COURT OF CHANCERY
OF THE
STATE OF DELAWARE

ABIGAIL M. LEGROW
MASTER IN CHANCERY

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

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Mr. Victor L. Sierra
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Re: *IMO Purported Codicil/Amendment to the LW&T of Lucia R. Sierra*
C.A. No. 7769-ML

Dear Counsel and Parties:

This action for review of proof of a purported codicil to a will was filed in August 2012 by the executrix of the decedent's estate and the beneficiary who will receive the bulk of the estate if the codicil is found to be invalid. After the respondent filed his answer, the petitioners moved for judgment on the pleadings, arguing that the undisputed facts demonstrate that the codicil is not valid and that the respondent's effort to challenge a will executed in 2009 is untimely. For the reasons that follow, I agree and recommend that the Court enter an order granting the petitioners' motion for judgment on the pleadings.

FACTUAL BACKGROUND

Lucia R. Sierra (hereinafter "Decedent") died on November 6, 2011 at the age of 91. The Decedent was survived by five of her children, Victor L. Sierra ("Victor"),[1] Aida Sanchez, Carmen Resto, Olga Collazo, and Pedro J. Sierra ("Pedro").[2] A sixth child of the Decedent, Raymond L. Sierra ("Raymond"), predeceased her, and was survived by his wife, Asuncion Sierra ("Asuncion").[3]

At the time of her death, the Decedent owned real property located at 826 South Broom Street, Wilmington, Delaware (the "Property"). On February 10, 2009, the Decedent executed a Last Will and Testament (the "2009 Will"), which appointed Ms. Collazo as executrix and left the bulk of the Decedent's estate, including the Property, to Asuncion.[4] The 2009 Will was filed with the Register of Wills and admitted to probate on December 5, 2011.[5]

In August 2010, the Decedent traveled to Florida to stay with Ms. Resto and her husband, William. While in Florida, the Decedent purportedly signed on September 17, 2011 an amendment to the 2009 Will, in which the Decedent directed that the Property should be sold during her lifetime and the proceeds distributed among her "heirs" (the "2011 Codicil").[6] The 2011 Codicil further instructed that if the Decedent died before

[1] Where certain individuals share the same last name, I use their first names for the sake of clarity. No disrespect is intended.
[2] Verified Petition (hereinafter "Pet.") ¶ 3.
[3] *Id*. It appears that the Decedent also had a seventh child, Maria Otero, who predeceased her. *See* Pet. Ex. A, Response to Pet. (hereinafter "Answ.") ¶ 11(g).
[4] Pet. Ex. A.
[5] Pet. ¶ 4.
[6] Pet. Ex. B.

the Property was sold, "the disbursement of the sale shall be divided evenly among my heirs."[7] The 2011 Codicil listed the Decedent's "heirs" as Victor, Ms. Sanchez, Ms. Resto, Pedro, Ms. Collazo, Asuncion, and Carmen Otero Ramos.

The 2011 Codicil was drafted by Victor's wife, without the assistance of an attorney and "under [Victor's] entire approval."[8] Victor concedes that, although he witnessed the Decedent signing the 2011 Codicil, neither he nor the other witnesses signed the 2011 Codicil in the Decedent's presence, apparently because the witnesses were thrown out of the house before they were able to do so.[9] The 2011 Codicil was filed with the Register of Wills on January 23, 2012, and was admitted to probate in February 2012.[10]

Ms. Collazo and Asuncion (collectively, the "Petitioners") filed this action in August 2012, alleging that the 2011 Codicil was not valid for a number of independent reasons, including because the Decedent lacked testamentary capacity and was unduly influenced to execute the Codicil, and because the Codicil was not properly executed or witnessed. In September 2012, Victor filed a letter dated August 27, 2012, in which he purported to respond to the complaint. In that August 27th letter, Victor alleged that the 2009 Will was the product of undue influence. The Petitioners filed a motion for default judgment, arguing that the August letter was not a valid responsive pleading. After a hearing, I ordered Victor to file a responsive pleading within 30 days. Victor filed a

[7] *Id.*
[8] Answ. ¶ 10.
[9] *Id.* at ¶ 11(e); Response to Motion for Judgment on the Pleadings (hereinafter "Response to Mot.") p. 1.
[10] Pet. ¶ 4.

response to the petition on February 22, 2013, in which he again asserted that the 2009 Will was the product of undue influence. Petitioners then moved for judgment on the pleadings (the "Motion"), arguing that they are entitled to judgment as a matter of law because the undisputed facts establish that the witnesses to the 2011 Codicil did not sign the document in the presence of the Decedent, and that any challenge to the 2009 Will should be dismissed as untimely.

