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Case Number 411,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE:	:	
Estate of Bennie P. Farren	:	No. 411, 2016

****

PATRICIA A. MCGLAUGHLIN,	:	
As Successor Trustee of the	:	
Hercules Living Trust and	:	
Beneficiary of the Hercules Living Trust,	:	
	:	ON APPEAL FROM THE
Petitioner Below,	:	COURT OF CHANCERY OF
Appellant,	:	THE STATE OF DELAWARE
	:	IN C.A. NOS. 8714-VCL AND
v.	:	9385-VCL
	:	
ANDREW P. FARREN,	:	
As Executor of the Estate of	:	
Bennie P. Farren under the Will of	:	
Bennie P. Farren, and in his individual	:	
capacity,	:	
	:	
Respondent Below,	:	
Appellee.	:	

ANSWERING BRIEF OF RESPONDENT BELOW, APPELLEE ANDREW P. FARREN

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DATED: November 9, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

NATURE OF PROCEEDINGS

Appellant Patricia McGlaughlin's ("McGlaughlin") description of the procedural posture of the case is accurate. This is the Answering Brief of the Executor Andrew P. Farren ("Executor").

References to "*Opinion*" are to the January 19, 2016, *Opinion* by Vice Chancellor Laster. References to "*Post-Trial Order*" are to the Vice Chancellor's Order dated July 13, 2016. Both were attached to McGlaughlin's Amended Opening Brief.

SUMMARY OF ARGUMENT

I. Appellant McGlaughlin's Argument is denied. *Pierce v. Higgins*, 531 A.2d 1221 (Del. Fam. 1987) did not create rigid requirements for the registration of a foreign support order when dealing with a support obligor who is deceased. Therefore, the Executor was correct in not requiring the claimant to first register the foreign support order, and by accepting the order without registration. The Vice Chancellor was also correct in his determination that "Full Faith and Credit" required that the Florida Court Order be recognized by this State.

II. Appellant McGlaughlin's Argument is denied. The Vice Chancellor properly denied McGlaughlin's motion for summary judgment because, viewing the record in the light most favorable to the Executor, there were numerous issues of material of fact which needed to be resolved at trial. In addition, not requiring the registration of the foreign support order in Family Court did not constitute a breach of fiduciary duty by the Executor. Even if the *Pierce* case had the effect urged by McGlaughlin, it does not necessarily follow that the Executor breached applicable duties.

STATEMENT OF FACTS

Appellant McGlaughlin's Statement of Facts is largely accurate, but in some respects incomplete. The Executor therefor offers the following additional facts.

The Trust

It is noteworthy that until just prior to his death, Ben Farren had intended to fund his Trust with the proceeds of several insurance policies. The Trust was intended to, among other things, pay for certain monthly household expenses until McGlaughlin's death. Within the six months prior to his death, however, the beneficiary designations on the policies were changed to Patricia McGlaughlin. As such, upon Ben Farren's death, McGlaughlin received more than $370,000.00, and the Trust was never funded. See *Post-Trial Order*, Section I(D).

The Florida Court Proceedings

There is no dispute that both the decedent and Ms. McGlaughlin were well aware of the existence of the Florida child support orders and the consequences of Ben Farren's non-compliance. McGlaughlin had testified at her deposition that she and her paramour had obtained and read a transcript of the Florida proceedings, and that Ben Farren had been ordered incarcerated as a result of persistent non-compliance with orders to pay child support (B-3).

After learning of the existence of the Courson claim stemming from those same obligations, McGlaughlin did nothing to satisfy herself as to the validity of

the claim. Rather, she relied exclusively on the Executor to deal with the claim (B-1, 2).

Yet despite her reliance on the Executor, McGlaughlin asked Andrew Farren to resign so that she could dispute the claim. He declined to resign, but instead explored whether McGlaughlin's counsel could assume defense of the claim while he remained as Executor. An Ethics Opinion from independent counsel advised against such a procedure. *Post-Trial Order*, I(H).

Following his investigation of the background of the claim and discussions with his own attorney, the Executor concluded that the claim was valid and must be paid. *Post-Trial Order*, II(2). He pointed out to McGlaughlin the need to sell the house since liquid assets of the estate were insufficient to cover the administrative expenses and payment of claims. As an accommodation to McGlaughlin, however, Andrew Farren offered her the option of satisfying the claim from the insurance funds that she had received or by way of a mortgage against the house. *Post-Trial Order*, I(I). Lacking a response, the Executor had no alternative but to petition the Court of Chancery for approval to sell the only other property owned by the decedent at the time of his death.

