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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESSE FREDERICK-CONAWAY, Appellant/Cross-Appellee, v. KEVIN M. BAIRD, COURT-APPOINTED EXECUTOR OF THE ESTATE OF EVERETT T. CONAWAY AND COURT-APPOINTED TRUSTEE OF THE EVERETT T. CONAWAY REVOCABLE TRUST, Appellee, And JANICE M. RUSSELL-CONAWAY, Appellee/Cross-Appellant.	:	NO. 359, 2016 ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 8379-VCG

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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Dated: November 14, 2016

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NATURE OF PROCEEDINGS

Appellant, Jesse Frederick-Conaway, incorporates the Nature of the Proceedings for his appeal of the Rule 54(b) Order of the Court of Chancery dated July 14, 2016 as stated on page 1 of his Amended Opening Brief.

Appellant is also the Cross-Appellee to a cross-appeal filed by Appellee, Janice Russell-Conaway. She filed her Answering Brief on Appeal and Opening Brief on Cross Appeal on October 12, 2016. This is Appellant's Reply Brief on the Appeal and Cross-Appellee's Answering Brief to the Cross Appeal.

Additionally, this is Appellant's Reply Brief on the appeal to the Answering Brief of Appellee, Kevin M. Baird.

SUMMARY OF THE REPLY ARGUMENT

AS TO APPELLEE, JANICE RUSSELL-CONAWAY

I. **Denied**. Janice's reliance on the decisions arising from the *Estate of Rocco Arcaro* is misplaced. For the first time she cites 12 *Del.C.*, §211 in support of her theory that pour over wills and revocable trusts must be considered "integrated testamentary plans." This argument perverts the true meaning of 12 *Del.C.*, §211 and fails to recognize if a revocable trust is the residual beneficiary, the estate's assets must first be probated before residual assets pass to the trust for administration. It is settled law these are separate and distinct procedures and not integrated into one as argued by Janice and found by the Court of Chancery.

II. **Denied**. The Court of Chancery improperly ruled the LPI of EJKC, LP had to be returned to the trustee for use to pay estate expenses, debts and trust bequests. Janice advocated that below and argues it in answer to Jesse's appeal. The Court below and Janice fail to acknowledge the asset is, to wit, a limited partnership interest and not specific limited partnership assets which are not divisible. Jesse also reasserts as set forth in the Opening Brief that the law of the case doctrine applies.

AS TO APPELLEE, KEVIN M. BAIRD

I. **Admitted in part; denied in part**. Jesse admits and adopts Mr. Baird's Answering Brief argument in support his position payments to Janice for the CDI stock were improper and should have been paid to the estate to satisfy estate debts.

Jesse denies, however, that his argument in the Opening Brief was too broad. The ruling below and the position advocated by Janice compels a full analysis of the impropriety of the "integrated testamentary plan" be undertaken to address all issues arising from the attempt to misstate the law. Jesse denies the portion of Mr. Baird's argument advocating a decedent's creditor may automatically reach assets in a decedent's revocable trust to satisfy claims against an estate not fully paid from estate assets.

II. **Denied**. Mr. Baird adopts the lower Court's ruling that the limited partnership assets can be used to satisfy estate debts and beneficiary distributions. For the reasons cited above regarding Janice's argument, Jesse denies the LPI can be so used. Additionally, Jesse denies the doctrine of the law of the case is inapplicable.

REPLY STATEMENT OF FACTS

Jesse incorporates the Statement of Facts set forth in the Amended Opening Brief.[1] Certain additional facts are required to supplement and clarify Appellees' facts.

I. REPLY FACTS TO APPELLEE, JANICE RUSSELL-CONAWAY

Janice's Answering Brief (hereafter Janice AB), page 6, states Mr. Ellis sent a letter dated July 31, 2014 to Mr. Baird that "...contained a complete factual background to the issues." That letter, not copied to Jesse's counsel, states the facts most favorable to Mr. Ellis' involvement in the administration of the Estate and Revocable Trust. Jesse's AOB Facts contain facts not recited by Mr. Ellis bearing on the pending issues. Mr. Baird's Answering Brief (hereafter "Baird AB") recites facts from his appointment forward as the court-appointed Administrator also bearing on the issues.

Janice's facts regarding gifts Everett made to Jesse in 1995, to wit, the disclaimer in the Estate of Eunice Tull and the conveyance of real property (Janice AB, p. 7) are irrelevant to the matter before the Court. These occurred prior to Everett's marriage to Janice and were not reviewed by the Court below.

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[1] Jesse filed his Opening Brief which was timely refiled as an Amended Opening Brief. Hereafter Amended Opening Brief: AOB.

Janice mischaracterizes the purpose of EJKC's formation on page 8 of Janice AB. It was a means for Everett to transfer limited partnership interests in EJKC to Jesse. It also served to limit transfers of the LPI without consent of the general partner and the other limited partner resulting in the entire partnership interest vesting in the surviving limited partner. There was no intent to avoid Federal Estate and Gift taxes as stated by Janice (Janice AB, p.8). In 2002 estates in excess of $600,000 were taxed. A purpose was to reduce the amount of such taxes that would have been paid when the LPI was gifted or when Everett died by reducing the value for estate tax purposes of any interest he still owned. Due to the increased minimum value for taxable estates, no taxes were due on Everett's estate.

Janice's Facts state Everett amended his trust to gift to Janice the 69% LPI titled in the name of the Trust (Janice AB, p. 9). Janice fails to state Everett was prohibited from making the gift under the LPA terms (A: 0039-0040), as previously ruled by the Court of Chancery and affirmed by this Court. Everett could only change the ownership by way of the LPA, not the Trust. His failed attempt regarded the LPI and not the assets of EJKC.