ANALYSIS

Any party may move for judgment on the pleadings after the pleadings are closed, provided such motion is made within such time as not to delay the trial.[11] "In considering a motion for judgment on the pleadings, the Court must be satisfied that there are no genuine issues of fact in dispute, and it must draw all reasonable inferences from those facts in the light most favorable to the nonmoving party."[12] The motion should be granted if no material issue of fact is found to exist and the moving party is entitled to judgment as a matter of law.[13]

The petitioners contend that they are entitled to judgment as a matter of law because the 2011 Codicil lacked the necessary attestation of witnesses and therefore is invalid. 12 *Del. C.* § 202 prescribes the requirements for execution of a will. That Section provides:

(a) Every will, whether of personal or real estate, must be:

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[11] Ct. Ch. R. 12(c).
[12] *CorVel Enter. Comp., Inc. v. Schaffer*, 2010 WL 2091212, at *1 (Del. Ch. May 19, 2010).
[13] *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1179 (Del. Ch. 2005).

> (1) In writing and signed by the testator or by some person subscribing the testator's name in the testator's presence and by the testator's express direction; and
> (2) Subject to § 1306 of this title,[14] ***attested and subscribed in testator's presence by 2 or more credible witnesses.***
> (b) Any will not complying with subsection (a) of this section shall be void.[15]

It is settled law in Delaware that the witnesses to a will "must sign in the presence of the testator," which means that the witnesses must sign the will in the same room that the testator is in, and where the testator "could see them if he chose."[16] Section 202(b) provides that a will that is not signed by the witnesses in the presence of the testator is void.

Victor does not contest the fact that Pedro, Victor, and Victor's daughter signed the will as witnesses outside the presence of the testator. Indeed, Victor's Answer and his response to the motion for judgment on the pleadings confirm that fact. Victor appears to argue, however, that this deficiency is cured by the fact that two witnesses signed affidavits at the Register of Wills when the 2011 Codicil was filed with that office. Although these affidavits were sufficient to allow the Register of Wills to admit the 2011

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[14] 12 *Del. C.* § 1306 provides that a will is valid if executed in compliance with Section 202, or if its execution complies with the law of the jurisdiction where the will was executed. Although the 2011 Codicil was executed in Florida, Victor has not argued that it was properly witnessed under Florida law.

[15] 12 *Del. C.* § 202 (emphasis added).

[16] *In re Young*, 1998 WL 409168, at *3 (Del. Ch. Jun. 24, 1998) (quoting *Rash v. Purnel*, 2 Del. (2 Harr.) 448, 458 (Del. Super. 1838)); *see also In re Wiltbank*, 2005 WL 2810725, at *10 (Del. Ch. Oct. 18, 2005) ("[t]o be within the testator's presence[,] the testator must be able to see the witnesses sign the will from their actual position at the time, or have the power to readily make alterations to the will without assistance, causing themselves pain, or incurring a personal risk.").

Codicil to probate, they do not cure the deficiencies under Section 202. Because the 2011 Codicil was not witnessed in the presence of the Decedent, it is void.

The petitioners also argue that any purported challenge Victor is making to the 2009 Will should be dismissed because it is barred by the six month statute of limitations contained in 12 *Del. C.* § 1309. As an initial matter, I note that Victor has not actually filed a claim or counterclaim challenging the validity of the 2009 Will, although he makes reference to such a challenge in both his Answer and his response to the Motion. Assuming, for the sake of argument, that these statements in the Answer constituted a legally cognizable challenge to the 2009 Will, they are untimely under Section 1309.

Section 1309(a) unambiguously requires a person challenging the validity of a will to file that challenge within six months after the will is admitted to probate.[17] Section 1309 is a "special statute of limitations as to wills," and is grounded in important public policy favoring prompt settlement of decedents' estates.[18]

The 2009 Will was admitted to probate on December 5, 2011, and any challenges contesting the validity of that will, therefore, should have been filed by June 5, 2012. The first mention of Victor's challenge to the Will was not made until August 27, 2012, the date on the letter he submitted responding to the petition. Accordingly, even if this Court were to consider any of Victor's filings in this action as a challenge to the 2009

[17] *In re Estate of Bates*, 1994 WL 586822, at *1 (Del. Ch. Aug. 1, 1994); *Criscoe v. Derooy*, 384 A.2d 627, 629 (Del. Ch. 1978).
[18] *Criscoe*, 384 A.2d at 629.

Will, it is undisputed that the first such filing was not made until more than eight months after the 2009 Will was admitted to probate.

Victor argues, however, that "there should be no time limit involved in pursuing this matter" because "fraud was involved when the [D]ecedent was forced to write a new will under undue influence in February 2009."[19] Even if taken as true, however, these allegations are not sufficient to overcome the statute of limitations contained in Section 1309(a). As this Court previously has held, "even fraud does not toll a statute [that] limits challenges to the validity of a will."[20] Accordingly, even if Victor's filings in this Court were viewed as a proper challenge to the 2009 Will, the challenge is untimely under Section 1309(a) and should be dismissed.

CONCLUSION

For the foregoing reasons, I recommend that the Court grant the Petitioners' Motion for Judgment on the Pleadings. This is my final report in this action, and exceptions may be taken in accordance with Court of Chancery Rule 144.

Sincerely,

/s/ *Abigail M. LeGrow*
Master in Chancery

[19] Response to Mot. p. 3.
[20] *Criscoe*, 384 A.2d at 630.