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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,	:	
	:	
Petitioner Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
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.	:	

APPELLANT'S REPLY BRIEF

TUNNELL & RAYSOR, P. A.

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ARGUMENT

I. THE EXECUTOR OF BENNIE FARREN'S ESTATE CANNOT ESTABLISH A JUST DEBT FOR $288,459.47 OR ANY OTHER AMOUNT.

The underlying action in this case is Andrew Farren's ("Andrew") Petition to Sell Land, as Executor of Bennie Farren's estate, to pay a claimed liquidated debt of $228,459.47 to Rebecca Courson. Patricia McGlaughlin ("Pat") asked the lower court for summary judgment on the petition to sell land to pay that claim because Andrew could not meet his burden of proof to establish that Bennie Farren ("Bennie") owed a debt of $228,459.47 (Andrew had already conceded that amount is overstated by more than $100,000.00) at the time of his death, and that the sale of Bennie's home was required to pay that debt. The underlying facts are not now and never have been disputed by the parties. This was confirmed by Andrew in his Answering Brief to this Court. See Answering Brf. at 3. There was no material issue of fact to be determined by a finder of fact. There is only the application of Delaware law to those facts.

The Chancery Court erred in applying the law to those undisputed facts and finding that Andrew properly accepted Courson's liquidated Claim without any prior arrears adjudication by any court. This Court reviews *de novo* Chancery Court's application of the law to the undisputed facts, and should find that 1) Andrew did not properly accept Courson's liquidated Claim for $228,459.47 (or

any other amount); 2) as such, Andrew cannot establish that Bennie's estate owes any debt greater than the liquid assets of the estate; and 3) therefore, summary judgment for Pat is appropriate on the Petition to Sell Land.

A. Pierce v. Higgins is not "optional."

The answer to "why" this Court should find that Andrew did not properly accept Courson's liquidated Claim and cannot establish the Estate owes a debt greater than the liquid assets of the Estate is found in Pierce v. Higgins, 531 A.2d 1221 (Del. Fam. Ct. 1987). Pierce v. Higgins set forth the specific procedure, as discussed at great length in Pat's Opening Brief (pp. 18-21), required to establish an amount of child support *arrears* owed by a decedent where no amount of arrears was established before death. There are several steps in that procedure and all but one are within the exclusive jurisdiction of Family Court. Only the power to enforce a child support arrears order against the Estate lies with Chancery Court.

However, in this case, the Chancery Court snubbed Pierce v. Higgins and instead, granted unto itself "concurrent jurisdiction" with Family Court to adjudicate the amount of child support arrears, if any, owed to Courson. Such an extension of the Chancery Court's jurisdiction by the court itself is improper; it is the Delaware General Assembly that giveth and taketh away the jurisdictional powers of the Delaware courts:

> By stating that a particular Delaware court has exclusive jurisdiction over a particular statute, the General Assembly makes clear which of Delaware's trial courts will handle the identified matters. When a Delaware state statute assigns exclusive jurisdiction to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts.

Pottsnet Coveside Homeowners Assoc. v. Tunnell Companies L.P., 2015 WL 3430089 (Del. Super. May 26, 2015). Chancery Court has previously recognized that by enacting the Family Court Act of 1971, and specifically 10 Del. C. §921, the General Assembly intended to grant the Family Court exclusive jurisdiction over child support cases. See Wife, S. v. Husband, S., 295 A.2d 768, 769 (Del. Ch. 1972). "Thus, the creation of the Family Court divested the Court of Chancery of jurisdiction over claims seeking an award of child support." Cummings v. Estate of Lewis, 2013 WL 979417 (Del. Ch. Mar. 14, 2013). The Chancery Court's unilateral assumption of concurrent jurisdiction over child support arrears matters is in direct conflict with established Delaware statutes, specifically, 10 Del. C. §921and 13 Del. C. §6-102(29) and §6-103, and is error as a matter of law.

Andrew does not necessarily defend Chancery's Court's assumption of concurrent jurisdiction, but continues to urge this Court find that adherence to the Pierce v. Higgins' procedures for establishing child support arrears against a deceased obligor in Family Court is *optional.*

First, Andrew argues that the Pierce procedures are optional because the Pierce court "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." Answering Brf. at 7. Andrew's argument is simply wrong. In fact, that is precisely what Pierce held done *in a situation where an obligee has not previously secured an arrears order from a court prior to the obligor's death and seeks to establish liability in Delaware.*

Hypothetically speaking, if Courson had, prior to Bennie's death, secured a court order from any state establishing an amount of child support arrears Bennie owed to her, Andrew would be correct and the procedures of Pierce v. Higgins would not apply. Courson could have proceeded directly to Chancery Court to enforce her arrears order against Bennie's Estate by filing a claim. Had there been on-going interest attached to that arrearage amount, by court order or state law, Chancery Court would have been perfectly capable, both jurisdictionally and otherwise, to calculate the interest.

