prior action to remove the Defendant as trustee and guardian, the Plaintiffs asserted that the Defendant's expectancy interest resulting from Mrs. Capaldi's exercise of the power of appointment for the Defendant's benefit created a conflict of interest that should prevent her from serving as trustee of Mrs. Capaldi. They also argued, in support of their motion to invade the marital trust for attorney's fees, that the Defendant opposed using the marital trust to pay attorney's fees because she anticipated receiving the balance of the assets in the trust as a result of Mrs. Capaldi's exercise of the power of appointment.

The Plaintiffs point out that the validity of the purported exercise of the power of appointment was never specifically litigated in the prior action and that the Court made no direct ruling. The Defendant, in response, notes that the Court, at the urging of the Plaintiffs, assumed that the exercise was valid.

* * *

The Plaintiffs assert that the Defendant's reliance on the defense of judicial estoppel reaches beyond the scope of their complaint, and, thus, her motion for

dismissal should be treated instead as a motion for summary judgment.[6] However, courts have granted motions to dismiss under the doctrine of judicial estoppel.[7] Indeed, judicial estoppel may be raised independently by the Court. Furthermore, in the context of the pending motion, the only matters beyond the scope of the complaint relied upon by the Plaintiffs are other filings in this Court in a related matter. That review alone does not convert the motion to one for summary judgment.[8]

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"[U]nder the doctrine of judicial estoppel, a party may be precluded from asserting in a legal proceeding a position inconsistent with a position previously

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[6] *In re National Auto Credit, Inc. S'holders Litig.*, 2004 WL 1859825, *1 n.1 (Del.Ch. 2004) ("Although the Defendants have labeled their application as a motion to dismiss, it will be treated as one for summary judgment because they are relying upon the doctrine of res judicata, which is raised as an affirmative defense, *see* Ct. Ch. R. 8(c), and matters beyond the Complaint (and the documents integral to the Complaint's allegations). The Court, accordingly, is called upon to answer two questions: (i) whether material facts are in dispute, and (ii) whether the Defendants, as the moving parties, are entitled to judgment as a matter of law. The material facts are not in dispute.").

[7] *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742 (U.S. 2001) ("Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion"); *See also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F. 3d 314 (3d. Cir. 2003).

[8] *In re General Motors (Hughes) S'holders Litig.*, 897 A.2d 162, 169 (Del. 2006). Moreover, while it may be of procedural significance, this debate is not outcome determinative. The Plaintiffs have had ample opportunity (and have taken advantage of that opportunity) to identify those portions of the record in the related proceeding that should inform the Court's analysis.

taken by him in the same or in an earlier legal proceeding."[9] The doctrine of judicial estoppel exists "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[10] Although not a formulaic exercise, a court, in applying the principles of judicial estoppel, should consider, among other possible factors, the following:

> First, a party's later position must be clear and inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[11]

Dismissal by way of judicial estoppel is not dependent upon a showing of detrimental reliance.[12] Dismissal, however, will not result unless the conduct in

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[9] *Steinman v. Levine*, 2002 WL 31761252, at *11 (Del. Ch. Nov. 27, 2002).
[10] *New Hampshire v. Maine*, 532 U.S. at 750.
[11] *Id*. at 750-51.
[12] The Plaintiffs rely upon *Norman v. Pago Pharmaceuticals Svcs., Inc.*, 1992 WL 301362, at *4 (Del. Ch. Oct. 21, 1992), to argue that detrimental reliance is an essential element of a defense based on judicial estoppel. *Norman* acknowledged that a minority of jurisdictions requires a showing of detrimental reliance and acknowledged that uncertainty reasonably existed with respect to the need for that showing. As observed, however, in *Steinman v. Levine*, 2002 WL 31761252, at *11 (Del. Ch. Nov. 27, 2002), "[M]ore recent Delaware cases [than *Norman*] cite the elements of judicial estoppel similarly to *Siegman* [*v. Palomar Med. Techs., Inc.*, 1998

the other action is so clear that "nothing will be left to be explained by argument or to be taken by inference."[13]

* * *

First, the Plaintiffs' current position regarding the exercise of the power of appointment is clearly inconsistent with their earlier (and unambiguous) position. In the prior action, the Plaintiffs alleged that:

> . . .[the Defendant] object[s] to invading the principal of the marital trust. [The Defendant's] motivation is obvious. She is the beneficiary of the power of appointment exercised by Mrs. Capaldi in the will, which appoints the remainder of the marital trust to [the Defendant]. If the principal of the marital trust is exhausted or diminished, [the Defendant] will lose her expected inheritance.[14]

Thus, a critical allegation of their complaint for the removal of the Defendant as trustee was her conflict of interest which they alleged existed because the power of appointment had, in fact, been exercised in her favor by their mother.

