IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

RUSSELL BANKS AND DAVID BANKS, Individually and as partners of the Banks Family Partnership,	)	
Petitioners,	)	
v.	)	C.A. No. 2086-S
MARY T. BANKS, THE ESTATE OF RAYMOND L. BANKS, JR., DAVID URIAN, Executor, and BAY FOREST, L.L.C., as successor to Ribera Development L.L.C.,	)	
Respondents.	)	

MEMORANDUM OPINION AND ORDER

Submitted: December 19, 2006
Decided: January 11, 2007

Melvyn I. Monzack, Esquire, Rachel B. Mersky, Esquire, Mary Elizabeth Browder, Esquire, MONZACK AND MONACO, P.A., Wilmington, Delaware, *Attorneys for the Petitioners.*

Eric G. Mooney, Esquire, James D. Nutter, Esquire, ERIC G. MOONEY, P.A., Georgetown, Delaware, *Attorneys for Mary T. Banks.*

Craig A. Karsnitz, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, Georgetown, Delaware, *Attorney for the Estate of Raymond L. Banks, Jr.*

William H. Sudell, Jr., Esquire, MORRIS NICHOLS ARSHT & TUNNELL, LLP, Wilmington, Delaware, *Attorneys for Bay Forest LLC.*

LAMB, Vice Chancellor.

In an action challenging the transfer of certain property as allegedly improper under the terms of a settlement agreement and a partnership, the respondents move to dismiss the amended complaint for failure to join indispensable parties pursuant to Court of Chancery Rules 12(b)(7) and 19(a).[1] Given the particular nature of the action, and recognizing that the allegedly indispensable parties have been afforded ample notice of the action's pendency and possess the ability to voluntarily intervene at any time, the court will deny the motions.

I.

A. The Parties

The petitioners, Russell Banks and David Banks, are two of the children of the late Raymond L. Banks, Jr. The respondents are Mary Thompkins Banks, the second wife of Raymond; David Urian, in his capacity as executor of Raymond's estate; and Bay Forest, LLC, the successor entity to Ribera Development, LLC, the purchaser of approximately 120 acres of land in Sussex County, Delaware formerly owned by Raymond.

[1] The Estate and Mary T. Banks each move to dismiss this action and have filed supporting papers. Bay Forest, LLC has not moved to dismiss or joined in either of the pending motions.

B. The Facts

During his life, Raymond was a farmer and businessman who acquired substantial land holdings throughout Sussex County. He and his family farmed many of these tracts. Raymond's sons, Russell and David, became involved in the farm operations. As time passed and Raymond grew older, Russell and David allegedly assumed primary responsibility for the maintenance and cultivation of the farms.

In 1985, Raymond and his wife of over 48 years, Louise Banks, divorced. Raymond and Louise executed a settlement agreement in March 1985 that resolved the division of marital property and alimony payments. Importantly, David and Russell were also parties to the agreement.

The settlement agreement recited that Russell and David "wish[ed] to assure that the family business continue[] unimpeded and substantially unaffected" by the divorce, and that Raymond and Louise were "willing to assure that the family business continue[], for the benefit of themselves and for the benefit of their two sons." The terms of the settlement agreement provided Louise with a home, a $200 per week stipend, and the right to receive one-half of the sale proceeds from certain enumerated properties "when and if" they were sold. In return, Louise conveyed her right, title, and interest in any of the remaining property of the "family business" to Raymond, Russell, and David. Raymond further agreed to

execute a will which would make "fair provision for all of his children, and special provision for [Russell and David] giving them absolute control of the family business upon his death." In 1986, Raymond executed a will that bequeathed 40% of his residual estate to Russell, 40% to David, and 20% to his daughter, Elaine Banks.

Sometime in the mid 1980s, Russell and David formed a partnership in order to operate the family business and to purchase real property for investment purposes. Raymond was not an initial partner; however, he allegedly became an equal one-third partner with his two sons in 1986. In return for his inclusion, Raymond allegedly contributed his interests in the "family business properties."[2]

In late 1997 and early 1998, Raymond fell ill with septicemia. During this time, Raymond's girlfriend, Mary Thompkins, allegedly "isolated Raymond from his children."[3] Following his illness, Raymond began transferring the titles to a number of properties to Mary, some directly and some in joint tenancy with himself. The couple married in October 2001 and Raymond continued to transfer property to Mary as late as 2003.

In early 2002, Russell and David learned that Ribera was interested in purchasing several parcels of land for future subdivision and development. Russell

---

[2] Am. Compl. ¶ 19.
[3] *Id.* at ¶ 76.

and David allegedly informed Ribera that they did not, under any circumstances, wish to sell these parcels. Nevertheless, representatives of Ribera approached Raymond about the sale.