The Opinion

The Vice Chancellor's detailed January 19, 2016 *Opinion* rejected the Master's earlier rulings, and determined that the Courson claim was valid and had

been timely filed. He left for subsequent proceedings the calculation of interest on the basic arrearage. Following supplemental submissions by counsel, that amount was quantified at $99,672.00 as of January 21, 2016, with continuing interest until paid (B-4-7). That sum, together with the expenses of the estate administration, still far exceeded liquid assets of the estate, and still compelled the sale of the real estate. But the Court declined to immediately order the sale of the property, based upon equitable considerations that might dictate a different remedy after trial.

Similarly, the Court denied McGlaughlin's request that the Executor be removed, again finding issues of material fact that precluded summary judgment, and that instead needed to be resolved at trial.

ARGUMENT

I. THE VICE CHANCELLOR CORRECTLY DETERMINED THAT THE COURSON CLAIM WAS VALID AS A MATTER OF LAW

A. Question Presented

The question presented is whether the Vice Chancellor correctly determined as a matter of law that registration of a foreign child support order in the Family Court was unnecessary before filing a claim and seeking enforcement against the deceased obligor's estate in Delaware. That issue was before the Vice Chancellor and resolved in the Opinion and the Post-Trial Order.

B. Standard of Review

The standard of review for an appeal from a grant of summary judgment is whether the court below committed an error of law. The Supreme Court may review the controversy *de novo.* *Lorillard Tobacco Co. v. American Legacy Foundation,* 903 A.2d 728 (Del. Supr. 2005).

C. The Merits

McGlaughlin's first argument revolves entirely around *Pierce v. Higgins,* 531 A.2d 1221 (Del. Fam. 1987), decided by the Family Court in 1987. McGlaughlin argues that *Pierce* established a mandatory procedure for registration of a foreign child support order which serves as prerequisite to the enforcement of child support arrears against a decedent's estate. As the Vice Chancellor ruled, though, McGlaughlin is incorrect on multiple levels.

The process of presenting a claim is fairly simple and straight forward in this State (See 12 *Del. C.* §2104). Claims with greater indicia of validity (for example, recorded mortgages), are presumed valid and need not be presented again (See 12 *Del. C.* §2103). But for those claims not deemed valid on their face, a personal representative must evaluate a claim as presented, and then make a decision to either accept the claim and see that it is paid, or deny it and force the claimant to pursue its remedies.

As a result, numerous unsecured and unregistered claims are presented and dealt with during estate administration. Claims may be filed by hospitals seeking payment of expenses incurred during a decedent's last illness. A funeral service practitioner may file a claim for services rendered during the burial process. And a bank holding a credit card account may file a claim for payment under the terms of a credit agreement. Those claimants are not required to obtain judgment in a law court or otherwise register their claims elsewhere prior to presenting them as claims against an estate.

A review of the decision in *Pierce* reveals that Judge Wakefield never required that a support recipient such as Rebecca Courson first register a support order and establish an arrearage figure in Family Court as part of, or a prerequisite to, enforcement against a deceased support Obligor. Indeed, in reaching an initial conclusion that unpaid arrears survived the death of the Obligor in that case, the

Family Court accepted the decision of the South Carolina Court of Appeals[1] that a support recipient need not obtain a judgment and then present that judgment to the personal representative of an estate before it could constitute a claim against the estate. Thus, Judge Wakefield concluded, after reviewing 10 *Del. C.* §3701, that support arrears, like other causes of action, survived the death of the Obligor.

With respect to registration of a foreign support order, the Court quoted language from former 13 *Del. C.* §639 that allowed an obligee to register such an order. That and other sections of the Code relating to foreign support orders have since been replaced by the Uniform Interstate Family Support Act ("UIFSA"), at 13 *Del. C.* §6-101 *et seq.,* which became effective July 1, 2006. But Section 6-601, the closest in content to the former Section 639, reads "a support order or income-withholding order issued by a tribunal of another state may be registered in this State for enforcement" [emphasis added]. In both statutes, the language clearly gives the obligee the option of registering an order, but that individual is under no obligation to do so[2].