In their post-trial briefing in the prior action, the Plaintiffs noted: "It just so happens that the plain language of the trust provides for liquidation of the marital

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WL 409352 (Del. Ch. July 13, 1998)] which does not require detrimental reliance." Although a showing of detrimental reliance is not essential, such a showing would, of course, enhance the argument.

[13] *Rudnick v. Schoenberg*, 122 A. 902, 903 (Del. 1923).

[14] *Capaldi I*, Amended Pet. for Instructions at ¶ 19.

trust (which [the Defendant] is slated to receive by exercise of Mrs. Capaldi's power of appointment) before the residuary trust."[15]

In their briefing filed with the Delaware Supreme Court, the Plaintiffs asserted: "Mrs. Capaldi exercised her power of appointment over the marital trust in favor of [the Defendant]."[16]

Finally, the Plaintiffs' position with respect to the exercise of the power of appointment remained of some significance to the Court even in the context of the ruling on the attorneys' fees on remand:

> "Even the way the attorneys' fees were sought, how did [the Plaintiffs] do it? They didn't do it in an even-handed way. No. They wanted the part of the trust that Mrs. Capaldi was giving to her daughter [*i.e.*, the marital trust given to Defendant through the power of appointment], they wanted that to pay the fees so that the daughter's share of the assets could be reduced . . ."[17]

* * *

The Plaintiffs, acknowledging their many references to Mrs. Capaldi's exercise of the power of appointment in favor of the Defendant, contend that they did so for the "sake of argument" and that they should not be penalized because of

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[15] *Capaldi I*, Pet'rs' Reply Post-Trial Br. at 14.
[16] *Capaldi II*, Appellants' Reply Br. at 11. The Supreme Court recognized that this Court had "found that self-interest alone motivated . . . [the Defendant]." *Capaldi II*, 870 A.2d at 497.
[17] *Capaldi II*, Bench Ruling at 38.

their arguments.[18] For example, their pretrial memorandum in the prior proceeding recited:

> Mrs. Capaldi is the income beneficiary of both the marital trust and the residual trust. Mrs. Capaldi has a power of appointment over the remainder interest of the marital trust which she has purportedly exercised in favor of [the Defendant]. [The Plaintiffs and the Defendant] are the remainder beneficiaries of the residual trust. Assuming (*without conceding*) that the exercise of the appointment was effective, upon Mrs. Capaldi's death, [the Defendant] will be the majority owner of the corporation.[19]

Thus, in this instance, the Plaintiffs qualified their position regarding the validity of the exercise of the power of appointment. This appears to have been an isolated example of careful drafting; it stands as an exception to the position that the Plaintiffs were vigorously asserting: the conflict of interest which the Defendant suffered because she was, in fact, the beneficiary of the exercise of the power of appointment.

* * *

[18] In a sense, the Plaintiffs are invoking the liberal pleading standards that allow litigants to take inconsistent positions. Typically, alternative allegations are asserted early on in the process, presumably when the facts are not clearly established. Here, the Plaintiffs focused on the exercise of the power of appointment; the Plaintiffs clearly expected the Court to view the case as one in which the power of appointment had been exercised; the Court accepted (without resolving) that contention; and the Plaintiffs did little to modify the impression which they intended.

[19] *Capaldi I*, Pet'rs' Pre-Trial Mem. at 2 (emphasis added).

Second, the Court must consider whether this Court, in the prior action, relied in its rulings upon the Plaintiffs' allegation that the power of appointment had been duly exercised.