On November 1, 2002, Raymond executed a new will. That document provided, *inter alia,* for the following division of the residual assets of the estate: Mary - 25%; Russell - 20%; David - 20%; Raymond III - 15%; Elaine - 15%; and Raymond's sister, Margaret West - 5%.

In April 2003, Raymond signed an agreement with Ribera for the sale and transfer of the aforementioned parcel.

Raymond died testate in December 2005. His 2002 will was admitted to probate on December 21, 2005. Shortly after Raymond's death, Mary sold a parcel of property for $800,000. This action was filed in April 2006, alleging that Raymond improperly transferred this property to Mary in 1999 and that the property was an asset of the partnership. The complaint further alleges that the property transferred to Ribera was an asset of the partnership as well and that, among other reasons, Raymond had no unilateral authority to sell it.

II.

The respondents argue that this action is primarily one challenging the validity and construction of Raymond's 2002 will. This is so, the respondents say, because the complaint alleges that Raymond lacked testamentary capacity at the

time the 2002 will was executed and that certain bequests therein violate the obligations Raymond owed to Russell and David both under the settlement agreement and the partnership. Since three of the named beneficiaries in the 2002 will–Elaine, Raymond III, and Margaret–are not parties to this action, the respondents urge the court to dismiss the complaint pursuant to Court of Chancery Rules 12(b)(7) and 19(a). The respondents argue that this outcome is necessary to protect rights of these three persons to take under the 2002 will, as well as for a just and final adjudication of this suit.

The petitioners respond that the movants' arguments misconstrue the substance of the complaint. According to the petitioners, the present action simply seeks to enforce the terms of the settlement agreement and to void improper transfers of partnership property to Mary and to Ribera/Bay Forest. It is ancillary, they say, that the outcome of this action will ultimately determine the property available for distribution from the estate. In addition, they claim, unless the action is ultimately successful, no beneficiary other than Mary will receive substantial distribution from the estate as it is presently comprised, since estate tax exposure will consume the vast majority of the assets.

The petitioners also point out that Raymond III, Elaine, and Margaret have all been apprised of the litigation. Each has been urged to obtain independent representation and to intervene if he or she believes it necessary. Moreover, the

petitioners say, David Urian, as executor of the estate, has a legal obligation to defend the will and protect the estate's assets. To the extent the other three named beneficiaries' interests are implicated in this litigation, the executor stands in a fiduciary capacity towards them and can act as an effective advocate on their behalf.

III.

Court of Chancery Rule 12(b)(7) allows a court to dismiss a claim for "failure to join a party under Rule 19." Court of Chancery Rule 19(a) requires that a person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction be joined as a party to an action if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

While this rule is "mandatory in letter as well as in spirit," it becomes so only upon a finding by the court that each of its specific terms are met.[4] Indeed, this determination is, in many cases, difficult and extremely fact intensive.[5] And, because the indispensability of a party is often not any easy question to answer, the

---

[4] *Hughes Tool Co. v. Fawcett*, 350 A.2d 341, 344 (Del. 1975).
[5] *Elster v. American Airlines, Inc.*, 106 A.2d 202, 203 (Del. Ch. 1954).

judiciary of this State has recognized that a court necessarily enjoys a measure of latitude in arriving at this determination. Basically, if, without the inclusion of some other person who is not a named party, the controversy cannot be finally disposed of in such a way as to wholly comport with principles of "equity and good conscience," that party must be joined if procedurally feasible.[6]

Upon review of the record, the court determines that none of the purportedly indispensable parties are required for a just and final adjudication of this matter. This is so for several reasons.

First, this suit is not primarily, either in its form or in its substance, a will contest. The petitioners base their position that the property transfers at issue were invalid on Raymond's undertakings *inter vivos*–namely, his participation in the partnership and his execution of the settlement agreement. The fact that the scope and nature of Raymond's estate may be affected as a collateral result of this dispute is insufficient, in the court's judgment, to redefine this action as a will contest requiring joinder of all the named beneficiaries to the will.

Second, Raymond III, Elaine, and Margaret have all been informed of the nature and pendency of this action. They have had, and will continue to have, sufficient opportunity to obtain independent counsel and to intervene if they regard it necessary to protect their interests.

---

[6] *Id.* at 203-04.

Finally, the executor is a named party here. His fiduciary obligation requires that he administer the estate so as to preserve and protect its property. Likewise, equity imposes upon him a "duty to defend the validity of the testator's disposition by will" if that document comes under attack.[7] Because these are continuing duties, the court expects that if circumstances change during this litigation such that the interests of the estate diverge from the interests of the named beneficiaries, the executor will renew a motion to join them.

IV.

For the foregoing reasons, the respondents' motions to dismiss for failure to join an indispensable party under Court of Chancery Rules 12(b)(7) and 19(a) are DENIED. IT IS SO ORDERED.

[7] *Shepherd v. Mazzetti*, 545 A.2d 621, 623 (Del. 1988).