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Slack v. Truitt:

Presumption of Due Execution Attaches to a Will, Despite the Absence of an Attestation Clause and May Only Be Overcome by Clear and Convincing Evidence that the Will was Not Properly Attested

By: Jennifer Merrill

In a case of first impression, the Court of Appeals of Maryland held a presumption of due execution attaches to a will, despite the absence of an attestation clause, and may only be overcome by clear and convincing evidence the will was not properly attested. *Slack v. Truitt*, 368 Md. 2, 17, 791 A.2d 129, 138 (2002). Additionally, the court emphasized when a will is signed by the testator outside the presence of witnesses, the requirement that the testator acknowledge the document as his will to the signatory witnesses may be achieved through the testator's conduct alone. *Id.* at 12-13, 791 A.2d at 135-36. In so ruling, the court elevated the validity of wills that do not contain an attestation clause and reinforced the legitimacy of attesting witnesses that are not present to observe the actual signing of the document by the testator.

On June 5, 1999, Dale Slack ("Slack") drafted and signed a one-page, handwritten, last will and testament that bequeathed the bulk of his estate to Michael and Teresa Truitt. Slack wrote the words "Witnessed By" at the bottom of the will with space reserved underneath for witnesses' signatures, but did not include an attestation clause in the

document. Thereafter, Slack asked his neighbor, Dorothy Morgan ("Morgan"), and Morgan's daughter, Sandra Bradley ("Bradley"), to come to his house to sign a document, but did not verbally reveal to either woman the document was his last will and testament. Two hours after Morgan and Bradley signed Slack's will in the space reserved for witnesses' signatures, Slack committed suicide.

Slack's brother, and next of kin, Clinton A. Slack ("Clinton"), filed a petition with the Orphan's Court for Cecil County requesting priority of appointment as personal representative of Slack's estate. Subsequently, Teresa Truitt ("Truitt") filed a separate petition also claiming priority of appointment as personal representative of Slack's estate as a beneficiary and creditor. The orphan's court selected Clinton as the personal representative for the estate, but declined to admit the will to probate.

Truitt filed a *de novo* appeal in the Circuit Court for Cecil County which similarly refused to admit Slack's will to probate. Thereafter, Truitt appealed to the Court of Special Appeals of Maryland. The court of special appeals reversed the ruling of the circuit court, finding

although "the witnesses' attestations were hurried and careless, they were sufficient under [Maryland Estates and Trusts Article Section] 4-102." *Id.* at 7, 791 A.2d at 132 (citing *Truitt v. Slack*, 137 Md. App. 360, 367, 768 A.2d 715, 719 (2001)). The Court of Appeals of Maryland granted certiorari to clarify and interpret conditions surrounding the attestation of a will that may impact due execution under Maryland law.

The court began its analysis with a review of Section 4-102 of the Maryland Estates and Trusts Article, noting in order for a will to be duly executed it must be "(1) in writing, (2) signed by the testator . . . and (3) attested and signed by two or more credible witnesses in the presence of the testator." *Id.* at 7, 791 A.2d at 132. As the Slack will was indisputably written and signed by the testator, the court deemed the primary issue to be whether the will was properly attested pursuant to the statutory attestation requirement. *Id.*

The court noted prior Maryland case law recognized that where a will contains an attestation clause, a presumption of due execution arises that may only be overcome by clear and convincing evidence. *Id.* at 9-

10, 791 A.2d at 133. The court then acknowledged that the question as to whether the same presumption arises absent an attestation clause is one of first impression in Maryland. *Slack*, 368 Md. at 10, 791 A.2d at 134. Accordingly, the court analyzed caveats from other jurisdictions where the basis for contesting the will was the absence of an attestation clause and a failure on the part of the signatory witnesses to recall the circumstances under which they signed the will. *Id.* at 10-12, 791 A.2d at 134-35. The court concurred with decisions that held that an attestation clause is not required for a presumption of validity to arise and further noted an “attestation clause is not the *sine qua non* of the presumption of due execution.” *Id.* at 12, 791 A.2d at 135.

The court of appeals next considered the appropriate burden of proof to place upon a caveator who contests a will that does not contain an attestation clause on the basis of improper execution. *Id.* The court looked to *McIntyre v. Saltysiak*, 205 Md. 415, 421, 109 A.2d 70, 72 (1954), where a clear and convincing evidence standard of proof was placed on a caveator contesting a will containing an attestation clause for failure to meet the requisite formalities. *Id.* at 13, 791 A.2d at 135. The court noted because a presumption of due execution arises in wills, notwithstanding the presence of an attestation clause, the clear and convincing evidence standard should be applicable in either situation. *Id.*

Upon ruling a presumption of due execution arises in a will without an attestation clause absent clear and convincing evidence to the contrary, the court looked to the circumstances surrounding the attestation of the Slack will. *Slack*, 368 Md. at 13-14, 791 A.2d at 136-37. The court again examined *McIntyre* and determined proper attestation does not require witnesses to be cognizant the document is a will if the testator signs the document in the witnesses’ presence. *Id.* at 12-13, 791 A.2d at 135-36. Conversely, the *McIntyre* court observed if a testator signs a will outside the presence of witnesses, he must acknowledge the document as his will. *Id.* This acknowledgement, however, may be done non-verbally, such that the testator holds the document out as his own to the witnesses while giving them an opportunity to ascertain the pertinent information contained within the document. *Id.*

Applying *McIntyre*, the court found Slack’s conduct sufficient to meet the acknowledgment requirement because he presented his own handwritten and signed document to Morgan and Bradley, which they signed in the space provided for witnesses. *Id.* at 14-15, 791 A.2d at 136-37. Additionally, the court determined Clinton did not present clear and convincing evidence to rebut the presumption of due execution that arose when Morgan and Bradley attested the document. *Id.* at 17, 791 A.2d at 138.

A forceful dissent asserted the majority overextended the court’s

McIntyre holding and interpreted the statutory attestation requirement so broadly as to render it as a condition for due execution moot. *Slack*, 368 Md. at 21-23, 791 A.2d at 140-42 (Battaglia, J., dissenting). The dissent opined a will that does not contain an attestation clause should not be given the same “evidentiary weight” leading to presumption of due execution as a will that does contain such a clause. *Id.* at 21, 791 A.2d at 140. The dissent further suggested the proper burden of proof for a caveator contesting a will absent an attestation clause should be a preponderance of the evidence accompanied by a consideration of the totality of the circumstances. *Id.* at 23-24, 791 A.2d at 142.

The Court of Appeals of Maryland’s *Slack* ruling is a victory for the rights of legitimate testators. By placing the hefty burden of clear and convincing evidence on a caveator to a will that does not contain an attestation clause, the court reduces potential claims by disgruntled non-beneficiaries. Neither a witness’ failure to recall the circumstances surrounding the signing of a will, nor the signing of the will by the testator outside of the presence of the witnesses, may be sufficient to overcome the burden. Through this decision, the court is emphasizing the desire of the judiciary to validate wills and vehemently protect the wishes and desires of testators by making it more difficult for a will to be invalidated in the State of Maryland based on the failure of statutory formalities.