Janice states the DNB debt was "incurred to pay off the costs of improvements on property gifted to Jesse," stated in Mr. Ellis' self-serving July 31, 2014 letter (Janice AB, p, 11). That quote is not on B0029 as stated. There is reference to a

debt "...incurred by Everett to improve property previously gifted to Jesse" at B0030. Missing is the fact the deed dated September 21, 1995 stated:

> RESERVING nevertheless, and excepting therefrom, unto [Everett], an estate for the term of his life by virtue of which [Everett] shall have and enjoy the use, control, income and possession of the property here conveyed for and during his natural life. (B0035.)

Everett was not looking to Jesse for repayment as Janice implies. An August 26, 2008 slip of paper reads, "I Everett T. Conaway am owed for the rip rap by the Conaway Partnership." (B0105.) EJKC had no interest in real property or need for rip rap. No timely claims were filed by the Estate regarding this.

Janice's AB at page 12 states no objections were made to the payments to Janice for the CDI stock by Jesse or his counsel. Payments were made in December, 2010 and December, 2011. On October 31, 2011, Mr. Ellis, estate counsel, represented, "There should be more than sufficient cash assets in the estate account to pay any potential claims." (A0060.) Jesse had previously objected to any further distributions of estate assets pending resolution of the estate issues. A0091. Janice states she relied on Mr. Ellis' representations (Janice AB, p. 13). So did Jesse until November 14, 2012 when he discharged Mr. Ellis (B:0029-0030).

II. REPLY FACTS TO APPELLEE, MR. BAIRD

Mr. Baird's Facts are limited to the time after his appointment as Administrator and Successor Trustee. He notes on page 3 of his AB in footnote 5 one of his goals was to protect the interests of the "Other Beneficiaries." He directs

the Court to AOB Exhibit D, the transcript of the Chancery hearing held April 20, 2015, pages 11-12, where the Vice Chancellor was advised of his attempts to settle the matter by offering four scenarios. On Jesse's behalf, his counsel advised the Court, "He did present formulas, and my client agreed to the formula.... My client was willing to try to resolve this." See AOB, Ex. D., p. 13.

Mr. Baird recounted the Estate and Trust assets and liabilities at the time of Everett's death (Baird AB, pp. 6-8). Using Mr. Baird's numbers, the following summarizes the estate assets, debts and any deficiencies:

Estate Inventory		$100,697
CDI payments due Everett		$150,000
Gross Assets		$250,697
Debts		
DNB	$261,000	
Funeral	$ 10,000	
"Minor"	$ 3,000	$274,000
		($ 23,303)

Assuming an additional $10,000.00 for fees and costs, the estate deficit would be $33,303.00.

Rather than using this pro forma to marshal assets and pay expenses, the Trust on Mr. Ellis' advice sold 32,486 shares of Fulton stock at $10.05 per share or $326,420.76 (Baird AB, p. 8). If probate assets were used to pay estate debts, and assuming the Trust paid the deficiency, 3,314 shares of Fulton stock rather than

32,486 shares would have been sold (3,314 x $10.05 = $33,305.70). 29,172 shares of Fulton would have remained in the Trust.

Everett's Trust gifted 30,200 shares of Fulton stock as follows:

Janice	23,000
Other Beneficiaries	7,200
	30,200

The sale of 3,314 shares to satisfy the estate debt balance would create a shortfall of 1,028 shares of stock for specific gifts (30,200 – 29,172 = 1,028) which at $10.05 per share would be $10,331.40. Now, Jesse has been ordered to pay from the Trust residual the current value of the 7,200 Fulton shares to the Other Beneficiaries, deficiencies if any to Janice after the funds she wrongfully acquired have been accounted for, Court costs, Mr. Baird's fees, and any other administrative costs. This is in excess of $263,000.00 (AOB, Ex. E, p. 9).

Mr. Baird also recites the fact Jesse transferred ownership of the EJKC assets to his personal account after the 2012 rulings in this matter. Jesse relied on the Court opinions that at Everett's death ownership of EJKC passed to Jesse or his trust by contract (Baird AB, p. 13). During the hearings on the Petition for Instructions, the Court amended its prior ruling now holding the EJKC LPI was not solely Jesse's. Jesse revived EJKC and retitled the account in which the stock is held (AOB, Ex. F, p.8). See also the Standstill Agreement stipulated to and granted by the Court of Chancery pending this appeal and the attached Statement of Account. AR0001.

REPLY ARGUMENT

I. THE COURT OF CHANCERY DID NOT APPLY 12 *DEL.C.*, §211 IN ITS DECISION BUT ERRONEOUSLY RELIED ON THE *ARCARO* DECISIONS

A. Question Presented by Appellee, Janice Frederick-Conaway

Did the Court below properly apply 12 *Del.C.*, §211 to determine payment of debts and distribution of assets under Everett's Will and Trust?

Reply. The Court of Chancery in its Bench decisions of April 20, 2015, August 17, 2015, and March 14, 2016, did not rely upon or analyze the issues under 12 *Del.C.*, §211.

B. Question Presented by Appellee, Kevin M. Baird

Did the Court of Chancery correctly rule that Janice was entitled to the CDI Payment? Or did the Trust's specific bequest fail because the right to the CDI payments were never transferred to the Trust, meaning those payments should be considered Estate assets?

Reply: The Court of Chancery erred in ruling the CDI Payments were payable directly to Janice. They were Everett's personal assets and should have been paid to the Estate subject to probate.

C. Standard and Scope of Review

This Court reviews Court of Chancery legal conclusions on a *de novo* basis. *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999)

D. Merits of Reply Argument

1. The Court of Chancery Did Not Address or Rely Upon 12 *Del.C.*, §211 in its Decision. 12 *Del.C.*, §211 Requires Pour Over Wills to be Probated Separately from the Administration of Revocable Trusts.