Had the Legislature intended registration to be a mandatory prerequisite to enforcement against a deceased obligor, the statute would have used the term "shall" as opposed to "may". Delaware Courts have consistently followed the

[1] *In Re Lundh,* 343 S.E. 2d 644 (S.C. App. 1986).
[2] It is also noteworthy that §6-501 permits enforcement of an income-withholding order issued in another state without registration in Delaware.

"plain meaning rule" for construction of statutes. In the absence of any ambiguity, the language of the statute must be regarded as conclusive of the General Assembly's intent. *Turnbull v. Fink*, 668 A.2d 1370 (Del. Supr. 1995).

McGlaughlin instead argues that "may" applies only to the later act of enforcement, but that registration somehow remains mandatory. Such an interpretation patently ignores the plain meaning rule. The earlier Section 639 was no different. It read:

> "An obligee may register a foreign support order in a Court of this State in the manner, with the effect and for the purposes herein provided. The Chief Judge of the Family Court shall maintain a Registry of Foreign Support Orders in which he shall file foreign support orders."

That subsection (a) was titled "Registration of foreign support orders permitted". Only in subsection (c) of Section 639 was the process of enforcement addressed, but nothing in the language of the statute suggested a mandatory registration requirement.

That language is important since the same Family Court Judge (and McGlaughlin here) recognized that enforcement of such an obligation against a deceased obligor has to comply with the requirements of Title 12 as to decedents' estates. As Judge Wakefield commented, enforcement by Family Court is limited to those obligors still living.

McGlaughlin's argument is that there are two distinct and mandatory

components necessary to enforce child support arrears – an adjudication of arrears, and then the enforcement of that total. But as the Vice Chancellor wrote, "…nothing in *Pierce* mandates that litigants always take a connecting flight through Family Court rather than a direct flight through Chancery" (*Opinion*, page 22). McGlaughlin also ignores 13 *Del. C.* §6-104(b)(1), which points out that UIFSA does not provide the exclusive method for establishing or enforcing a support order. As the Vice Chancellor also observed, a determination of the amount of interest accruing over time (the object of this proceeding) is something the Court of Chancery does routinely (*Opinion*, page 25).

Once an obligor such as Bennie Farren has died, enforcement of a child support order, whether originating or registered in Delaware, or already existing elsewhere as a final order, was within the exclusive jurisdiction of the Court of Chancery. That is because 12 *Del. C.* §2102 requires that all claims against a decedent's estate be presented to the personal representative, and if not accepted, be enforced in Chancery[3].

The only reason for registering a foreign support order in Family Court would be to enable the recipient to attempt enforcement in this State while the

[3] That is, of course, if the enforcement triggers Chancery's traditional jurisdiction. If enforcement does not compel equitable jurisdiction (such as in a traditional suit for damages), such an action lies with a law court. Here, the enforcement action was a petition to sell land to pay debts, a remedy available only in Chancery. See, for example, 12 *Del. C.* §2104(2).

obligor was still alive, since Family Court would have jurisdiction in that situation. Rebecca Courson was not required to take the meaningless step of registering her Florida Order in the Family Court when she could proceed with a direct claim against the estate. Indeed, equity will not require a useless act to be undertaken. *Heineman v. Datapoint Corp*., 611 A.2d 950 (Del. Supr. 1992). Thus, there should be no requirement that a Final Order from the State of Florida be pre-registered when there is no enforcement possibility.

McGlaughlin's theory also conceivably triggers a potentially mind-boggling situation in which a claimant such as Courson would be required to visit three different Delaware Courts in order to process her claim – Family Court to register the order[4], a law court to establish the amount due and the liability previously denied by the personal representative, and finally Chancery Court to enforce the judgment against estate assets. Such an inefficient and complex situation could not have been contemplated.

The Executor also argued, and the Vice Chancellor agreed, that a detour through Family Court undermines the Full Faith and Credit Clause of the United States Constitution. The Courson claim was based upon a "Final Order of Custody and Support" effective July 21, 1986, entered in the Circuit Court of the 9th Judicial Circuit, In and For Osceola County, Florida, in Case No. 84-1266. Under the Full

[4] The "ministerial duty of a clerk", as referred to in *Pierce v. Higgins, supra*.; *Opinion* at page 18.

