IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| EDWARD S. MACHULSKI, individually and in his capacity as Executor of the Estate of Stanley F. Machulski, Sr., and STANLEY F. MACHULSKI, JR., | C.A. No. 06C-06-310 (JTV) |
| Plaintiffs, | |
| v. | |
| MARY C. BOUDART, ESQUIRE and DOROSHOW, PASQUALE, KRAWITZ & BHAYA, | |
| Defendants. | |

*Submitted: December 12, 2007*
*Decided: March 28, 2008*

Kevin W. Gibson, Esq., Gibson & Perkins, Media, Pennsylvania. Attorney for Plaintiffs.

Jeffrey M. Weiner, Esq., Wilmington, Delaware. Attorney for Defendants.

*Upon Consideration of Defendants' Motion to Dismiss*
**DENIED**

**VAUGHN, President Judge**

***Machulski et al. v. Boudart, et al.***
C.A. No. 06C-06-310
March 28, 2008

**OPINION**

The defendants, Mary C. Boudart, Esquire, and Doroshow, Pasquale, Krawitz & Bhaya, Ms. Boudart's law firm, have filed a motion for summary judgment. The case involves a claim of alleged legal malpractice.

The plaintiffs, Edward Machulski and Stanley Machulski, Jr., allege that they and their father, Stanley F. Machulski, Sr., hired Ms. Boudart, an attorney, to draft documents to ensure that the father's assets would pass to the plaintiffs upon his death, free and clear of an elective share claim from the father's wife, Philomena. One such asset was the house in which the father and Philomena lived. The house was in his name alone, having been purchased by him prior to his marriage to Philomena.

Ms. Boudart prepared reciprocal wills for Mr. and Mrs. Machulski. They contained a waiver of the elective share of each other's estates. She met with Mr. Machulski, the father, on June 27, 2003, at his residence, at which time he signed his will. Mrs. Machulski was apparently there but would not interact with Ms. Boudart and refused to sign her will. Ms. Boudart left the wife's will at the house. There was apparently no follow-up as to the wife's will thereafter. The plaintiffs' father passed away two months later, on August 27, 2003. On December 29, 2003, Mrs. Machulski filed a timely petition for an elective share.[1] The house was part of the elective estate and was liable for a portion of the wife's elective share. The plaintiffs have settled Mrs. Machulski's claim for more than $100,000, which includes money from the sale

[1] She had previously filed a claim for a spousal allowance on September 29, 2003.

of the house after Mr. Machulski died.

## STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] The facts must be viewed in the light most favorable to the nonmoving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for a decision as a matter of law.[5] When a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact.[6]

## DISCUSSION

The spouse's elective share is one-third of the decedent's elective estate.[7] The

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[2] Super. Ct. Civ. R. 56(c).

[3] *Guy v. Judicial Nomination Comm'n*, 649 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

[6] *Moore v. Sizemore,* 405 A.2d 679 (Del. 1979).

[7] 12 *Del. C.* § 901.

elective estate means the amount of the decedent's gross estate for federal estate tax purposes, regardless of whether a federal estate tax return is filed or required to be filed, with certain modifications which need not be mentioned here.[8] The defendants' contend that once Philomena decided that she would not sign the will containing a waiver of her elective share, liability of the house for the elective share became unavoidable. They contend that the house would have been included in Mr. Machulski's federal gross estate, and thus his elective estate, even if deeded as a gift to his sons in June 2003. Thus, they contend, in substance, that the plaintiffs cannot establish causation.

The plaintiffs' contend that whether the house is part of or not part of the elective estate is not a decisive issue. They contend that only assets which are part of the "contributing estate," as defined hereinafter, are liable for the elective share, and that even two months before Mr. Machulski's death, steps could have been taken to remove the house from the "contributing estate." Such steps, they contend, would have shielded the house from liability for the elective share.

Prior to 1990, the law pertaining to the elective share provided, in 12 *Del. C.* § 906(d), that:

> . . . the Court of Chancery shall determine the amount of the elective share and shall order its payment from the assets of the elective estate or by contribution as appears appropriate under § 908."[9]

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[8] 12 *Del. C.* § 902.

[9] 59 Del. Laws Ch. 384.

This language was susceptible to an interpretation that the elective share was payable out of the assets included in the elective estate or by a contribution method discussed in 12 *Del. C.* § 908.

In 1990, however, §§ 906(d) and 908 were amended.[10] The amendment to 906(d) substituted the following language in place of the above-quoted language:

> . . .the Court of Chancery shall determine the amount of the elective share and shall enter a judgment and order apportioning the liability for the amount of the elective share among the recipients of the contributing estate and directing payment of such liability as provided in § 908(a) of this title.

The amendment also reworded § 908 and changed the title of that section from "Liability of Others for Elective Share" to "Liability for Elective Share."

The effect of the 1990 amendment was to express an unambiguous legislative intent that the elective share is payable only from the decedent's "contributing estate."

The "contributing estate" is defined in § 908(b) as follows:

> . . . the decedent's contributing estate consists of only that portion of the elective estate of which the decedent was the sole owner at death . . . The decedent's contributing estate does not include any jointly owned property . . . of which the decedent was a joint owner, any insurance proceeds which are payable to a beneficiary other than to the estate, or any property held in trust.

Under this unambiguous language, the "contributing estate" consists only of

[10] 67 Del. Laws Ch. 240.

property in the elective estate which the decedent owned solely at the date of death, and excludes jointly held property, insurance payable to a named beneficiary, and property held in trust. The statutes which comprise the elective share chapter do not contain any provision which pulls pre-death transfers back into the "contributing estate," even if they occur shortly prior to death.

The position of the plaintiffs, which is supported by the affidavit of an attorney experienced in estate planning, is that if Mr. Machulski had transferred his house into a revocable, inter vivos trust in June 2003, the house would have been removed from the "contributing estate," and would, therefore, not be subject to liability for Philomena's elective share. The plaintiffs' contention is consistent with the language of the statute, which expressly provides that the "contributing estate" does not include property held in trust. After considering the above-quoted statutory language, I am persuaded that the plaintiffs are legally correct. A transfer of the house into a trust, even two months before the decedent's death, would have removed it from his "contributing estate," regardless of whether it removed it from his elective estate. I conclude, therefore, that the defendants' contention, that the house was unavoidably liable for the elective share once Ms. Machulski decided not to sign her will, must be rejected, and the motion for summary judgment denied.

In view of the grounds upon which the motion is decided, I find it unnecessary to consider whether the house would or would not have been part of the elective estate if it had been conveyed to the sons in June.

The issue of negligence is not involved with this motion, and I express no opinion thereon.

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The motion for summary judgment is ***denied***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File