The Court of Chancery relied on Janice's arguments in her prehearing submissions and restated at the hearings on April 20, 2015 (AOB, Ex. D), August 17, 2015 (AOB, Ex. E) and March 14, 2016 (AOB, Ex. F). Neither the submissions nor the arguments made on behalf of Janice mentioned or analyzed the relationship of 12 *Del.C.*, §211 to Everett's Will and Trust. Rather, the arguments were based on the decisions of the Court of Chancery in *In re Estate of Rocco Arcaro*, 1977 WL 9539 (Del. Ch., Oct. 12, 1977). When Janice states at page 14 Janice AB, "The Court reached this conclusion by relying upon 12 *Del.C.*, §211 and by applying *In re Estate of Rocco Arcaro*" she is incorrect. Had the Court below properly applied 12 *Del.C.*, §211 it would have been compelled to conclude the probate of an estate even if the will is a pour over will is necessary and distinct from the administration of a revocable trust that is the estate's residual beneficiary.

As argued by Jesse in his AOB and as concurred in by Mr. Baird for the most part in his AB, the Court of Chancery erred in stating Everett's Will and Trust were a "unified estate plan" (AOB, Ex. E, p. 6). The estate probate process requires all of Everett's assets, including the payments made to Janice for the CDI stock, be marshalled, the debts of the estate paid, and the residual, if any, paid to the beneficiary, or in this case, the Trust to be thereafter administered. See *In re Estate of Farren*, 131 A.2d 817, 840 (Del. Ch. 2016).

Mr. Baird agrees with Jesse, with two caveats (Baird AB, p. 17). He avers Jesse's argument is overly broad because the Court did not fully agree with Janice's expansive interpretation of the *Arcaro* holding, and secondly, that Jesse was incorrect in stating Trust assets could not be used to pay estate debts. First, even though the Court stated it did not broadly read *Arcaro*, AOB, Ex. E, p. 17, the Court's decision and Rule 54(b) Order had the effect of adopting Janice's arguments *in toto*. It was anticipated Janice would argue on appeal for the all-inclusive interpretation. Thus, it is important to analyze the full impact of the argument so it cannot be subject to further interpretation.

Mr. Baird's second caveat regarding Trust liability for Estate debt, will be addressed in a subsequent section of this Reply Brief. However, it is correct to say that his conclusions regarding the CDI stock payments and the administration of the probate estate are in concert with Jesse's position.

Janice's Answering Brief recites 12 *Del.C.*, §211 (Janice AB, p. 15) emphasizing §211(b) was amended after the *Arcaro* decisions, but failing to emphasize the language applicable to this case. She failed to recognize under §211(b) property devised to a trust is not to be interpreted as a devise to a *testamentary trust* unless the testator specifically directs it to be. Rather, any such property when devised to a trust named as a residual beneficiary is to a separate and distinct entity, i.e., a trust established by a revocable trust agreement, to "...be administered and disposed of in accordance with the provisions of the governing instrument." That is, there is not an integration of the will and trust as there would be if it was a testamentary trust, which is one established within the will itself. This Court has recognized the distinction between testamentary trust, See *In the Matter of Peierls Family Testamentary Trusts*, 77A.3d 223 (Del., 2013), and *inter vivos* trusts, see *In the Matter of Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del., 2013), and how they are separately analyzed and administered. When a beneficiary trust is an *inter vivos* trust, the residual estate is paid to a separately formed trust only after the estate has been fully probated. 12 *Del.C.*, §211 draws a clear distinction between probate administration and trust administration. That is, there is no merger as found by the Court in this case and as advocated by Janice in her Answering Brief.

Janice relies almost exclusively on the holdings in the line of *Arcaro* decisions. *In Matter of Estate of Arcaro*, 1977 WL 9539 (Del. Ch., Oct. 12, 1977);

In Matter of Estate of Arcaro, 1977 WL 176267 (Del. Ch., Oct. 28, 1977); *In Matter of Estate of Arcaro*, 1977 WL 4530 (Del. Ch., Jan. 10, 1978). Baird AB, pages 22, 23, summarized the *Arcaro* holdings in the three companion cases. He concludes those cases upheld the validity of the underlying trust and not the incorporation by reference theory Janice advocates to support her receipt of assets to which she is not entitled. The validity of the *Arcaro* trust was based on timing under the original version of Section 211. That was clarified by the statutory amendments making the issue in *Arcaro* moot.

The effect of the Section 211 amendments post *Arcaro* is misconstrued by Janice. She dismisses the amendments saying, "The amendments merely expanded the acceptable types of *inter vivos* trust instruments." The amendments did much more. They clarified the timing of the formation of trusts as beneficiaries in a will. The amendments to the Uniform Testamentary Additions to Trust Act promulgated in 1991 ("1991 UTATA") adopted in Delaware in 1997 reinforced the distinction between a will (and its probate) and a trust (and its administration). Attached at AR0008-AR0013 are relevant portions of Bloomberg Bureau of National Affairs, *Estates, Gifts and Trusts Portfolios*, Trust Portfolio 860-1st: Revocable Inter Vivos Trusts Detailed Analysis (2016), which analyzes the relationship between pour-over wills and *inter vivos* trusts. The publishers open with the statement, "Typically, the settlor of a revocable trust directs ...[the] residuary estate *be added to the trust*

(emphasis added)." A review of the history of the 1991 UTATA follows with an analysis of the various types of receiving trusts of a residual estate. Trusts receiving the residual estate are separate and distinct entities and not merged as Janice advocates. In the present case, Everett executed separately a Will and a Trust. The Trust was the residual beneficiary, not a testamentary trust thus maintaining its distinction as a separate entity.