Because the Defendant agreed to relinquish her position as trustee, the Court's decision on the merits in the prior action did not result from its understanding of whether the power of appointment had been properly executed. The decisions which the Court did make, such as who would actually serve as the trustees, were not based on this assertion of the Plaintiffs. The Court did acknowledge the self-interest motivating the parties. Perhaps the power of appointment informed that observation, but there was plenty of other self-interested conduct to rely upon. Thus, in its decision on the merits, the Court was not misled in making its ruling because of the Plaintiffs' allegations regarding exercise of the power of appointment.

On remand to reconsider the award of attorneys' fees, the Court did note that the Plaintiffs were seeking an award of attorneys' fees from the marital trust which Mrs. Capaldi had given to the Defendant. That, again, was but one of several factors inducing the Court to minimize the award of fees to the Plaintiffs, *i.e.*, to the detriment of the Plaintiffs. In short, whether the power of appointment had

been properly executed or not was not of material significance to any of the decisions reached by this Court (or by the Delaware Supreme Court).[20]

* * *

Third, the Plaintiffs' conduct has not provided them with an unfair advantage.[21] Indeed, in the prior action, when the Court focused on the power of appointment, it was used (although far from determinatively) to criticize them for seeking to have their attorneys' fees paid from the marital trust which would ultimately, according to their contentions, pass to the Defendant.

* * *

The decision to dismiss an action because of judicial estoppel requires the exercise of the Court's discretion in balancing a number of factors. In this action,

[20] Thus, there is no risk that inconsistent outcomes might result from the Plaintiffs' conduct. No decision in the prior action would necessarily be inconsistent with a decision in this action that Mrs. Capaldi successfully exercised (or not) the power of appointment.

[21] The Defendant has not argued (and it would have been difficult to have pressed the point on a motion to dismiss) that she relied upon the Plaintiffs' assertions in the prior action. For example, one could question whether the passage of time may have dimmed the memories of the individuals involved in the preparation and execution of Mrs. Capaldi's will; also, although there may have been questions about her competence to exercise the power of appointment at the time, Mrs. Capaldi was alive for most of the prior action. If the validity of the exercise of the power had been challenged then, at least the holder of the power would have been alive. In addition, it is conceivable that her decision to resign as trustee was influenced by the Plaintiffs' allegation regarding the power of appointment. There were other reasons—notably, impasse and lack of family harmony—militating in favor of resignation. Thus, at most, the benefit to the Plaintiffs, at the expense of the Defendant, of the power of appointment allegations was minimal.

the Plaintiffs have taken a position regarding the effectiveness of the exercise of the power of appointment that is clearly and significantly inconsistent with their assertions in the prior action. That inconsistency, alone, is not enough,[22] and that is substantially all that the Defendant has advanced in support of her application. Because the Court in the prior action did not materially rely upon the exercise of the power of appointment in making either its decisions or its specific findings and because no particular benefit accrued to the Plaintiffs as a result of their inconsistent and contradictory allegations, a conclusion here depriving the Plaintiffs of the opportunity to have their claim resolved on the merits would be unwarranted.

* * *

[22] Delaware requires both an inconsistent position and "that the Court was persuaded to accept [it] as the basis for its ruling." *Siegman*, 1998 WL 409352, at *11. *See also McQuaide v. McQuaide*, 2005 WL 1288523, at *6 (Del. Ch. May 24, 2005). ("The doctrine of judicial estoppel precludes a party from advancing an argument that contradicts a position it previously persuaded a court to adopt as the basis for its ruling."). In *Coates Int'l, Ltd. v. DeMott*, 1994 WL 89018, at *5 (Del. Ch. Feb. 4, 1994), this Court, applying New Jersey law, relied upon *Levin v. Robinson, Wayne & LaSala*, 586 A.2d 1348 (N. J. Super. 1990), for the proposition that the court's acceptance of, and reliance upon, the contradicted argument was not essential to a claim of judicial estoppel. The courts of New Jersey, a few years after *Coates*, repudiated that standard and now require reliance. *See Kimball Int'l, Inc. v. Northfield Metal Products*, 760 A.2d 794, 799 (N. J. Super. 2000) (The party to be estopped "must have convinced the court to accept its position in the earlier litigation.").

Accordingly, for the reasons set forth above, the Defendant's Motion to Dismiss is hereby denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Adam L. Balick, Esquire
Vincent A. Bifferato, Sr., Esquire
Mark D. Olson, Esquire
Register in Chancery-NC