But, Courson did not secure a court order from any state establishing any amount of child support arrears Bennie owed her prior to his death. There is no judgment or order or decree from any court in any state establishing Bennie's child support *arrears*. The 1986 Florida Order established Bennie's then current monthly child support obligation. It did *not* establish Bennie's child support arrears. (A81). Likewise, the 1987 Florida Order modified Bennie's then current

monthly child support obligation. It did not establish Bennie's child support arrears. It actually denied Courson's request for an arrears order for missed payments from July 21, 1986 to January 29, 1987. (A125-125). The Florida Clerk's Office affidavit is *not* a court order establishing Bennie's child support arrears and includes amounts for those missed payments from July 21, 1986 to January 29, 1987 that were specifically denied as arrears amounts by the Florida court. (A70; A126) And, the missed payments themselves are *not* judgments by operation of Florida law as no notice to Bennie, as required by Florida statute §61.14(6)(b) has been established. There is no Florida statutory provision for imputed notice. Andrew asserts that whether Bennie was provided the required notices is "immaterial." Answering Brf. at 13. On the contrary, as there is no statutory provision for imputed notice upon a respondent under Florida law, if §61.14(6)(b) is not complied with, there are no judgments by operation of law.

Given that Courson has never obtained a judgment, order, or decree for child support arrears against Bennie, she falls precisely into situation that the Pierce v. Higgins procedures were meant for.

Next, Andrew argues that the Pierce procedures are "optional" because the Pierce court "accepted" the decision of In Re Lundh, 343 S.E. 2d 644 (S.C. App. 1986) that held an obligee does not need to obtain a judgment before it could

constitute a claim against the estate. Answering Brf. at 8. Again, Andrew is simply wrong.

The Pierce court did review several states' legal precedent, including South Carolina's In Re Lundh when deciding the threshold issue of whether Delaware law would allow liability of an obligor's estate for child support arrears which accrued but were not reduced to judgment prior to an obligor's death. Pierce 531 A.2d at1223. South Carolina does allow for such liability and ultimately, the Pierce court held that Delaware too allows for such liability. However, Pierce clearly did not accept South Carolina's position on the lack of need for a judgment of arrears, for the Pierce court went on to precisely set forth the steps in Delaware to achieve liability against a deceased obligor's estate, and those steps clearly set forth that an obligee registers the foreign support order with Delaware, seeks a judicial determination from Family Court of any arrears, which is reduced to a judgment and presented to Chancery Court for enforcement against the estate.

Lastly, Andrew argues that the Pierce procedures are "optional" because 13 Del. C. §6-104 makes the provisions of Title 13, Chapter 6 optional. Again, Andrew is incorrect.

Section 6-104 provides, in relevant part, that: (a) "[r]emedies provided by [Chapter 6] are cumulative and do not affect the availability of remedies under other law…;" and (b) [t]his Chapter [6] does not (1) provide the exclusive method

of establishing or enforcing a support order under the laws of this State . . . ." The Delaware courts, to date, have not examined §6-104 or expounded on its' meaning through case law. However, the comments to Section 104 of the Amended Uniform Family Support Act of 2001, which Delaware adopted in its entirety as §6-104, provide some insight as to that section's meaning:

> The existence of procedures for interstate establishment, enforcement, or modification of support or a determination of parentage in UIFSA does not preclude the application of the general law of the forum.
>
> * * *
>
> Subsection (b)(1) gives notice that UIFSA is not the only means for establishing or enforcing a support order with an interstate aspect. Examples abound. A potential child-support obligee may voluntarily submit to the jurisdiction of another State to seek the full range of desired relief under the law of that State using intrastate procedures, rather than resorting to the interstate procedure provided by UIFSA.

(A199-A200). Delaware's inclusion of Section 104 of the uniform act (as §6-104) made it legislatively clear that adoption of the UIFSA provisions in 2006 did not preclude the application of the general law established prior to enacting the UIFSA. These comments may also explain further why the language of Chapter 6 utilizes terms of "may" and not "shall." The Delaware legislature made clear

within the statute itself that the UIFSA did not revoke or replace all procedures or rules of law established before the statute's enactment in 2006.[1]

B. There is no arrears order to give Full Faith and Credit.

Lastly, Andrew argues and the Chancery Court erroneously agreed, that the Pierce v. Higgins procedures are completely unnecessary because the original 1986 Florida Order establishing the child support obligation must be given Full Faith and Credit.

The 1986 Florida Child Support Order only provides Bennie's monthly child support obligation from August 1986 to July 1992 (when his younger son turns 18 years old). Nowhere does that Order provide any amount that Bennie owes in arrears to give full faith and credit to. Likewise, the 1987 Florida Order only provides a *denial* of Courson's request for a judgment for any arrears from August 1986 to January 1987 and a modification of Bennie's child support obligation from February 1987 to July 1992. Nowhere does that Order provide any amount that Bennie owes in arrears to give full faith and credit to.