Janice asserts that the AOB "misses the point" in its discussion of Section 3.8 of the *Restatement (Third) of Property* regarding the "common law doctrine of incorporation by reference" (Janice AB, p. 19). To the contrary, Janice fails to appreciate the distinction between common law incorporation by reference and Section 211(b). She argues incorporation by reference is actually a merger of the Will and Trust into one instrument. That is incorrect. The language of Section 211(b) maintains the separate identity of a Will administered through probate and a Trust that is administered by the terms of its agreement.

Stunningly, Janice terms Jesse's summarization that wills and trusts are independently interpreted as "nonsensical." Janice AB, p. 20. To the contrary, it is sheer denial to not recognize the cases, commentaries, treatises, Restatements, and other learned sources separating the analysis of a will from a trust, including how each are separately administered. Jesse's AOB cites several examples of the separate treatment of wills versus trusts. Revocable trusts as estate planning tools

are now well established. They grew in popularity in the 1960s leading to promulgation of uniform codes such as the UTATA. The attached BNA commentary, AR0008, represents the established trend and current practice of estate planning. Janice's argument and the acceptance of it by the Court of Chancery that Everett's Will and Trust were a unified estate plan is wrong. The lower Court decision should be overturned with a finding that the Will and the Trust are separate and distinct estate planning documents.

2. The Court of Chancery Erred in Ruling the Assets of Everett's Trust are to be Used to Pay Estate Debts and Expenses

Jesse and Mr. Baird diverge on the lower Court finding that Trust assets are available to pay estate debts and expenses. Mr. Baird and Janice are in accord with that conclusion, if not for the same reasons. Mr. Baird cites 12 *Del.C.*, §3536(c) for the proposition estate creditors can reach trust assets to satisfy claims "...after the estate is exhausted." Baird AB, pp. 17-18. Janice relies on her integrated estate plan theory arguing the Will is silent on expense payment, thus, the Trust must pay them because "...payment is addressed only in the Trust." Janice AB, p. 20.

Janice refuses to acknowledge there is in fact a probate estate, and once the Will was filed, the estate administration is subject to 12 *Del.C.*, Part IV, Administration of Decedent's Estates. Mr. Baird's reasoning makes it automatic that if estate assets are exhausted and a trust exists, trust assets are available to pay

estate debts. Both fail to address the requirements of Title 12 and estate probate procedures.

Everett's probate estate filed an inventory pursuant to 12 *Del.C.*, §1905. Jesse, and Mr. Baird, maintains it is deficient for failing to include the CDI payment due the Estate and not the Trust. As detailed in the Reply Brief Facts, the assets should exceed $250,000.00. The failure to include the CDI payments can be cured by filing an additional inventory, 12 *Del.C.*, §1910.

There was a rush to use Trust assets to pay estate debt. The co-executors, Janice and Jesse, relied on Mr. Ellis' advice to liquidate Trust assets to pay DNB, which was an unsecured creditor. Instead, DNB and other creditors should have been required to file creditor claims within eight (8) months of Everett's death or be forever barred. 12 *Del.C.*, §2102(a). This is a statutory means to identify legitimate claims and establish a statute of repose on claims to permit orderly estate probate. When a decedent has a concurrent revocable trust as here, there is a similar eight (8) month period for filing claims. 12 *Del.C.*, §3337. If DNB was not immediately paid, and a claim not filed against the Estate and independently against the Trust, the claim would have been barred. It was wrong to pay DNB without a proof of claim, and contrary to Mr. Baird's insinuation all debts are not automatically payable by a trust if estate assets are deficient.

The filing of a claim does not make the debt automatically payable. The executor can reject the claim commencing a three (3) month perfection period which if not met again bars the claim. 12 *Del.C.*, §2101(c). Clearly, this did not occur here. Assuming all claims are properly filed and perfected, the executor must file an annual accounting with the Register of Wills, 12 *Del.C.*, §2301. Such accounts detail the payment of all estate debts, administrative expenses and costs. Everett's First Account is in Jesse's Appendix. A0014.

Payments of legacies, for example residual assets to Everett's Trust, may be refused if there are insufficient assets to pay all just demands against Everett's estate. 12 *Del.C.*, §2312. Had all assets been identified and all debts paid, there would have been a deficiency resulting in no payments to the Trust. 12 *Del.C.*, §2105 establishes an order of preference for payment of claims, with the right to petition the Court of Chancery to determine the order. 12 *Del.C.*, §2106. Since DNB was an unsecured creditor, A0050, it was eleventh in the order of preference, that is, holder of a contract for the payment of money. 12 *Del.C.*, §2105(a)(11). In all likelihood, it would not have been paid in full with an estimated deficiency of approximately $33,000.00. It would have had to decide whether to seek the deficiency against the Trust, assuming a claim had been filed.

After accountings are filed, any interested person can seek a Decree of Distribution from Chancery. 12 *Del.C.*, §2332. The Court can enter a decree

distributing part of the assets, but reserving a contingency for estate liabilities, 12 *Del.C.,* §2335, or can distribute in kind assets "after the payment of debts." 12 *Del.C.,* §2336.