Faith and Credit Clause, this order, when presented in Delaware, was entitled to be treated the same as if it had been originally decided in this State. *Pyott v. Louisiana Municipal Police Employees Police Retirement System*, 74 A.3d 612 (Del. Supr. 2013), citing Article IV, Section 1 of the *U.S. Constitution* and the Full Faith and Credit Act, 28 *U.S.C.S.* §1738.

As the Court Below noted, though, the Full Faith and Credit Clause and the Full Faith and Credit Act did not initially address interstate enforceability of child support orders. But in 1994 Congress adopted the Full Faith and Credit for Child Support Orders Act, which requires that a State Court "… enforce according to its terms a child support order made…by a Court of another State". 28 *U.S.C.S.* §1738B (a)(1).

The Florida court order required Bennie Farren to pay specific amounts over a period of time, terminating when his children reached their majority. That he failed to comply with that order has never been disputed, and since the commencement of proceedings in this State there has been no suggestion that Florida lacked jurisdiction, that the order was secured by fraud, or any other allegation that might serve to undermine the obligation. McGlaughlin's objection has always been to the amount due, and calculations of interest are routinely accomplished in Chancery Court proceedings.

To the extent that she argues that the Florida Court never used the term

"judgment", the opinion below points out that under Florida law "unpaid child support…is essentially recognized as a judgment by operation of law", citing *Vitt v. Rodriguez*, 960 So.2d. 47, 48 (Fla. Dist. Ct. App. 2007); *accord*, *Dept. of Health and Rehabilitation Services v. Atterbery*, 578 So. 2d 485, 486 (Fla. Dist. Ct. App. 1991) ("Past due installments become judgments by operation of law.").

Finally, McGlaughlin goes to some lengths to undermine the effect of the Florida judgment by focusing on an apparent lack in the record of more than 70 notices to Ben Farren regarding his missing child support payments. Whether or not such notices ever went to the decedent, however, is immaterial.

The Courson claim included a certification of the original "Final Order of Custody and Support" effective July 21, 1986. That "Final Order" included the requirement for the monthly child support payments at issue. The claim also included an "arrearage affidavit" sworn to by the Clerk of the Circuit Court on January 18, 2013, identifying the total of missed payments as $24,300.00, along with a notation that that figure might not include interest and fees. There was a separate certification to the effect that the arrearage affidavit was a true copy of the original filed with the court.

Had Ms. Courson sought to enforce the order while her former husband was still alive and prior to her children having reached their majority, those individual judgments may have had some importance. After his death, however, her task was

not to pursue an ongoing obligation, but rather to process a claim against the decedent's estate under Title 12. As the Vice Chancellor noted, McGlaughlin's argument at most would suggest that the Florida order was not a series of final judgments totaling $24,300.00, but rather a single judgment of $24,300.00. Both of those were valid for purposes of filing a claim under Title 12 (which does not have to be based on a final judgment) and both were valid as judgments to be recognized under federal law.

Under the law, the Florida support order is and was entitled to Full Faith and Credit, and McGlaughlin has offered no legal basis for ignoring the Constitutional requirement that the Florida order be recognized as such.

The Court below correctly determined that as a matter of law there was no need to register a foreign support in Family Court before undertaking enforcement efforts which, by statute, had to be pursued in the Court of Chancery. The remaining task of "doing the math" (*Opinion*, page 26) was accomplished through additional proceedings in the court below, and the ultimate issue as to the appropriate remedy was resolved after trial.

II. THE VICE CHANCELLOR DID NOT ERR IN DENYING THE MOTION FOR SUMMARY JUDGMENT FOR REMOVAL OF THE EXECUTOR WHEN THERE WERE NUMEROUS ISSUES OF MATERIAL FACT

A. Question Presented

The question presented is whether the Vice Chancellor properly denied McGlaughlin's request to remove Andrew Farren as Executor at the summary judgment stage of the proceedings despite the existence of numerous issues of fact. That issue was before the Vice Chancellor and resolved in the Opinion. McGlaughlin does not address the Post-Trial Order.

B. Standard of Review

The Supreme Court reviews a trial court's denial of a motion for summary judgment for abuse of discretion. *Empire Financial Services v. Bank of New York*, 900 A.2d 92 (Del. Supr. 2006). "There is no 'right' to a summary judgment. A trial court's denial of summary judgment is entitled to a high level of deference and is, therefore, rarely disturbed". *Id*., quoting *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. Supr. 2002).