Had Everett's estate been probated as outlined, it would have had sufficient assets to pay most of the estate debt. It would not have been necessary to divest substantial Trust assets as Janice blithely argues. The Delaware Code dictates the probate process. Janice argues Everett's Will does not require payment of debt, with such payment addressed in the Trust. Janice AB, p. 20. The Trust and particularly Section Three, Disposition After Trustor's Death, does not include a provision that the Trust corpus will pay estate debts and costs. See A0018-0031. Section Three directs specific bequests and includes contingencies in the event a beneficiary predeceased Everett. Perhaps Janice is relying on Section Seven of the Trust entitled Administrative Powers. A0026. That does not help her since Administrative Powers under both the Will and Trust are essentially the same. The executors of the Will could dispose of estate assets for such purposes as they determined, A0003, Subparagraph C, as can the trustee, A0026, Subparagraph A; the executors could "...borrow money for any purpose in connection with the administration of my estate..." A0003, Subparagraph E, as can the trustees A0028, Subparagraph I; the executors could compromise claims against the estate or prepay any debt, A0004, Subparagraph F, as can the trustees A:0027, Subparagraph D; and, the executors

were granted the power to retain professionals "...in the administration of my estate...," A0005, Subparagraph K, a grant not specifically granted to trustees but inferred in the general Powers of Trustee, A0025. Clearly, Everett *did* give his executors the power to pay estate debts which he expected to be performed as part of the probate process.

Janice argues the Court of Chancery correctly adopted the Trust into Everett's Will because that was "his intent." Janice AB, p. 21. Where a provision in a trust is clear and unambiguous, the Court cannot consider extrinsic evidence to vary or contradict the meaning of the provision. *Otto v. Gore*, 45 A.3d 120, 136 (Del., 2013). The language in both the Will and Trust is clear, thus it is not necessary to divine intent.

Janice accuses Jesse of misleading this Court on his objection that the Court of Chancery obligated him to pay estate debts and expenses from the Trust's residuary, stating such payment is "...the normal operation of Delaware's trust abatement statute," Janice AB, p. 21. She ignores the necessity of probating the estate before the trust is considered. Instead of focusing on trust abatement, 12 *Del.C.*, §3595, the proper Code section is 12 *Del.C.*, §2317, Abatement of Estate Assets. Janice refuses to acknowledge estate asset abatement since it would require the CDI payment and gifts of personal property to be used to pay estate debt.

Before trust assets can be considered to pay estate debt, Janice must repay the money she improperly received both from CDI and her invasion of the estate account, and account for the personal property she received. The Court of Chancery erred in ruling those assets were Janice's. These were Estate assets to be used to pay Estate debts. She should be ordered to repay those assets.

II. THE COURT ERRED IN ORDERING JESSE TO RETURN THE 69% LIMITED PARTNERSHIP INTEREST IN EJKC, LP TO THE TRUSTEE

A. Question Presented:

1. Was the 69% LPI a residuary asset of the Trust, subject to payment of specific bequests, and debts and expenses of administration?

Reply: Pursuant to the prior rulings regarding ownership of the limited partnership interest the ownership of the LPI vests in Jesse. Even if it passed by way of the residual clause of the Trust, it is not available to pay estate debts and expenses.

B. Standard and Scope of Review

This Court reviews Court of Chancery legal conclusions on a *de novo* basis. *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999).

C. Merits of the Argument

The Court of Chancery as affirmed by this Court held by contract Jesse was the owner of all the LPI in EJKC. Even if the interest was determined to pass to Jesse by way of the trust residual clause, the asset is Everett's LPI and not the assets of the limited partnership and thus not available to the trustee to pay debts and expenses.

D. Argument

1. The 2012 Ruling in this Matter Finding Jesse was the Owner of EJKC by Contract is Correct.

Both Janice and Mr. Baird argue the 69% LPI Everett's Trust owned in EJKC should be "returned" to the Trust to be used by Mr. Baird to pay estate debts and specific bequests. These positions mirror the Court's Order in this matter. AOB, Ex. 6, para. (a). The Court and both Appellees fail to acknowledge the nature of the interest in question.

Janice argues ownership of the LPI involves the "interplay of the LPA and the Trust." Janice AB, p. 24. That is incorrect, but followed by an accurate statement of law that the LPA is a contract, citing *Norton v. K. Sea TransPartners, L.*, 67 A.3d 354 (Del., 2013). A complete reading of cited portions of that case is instructive:

> Limited partnership agreements are a type of contract. We, therefore, construe them in accordance with their terms to give effect to the parties' intent...When construing contracts, we construe them as a whole and give effect to every provision if it is reasonably possible. A meaning inferred from a particular provision cannot control the agreement if that inference conflicts with the agreements overall scheme...If the contractual language at issue is ambiguous and if the limited partners did not negotiate for the agreement's terms, we apply the *contra proferentom* principle and construe the ambiguous terms against the drafter. *Id.* p, 360.

Janice (Janice AB, p. 25) and Mr. Baird (Baird AB, p. 27) state Jesse's position he owns the LPA by contract was waived or only briefly mentioned in the AOB. That ignores the argument in the AOB on pages 29-34 pointing out how the

prior rulings of the Court of Chancery as affirmed by this Court were changed by the Court below on the Petition for Instructions. Jesse relied on the original ruling which held:

> For the reasons stated in my Letter Opinion of February 15, 2012, I found that the ownership interest in EJKC...held by [Everett's Trust]...passed to Jesse...upon the death of Everett...Ownership of that interest is determined not by equity, but as a matter of contract law. AOB, Ex B, and p. 30.

Janice claims the LPA is silent on the issue of ownership of the LPI on the death of a limited partner. Applying the law cited from the *Norton* case above, that is wrong.

The LPA must be read in its entirety. There is no disputing the purpose of the LP. Janice stated in her AB on page 8, "The objective of the Partnership was to provide a mechanism by which Everett could make voluntary gifts of appreciated stock to Jesse." Under the LPA, A0032, there are three partners, CONFAM, Inc., the general partner corporation owned by Jesse and Everett, and Everett's Trust and Jesse's Trust, in essence just Jesse and Everett. The initial contributions according to the LPA were: CONFAM 1%; Everett 89%; Jesse 10%. A0035, 36. The LPA provides:

> No partner shall be entitled to any interest on such Partner's capital account or on such Partner's contributions to the capital...except as...provided herein, no Partner shall have the right to demand or to receive the return of all or any part of [the] capital account or of [contributions] to the capital... . A0035.