C. The Merits

Appellant McGlaughlin's second argument is an extremely narrow one – that the Court of Chancery committed legal error by denying her motion for summary judgment as to the removal petition. Although this Court may review

that denial *de novo*, the strict standard for an award of summary judgment controls that review and dictates that the Vice Chancellor's decision be affirmed.

As the Court observed, summary judgment is appropriate if the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

> "The function of the judge in passing on a motion for summary judgment is not to weigh evidence and to accept that which seems to him to have the greater weight. His function is rather to determine whether or not there is any evidence supporting a favorable conclusion to the non-moving party. When that is the state of the record, it is improper to grant summary judgment." Quoting *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. Supr. 1969).

In addition, in its discretion, the Court may deny a summary judgment "… if it decides upon a preliminary examination of the evidence that it is desirable to inquire into or develop the facts more thoroughly at trial in order to clarify the law or its application." *Opinion*, page 9, citations omitted. See also *AeroGlobal Capital Management, LLC v. Cirrus Industries*, 871 A.2d 428 (Del. Supr. 2005).

It was with those principles in mind that the Vice Chancellor denied McGlaughlin's motion for summary judgment, and set the case down for trial. Ultimately, the Court determined in his Post-Trial Order that McGlaughlin did not prevail by a preponderance of the evidence with respect to her removal claims, and he therefore declined to remove the Executor. McGlaughlin does not appeal the

post-trial findings and conclusions, but instead focuses on the prior denial of summary judgment.

McGlaughlin offered four reasons for the requested removal of the Executor: (1) he did not require a pre-registration of the claim in Family Court; (2) he failed to sufficiently investigate the merits of the claim before accepting it; (3) he put his personal views ahead of the interests of the estate; and (4) he "attempted to financially blackmail" McGlaughlin.

But an Executor is bound by several well-established principles. First and foremost an Executor must act in good faith. *Thomas & Agnes Carvel Foundation v. Carvel*, 2008 Del. Ch. LEXIS 142. In addition, he must deal fairly with beneficiaries while at the same time operating under a "mandatory duty of paying demands against the deceased in a certain prescribed order". *In Re Ortiz' Estate*, 27 A.2d 368, 372 (Del. Ch. 1942). That order of preference is set out in 12 *Del. C.* §2105. Pertinent to this case are level 3 child support arrears or retroactive support due as of the date of the decedent's death, which the Court noted were junior only to a surviving spouse's statutory allowance and funeral expenses, but ahead of taxes and other obligations. As the Vice Chancellor also found in that regard, creditors take precedence over beneficiaries, who are only entitled to their bequest after creditors' claims have been satisfied. 12 *Del. C.* §2312(6).

The Vice Chancellor reviewed a record which included the Executor's

description of his activities in analyzing the claim, and which established numerous factual issues. *Opinion*, pages 34-40. It is noteworthy that the Court did not rule in the *Opinion* that the Executor did not violate his duties in connection with the administration of the estate. Rather, the Court simply recognized that there were issues of fact which, if viewed in a light most favorable to the Executor as the non-moving party, might very well result in a finding that he complied with his duties.

Whereas the first argument raised by McGlaughlin on appeal relative to the pre-registration of a support order is a legal one, the reasons advanced for the removal of the Executor are plainly fact-based and far less likely to be determined by way of summary judgment. Generally, questions of subjective motive or intent rarely lend themselves to summary judgment. See *George v. Frank A. Robino, Inc*., Del. Supr., 334 A.2d 223, 224 (1975); *Continental Oil Co. v. Pauley Petroleum, Inc*., *supra.*

At trial McGlaughlin had every opportunity to advance arguments and facts to prove that the Executor had breached his duties. The Vice Chancellor found, however, that the Executor testified credibly as to his good faith in dealing with the claims, and that he did not violate his duties. *Post-Trial Order*, Section II.

McGlaughlin did not address the trial testimony or take issue with the Vice Chancellor's post-trial findings. It is clear that the Vice Chancellor adhered to the

rigid standard for a review of a motion for summary judgment in a fact driven case, declining to rule on a partial record in favor of a trial on the merits. The decision to deny summary judgment was well founded and beyond reproach.

CONCLUSION

Based upon the rationale of the Vice Chancellor in the *Opinion* and *Post-Trial Order*, and for the reasons stated herein, the decisions below should be affirmed.

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