Distributions were only to be made in the following priority:

1. Repayment and reimbursement of monies advanced [for] the operation of the LP.
2. Return of capital proportionately.
3. Payment of profits.

A0038.

They agreed there were three events of termination:

1. Upon expiration of twenty-five years, or in this instance August 9, 2027;
2. Upon sale of all LP properties;
3. "Upon agreement of the General Partner and the Limited Partner."

A0039.

Importantly, they agreed the partnership interests could only be transferred to another partner, that is, to each other. An interest could be transferred to a third party only by unanimous consent. A0039-40. If either withdrew, they were to receive 50% of the value of the capital account and the LPI remained with EJKC.

When the LPA is considered in its entirety, the clear intent was the entire limited partnership was to vest in one or the other, but not in a third party. Everett

was born in September, 1915. A001. It was reasonable to assume he would be deceased in 2027 when the LP terminated by its own terms. The "properties" of the LP was stock in Fulton, but it could have been any asset. These were not sold, so no termination was effectuated. The third termination event was by agreement of CONFAM and *the* Limited Partner, that is, a singular partner not plural. The introductory language of the LPA defined "Limited Partner" as Jesse and Everett collectively reinforcing the fact their interests were merged into one requiring unanimous consent. The restrictions on assignability and withdrawal virtually guaranteed the class of partners would not expand. The LPA terms clearly intend the assets would stay in the LP with ownership vesting in the surviving limited partner. That is exactly what the Court of Chancery found in 2012.

Janice advances her arguments the LPI should not pass by contract by attaching to her Appendix documents not in the record below and lodged with this Court. She attaches Jesse's Motion for Summary Judgment filed in 2012 and her 2012 brief. The Court should reject and ignore these *ultra vires* documents and adopt its prior affirmation of the 2012 Chancery rulings. Janice comments in her footnote 75, Janice AB, p. 27, that Jesse breached his fiduciary duties by retitling the LPI to his own account. This is despite the fact the Court below acknowledged it was done in good faith due to the prior ruling, AOB, Ex. E, p. 5; that once the Court

changed its ruling, EJKC was revived; and knowing the account had been restored in EJKC's name. AR0006.

2. The LPI is Not an Asset that can be Returned to the Trustee

Janice and Mr. Baird argue since the LPI is a residual asset it should be returned to the Trust. Both fail to appreciate the nature of the asset.

Everett's Trust owned a 69% *limited partnership interest* in EJKC. His failed attempt of gifting to Janice under the Trust was "...the Trustor's partnership interest in EJKC..." A0021. Everett did not own the partnership assets, nor could he by law. 6 *Del.C.*, §17-701(13). Additionally: "A partnership interest is personal property. A partner has no interest in specific limited partnership property. A partnership interest is only the right to a share of profits, losses and distributions." 6 *Del.C.*, §17-101(13); "A creditor of a limited partner seeking to satisfy a debt against the LPI has only the right to receive distributions against that LPI if made." 6 *Del.C.*, §17-703(a); and, "No creditor of a partner...shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership." 6 *Del.C.*, §17-703(e).

In the case of *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund LP*, 2015 WL 9060982 (Del. Ch., 2015) the court was called upon to rule on the cited sections of the Delaware Code. The general partners had made

distributions of partnership assets to favored limited partners disproportionate to their capital account. The Court ruled:

> By claiming an ownership interest [in LP assets] the Favored LPs are claiming an ownership interest in specific Partnership property. By statute, a limited partnership is a separate entity, and individual partners do not have any rights in specific partnership property. The LP Act says just that...Ownership of a partnership interest does not carry with it any rights to specific limited partnership property. *Id.*, at *5.

Yet, what the Court ordered, and Janice and Mr. Baird advocate, is a return of 69% of the assets of EJKC to pay expenses, debts and specific bequeaths. That is not possible under the law. Assuming the 69% LPI did not pass to Jesse under the LPA, what the Trust would have is a 69% LPI, not the Fulton stock owned by EJKC. Appellees' argument amounts to a termination or dissolution of EJKC. Janice clearly has no right to seek that. At most, and Jesse denies it is correct, she would be a creditor who could seek a charging order. Mr. Baird as Trustee would have conflicting duties to the trust beneficiaries, including Jesse, whose option would be to seek a judicial dissolution. 6 *Del.C.*, §17-802, would require a finding "...it is not reasonably practicable to carry on the business in conformity with the partnership agreement." That issue clearly is not before this Court.

Once EJKC was revived and the account restored, pending this appeal ownership of EJKC is comprised of exactly what it was at Everett's death: a 1% general partner, CONFAM; a 69% limited partner, Everett's Trust; and a 30%

limited partner, Jesse's Trust. They each have their rights under the LPA, which does not include Mr. Baird being able to invade or obtain EJKC's assets.

The result that should be ordered is for Janice to return to Everett's Estate all the assets she has wrongfully obtained. That is, all tangible personal property (or their value per the Inventory), all funds improperly paid to her, the $150,000 for the CDI stock, plus legal interest and costs. The Estate can then be closed and the residual funds repaid to the Trust after which the Trust can make its specific bequeaths to the Other Beneficiaries and the balance of the Trust administered.

3. The Law of the Case Doctrine Applies

Both Appellees dispute the applicability of "the law of the case" doctrine herein. This stems from Jesse's objection to Chancery amending its prior ruling that Everett's LPI passed to Jesse by contract. The Court has now ruled it is his Trust residual subject to payment of estate debts and bequeaths. AOB, Ex. E, pp. 4-5.

This doctrine is not inflexible when a prior decision is clearly wrong or there are changed circumstances. *Taylor v. Jones*, 2006 WL 1566467 (Del. Ch., 2006 at *5-6). However, here it is necessary to consider what is "the case." Jesse submits "the case" is the analysis and interpretation of Everett's estate planning documents and the EJKC LPA. There is a continuum of interpretations each of which bear on the other.

The Court of Chancery has explained the law of the case doctrine as follows:

> The law of the case doctrine, like *stare decisis*, is founded on the principle of stability and respect for court processes and precedent...[it] is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout litigation. In practical terms, the doctrine appears most often when a trial court is required to give effect to law established in a case after it has been appealed and the appellate court has ruled on the relevant issues...[The] law of the case doctrine, by its terms, contemplates one continuous action within the same court system. Both the rulings [of this Court] and the rulings issued on appeal by the Supreme Court would be binding as law of the case."

Carlyle Investment Management, L.L.C. v. Moonmouth Company, 2015 WL 5278913 (Del. Ch., 2015, at *7-8). The facts are unchanged here. The new Court ruling has unilaterally changed the affirmation of this Court of the prior decision.

The *Taylor* case allows the Court to review the equities involved. It is agreed the intent of the LPA was to transfer ownership of the LP assets from Everett to Jesse by way of gifting. Consequently, they entered into the LPA without the involvement of other parties, but Everett surreptitiously breached its terms by attempting to gift the LPI to Janice which has caused many issues in the probate of the estate and administration of the Trust. The intention of Jesse and Everett regarding ownership of EJKC was established by contract and never amended. Whatever Everett's alleged intentions were regarding the Trust's LPI interest at a later date should not be deemed to override the LPA. To assure an orderly result, the Court below should be bound by its prior ruling to avoid inconsistent results.

APPELLANT/CROSS-APPELLEE JESSE FREDERICK-CONAWAY'S ANSWER TO APPELLEE JANICE RUSSELL-CONAWAY'S CROSS-APPEAL

SUMMARY OF ANSWERING ARGUMENT ON CROSS-APPEAL

1. **Denied.** The Court of Chancery properly ordered Janice to pay to the Estate or Trust legal interest on the CDI payments made to her. The Court's reasoning for imposing legal interest was stated on the Record. The CDI payments were personal to Everett and not payable to the Trust nor distributable to Janice. Until the assets are all returned to the Estate for proper administration it is unknown if Janice will have any offset rights and thus there are no inequities she can claim.

2. **Denied.** Janice is not just a named beneficiary but also a fiduciary who breached her duties by removing for her own self-interest $77,987.00. She is subject to a strict liability standard for self-dealing and the Court properly ordered her to return the funds she improperly appropriated with legal interest.

ANSWERING STATEMENT OF FACTS ON CROSS-APPEAL

Certain Facts of Janice on Cross-Appeal require clarification.

She states Everett sold his CDI stock prior to his death. It is correct two payments of $75,000.00 were to be paid on anniversaries of the sale. Janice AB, p. 37. Janice fails to state the payments were to be made to Everett individually and not to his Trust. A066. Relevant excerpts of the SPA language are set forth in the AOB, pp. 9-10, and incorporated here by reference. Mr. Baird in his Answering Brief at pages 10-11 states there is no evidence Everett assigned the payments to the Trust. Mr. Baird and Jesse take the position these payments were Everett's personal assets and subject to estate probate and not Trust assets payable to Janice.

Janice recites Mr. Ellis' statement no objection to the payments to Janice were made by Jesse or counsel. Janice AB, pp. 37-38. That is correct, when the payments were made to Janice at Mr. Ellis' direction in December, 2010. At that time, counsel had been retained solely to determine the question of ownership of the limited partnership interest for which suit was filed on December 22, 2010. Mr. Ellis was the estate counsel. Later, Mr. Ellis misrepresented to Jesse and counsel there were sufficient assets in the *estate* account to pay any potential claims. A0060. Jesse and counsel justifiably relied on Mr. Ellis' statements as estate counsel. Mr. Ellis instructed the December, 2011 payment be made despite acknowledging that on August 10, 2011 he was advised by Jesse's counsel no further distributions should

be made during the pending litigation. B0029; A0091. Thus, Janice and Mr. Ellis are wrong regarding the lack of an objection for the December, 2011 payment.

Janice received $77,986.22 in cash from the estate plus personal property valued on the Inventory at $33,500.00, A0012, (household furnishings, 2002 Silverado, 2000 utility trailer). Janice's Facts fail to identify the receipt of the tangible property since Chancery agreed the specific bequests were not subject to an accounting of assets available to pay estate debts. AOB, Ex. E, pp. 16-17.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED JANICE WAS TO PAY LEGAL INTEREST ON FUNDS SHE IMPROPERLY RECEIVED FROM THE ESTATE

A. Question Presented

Did the Court of Chancery properly assess legal interest on the $150,000.00 Janice improperly received for the CDI stock payments?

B. Standard and Scope of Review

This Court reviews Court of Chancery legal conclusions on a *de novo* basis. *Schrock v. Nash,* 732 A.2d 217, 223 (Del., 1999).

C. Merits of Argument

1. The Court of Chancery properly ordered Janice to pay legal interest on the payments for the CDI stock to the Trust

Janice argues that it was improper for the Court of Chancery to order her to pay legal interest on the CDI stock payments made to her. Her argument is predicated on the erroneous belief the funds were properly paid. She ignores as she has done consistently the undisputable fact the CDI payments were per the SPA payable to Everett personally and not to the Trust. The funds were thus payable to the estate to pay debts and not to Janice.

Janice errs in calling the payments "advances." Janice AB, p. 40. The CDI payments were not Trust assets since the attempted gift failed. It is not even proper to state it was Everett's intent that the stock payments be Trust assets. Perhaps it could be so argued when the Trust was executed on September 21, 2009, but the SPA was executed three (3) months later on December 22, 2009, A0062, and Everett being acknowledged as an astute business man did not thereafter assign the right to receive the stock payments to his recently prepared Trust or to Janice despite having the right to do so. A0081, paragraphs 9, 10. Thus, it is easy to infer Everett no longer intended the payments to be made to the Trust but to be available to his estate. There is no evidence of record either way so the clear and unambiguous fact he was to personally receive the payment must control, and the Court of Chancery erred in finding Janice was entitled to receive the payments. The Vice Chancellor correctly ruled the payments were premature and that legal interest was payable.

The funds must be returned to the estate with interest to make it whole and able to properly pay debts, including the funds loaned from the Trust to pay Estate debts.

2. The Court of Chancery Justified its Assessment of Legal Interest

Janice argues the Court failed to give reasons for the imposition of legal interest. Janice AB, p. 42. That ignores the following rationale of the Court when Mr. Baird's counsel asked what interest rate to apply:

The Court: This is the legal interest rate.

Mr. Smith: Which is what I put in there. And there was some - - we didn't actually say it in the bench ruling.

The Court: That's quite true. It was open. And I have read Mr. Gibbs' position. I have read your position. This is something that, as a fiduciary, she divested to herself. I know she did it under a claim of right, but the proper rate of interest is the legal interest rate in that situation. AOB, Ex. F, pp. 16-17.

Janice's argument fails because the Court reviewed not only the position of the Trustee, but also *Janice's* on the interest issue. It is wrong for her to argue he failed to consider the merits or "...the equities or to identify an equitable maxim or legal basis for the conclusion." Janice AB, p. 43.

The Court has broad discretion in fixing the interest rate to be applied. *Boyer v. Wilmington Materials, Inc.,* 754 A.2d 881, 909 (Del. Ch., 1999). Where a fiduciary has improperly removed or received funds, Chancery has assessed legal interest. *In re Buonamici,* 2008 W L 3522429 (Del. Ch., 2008); *Gilmore v. Gilmore,* 2008 WL 5244573 (Del. Ch., 2008). Therefore, the Court in this matter did consider the positions of counsel and had precedence to impose legal interest.

3. The Court of Chancery Erred in Finding the CDI Payments Were Properly Paid to Janice so There is no Inequity to her

For the reasons heretofore stated, Jesse avers the CDI payments were not properly paid to Janice. There is no evidence of Everett's intent to subvert the clear language of the SPA at the time he entered into the agreement to sell his CDI stock.

Thus, the remedy of the Court assessing legal interest would not contradict Everett's intent as Janice argues. Janice AB, p. 43.

Rather, the objective facts are: (1) the CDI stock payment was personal to Everett and should have been paid to his estate; (2) Janice as a fiduciary improperly received the funds to the detriment of the Estate, the Trust, and Jesse; and (3) the funds should be repaid to the Estate with legal interest.

II. THE COURT OF CHANCERY CORRECTLY ORDERED JANICE TO REPAY $77,987.00 SHE IMPROPERLY RECEIVED AS A FIDUCIARY, PLUS LEGAL INTEREST

A. Question Presented

Did the Court of Chancery correctly order Janice, a co-executor and co-successor trustee, to repay advances made to herself plus interest despite the fact she may have a beneficial interest in Trust assets?

B. Standard and Scope of Review

This Court reviews the Court of Chancery's legal rulings on appeal *de novo*. *Schrock v. Nash*, 732 A.2d 217, 223 (Del., 1999).

C. Merits of Argument

Janice may be a beneficiary, but she is first and foremost a fiduciary of the Estate, A0005, and Trust, A0029. She had a duty to not do anything that was detrimental to the administration of either.

The Rule 54(a) Order, AOB, Ex. G(f), identifies all improper payments to her being made in 2012. This was after Jesse, the other co-fiduciary, made clear to Mr. Ellis on August 10, 2011 he objected to "...any further distributions of assets until after the litigation is complete and all assets, liabilities and claims may be properly addressed." A0091.

Janice reasoned she could rely on Mr. Ellis' advice concerning the advances. AB, p. 38. The courts under trust law impose a strict liability standard on self-dealing despite potential mitigating circumstances. *Stegmeier v. Magness*, 728 A.2d 557, 564 (Del., 1999). Despite Jesse's objections, and without notice to him, Janice used the estate bank account as her own. A0097-0099. There is an absolute prohibition on a fiduciary using fiduciary property: "...the purpose of the rule remains – to relieve the [fiduciary] of any claim of a conflict of interest, and to prevent fraud through imposing strict prohibitions of self-dealing on the basis that the fraud in such transaction is difficult to discern." *Stegmeier*, page 565.

This case is clearly distinguishable from *In re Lomker* 1999 WL 1022082 (Del. Ch., 1999) cited by Janice. The alleged breach of fiduciary duties in that case involved failure to timely file the Inventory and disposal of sentimental items of little value without itemizing them on the Inventory when filed. Janice's breach was the self-appropriation of $77,987 of estate funds to her own use and benefit.

The Court properly ruled Janice should return the money with legal interest. The amount in question has been agreed upon. There is no finding that Janice will be ultimately entitled to these funds. They should be repaid to the Trust that loaned the Estate proceeds of the Fulton stock sale for the payment of debt. Since 2012, Janice has had exclusive possession of the funds and should properly pay interest on the return of the money.

CONCLUSION

For the reasons set forth in the Opening Brief and this Reply Brief, it is prayed this Honorable Court will reverse the ruling of the Court of Chancery and find the Estate and the Trust are to be separately administered, that the LPI titled in Everett's Trust vests in Jesse, and that Janice is to repay and return to the Estate all funds and personal property improperly appropriated by her, with interest.

Respectfully submitted,

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