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[1] By doing so, the General Assembly eliminated the need for judicial interpretation of whether adoption of the UIFSA provisions revoked previous procedures established before the statute's enactment, as the Supreme Court was required to decide regarding the Delaware Parentage Act of 1983. See DCSE v. Myrks, 606 A.2d 748, 751 (Del. 1992)(superseded by statute 2004)(Supreme Court ruled that passage of the Delaware Parentage Act did not "revoke[e] the Family Court's ability to determine paternity in accordance with procedures established before the statute's enactment.")

On a more practicable level, if a child support order that establishes a current monthly support obligation is also the order that establishes any arrears of that obligation, what is the purpose of the Delaware Family Court's legal action based on a "Petition for Child Support Arrears?" (A201). And what is the purpose of 13 Del. C. §6-604(a)(2), which addresses the choice of law issue for "computation and payment of arrearages and accrual of interest on arrearages under support order?" And why are there numerous Delaware family court cases involving appeals from orders establishing an amount of arrears against an obligor? See e.g. D.M.T. v. P.J.A., 2002 WL 31445225 (Del. Fam. Ct. Apr. 4, 2002); B.K. v. A.M.K., 2010 WL 1444637 (Del. Fam. Ct. Feb. 19, 2010); K.G. v. S.G., 2001 WL 1669711 (Del. Fam. Ct. Apr. 20, 2001); J.D.H. v. DCSE/K.T., 2003 WL 21435044 (Del. Fam. Ct. Feb. 27, 2003); L.H. v. E.P., 2003 WL 23269507 (Del. Fam. Ct. Nov. 25, 2003); Cubbler v. Fortucci, 1981 WL 29895 (Del. Fam. Ct. Sept. 15, 1981); Tootell v. Boyer, 1996 WL 797030 (Del. Fam. Ct. Aug. 15, 1996).

Pierce v. Higgins addresses this very dilemma. It sets up a very specific procedure for situations where a court has issued a child support obligation order and the obligee asserts the obligor has not paid the obligation, but the obligor dies before the obligee secures an order establishing any arrears. That is the exact situation we have in this case. An order establishing the amount of arrears, if any, Bennie owed at the time of his death has yet to be determined by any competent

court in any state. Delaware Family Court can be that competent court. Delaware Chancery Court cannot. And until Courson seeks that arrears order establishing the amount of arrears Bennie owed at the time of his death from a competent court, Andrew cannot accept Courson's Claim and he certainly cannot seek to sell Bennie's home to pay it as a just debt of the estate.

II. THERE ARE NO ISSUES OF MATERIAL FACT IN THE PETITION TO REMOVE THAT WOULD PREVENT GRANTING SUMMARY JUDGMENT.

The undisputed facts, viewed in the light most favorable to Andrew, establish as a matter of law that Andrew breached his fiduciary duties as Executor of Bennie's estate through any one or all of the actions submitted in Pat's opening brief. There is no question that, identical to the standard of review of Issue I, this Court reviews the Chancery Court's denial of summary judgment to Pat on her Petition to Remove Andrew as Executor for breach of fiduciary duty *de novo.*

Andrew contends that *unlike* Issue I, his removal as Executor is "plainly fact driven" and therefore inappropriate for summary judgment. However, as those facts are undisputed by the parties, there is nothing for a finder of fact to decide. There is no factual dispute as to Andrew's actions or inactions in accepting his mother's Claim as a just debt of the estate. Those facts are sufficient to establish Andrew should be removed as Executor for breach of fiduciary duty as a matter of law.

Pat asserts four separate undisputed sets of facts that as a matter of law establish Andrew's breach of his fiduciary duty to the Estate, its beneficiaries, and its creditors. See Pat's Opening Brf. at 35-47. Andrew submits that the Chancery Court below correctly found there were issues of fact in dispute as to Pat's assertions that Andrew breached his fiduciary duty by 1) failing to properly

investigate his mother's claim and therefore, accepting a liquidated amount as a just debt of the Estate for over $100,000.00 what the Claim could have ever been valued; and 2) showing preferential treatment to his mother's Claim by denying another claim from the same time period. Even if Chancery Court was correct, which is certainly *not* conceded (refer to Pat's Opening Brf. at 38-46), the Chancery Court erred in ruling that the remaining two sets of undisputed facts, either separately or together did not establish Andrew's breach of duty as a matter of law. The first was Andrew's attempted blackmail of Pat to fund any litigation regarding his mother's Claim and the second was his outright refusal to meaningfully dispute a child support arrears claim from his mother.

A. Section 2312(b) does not apply in this case.

As to Andrew' attempted blackmail of Pat, where he demanded that he would oppose his mother's claim against the estate *only if* she agreed to fund the opposition, the Chancery Court below ruled that such a demand was appropriate as "sufficient security as a condition precedent to delivery of a legacy upon demand of the legatee" under 12 Del. C. §2312(b). This ruling was an error of law.

There are no facts in this case that support application of that statute, and Andrew did not even attempt to defend this Chancery Court ruling in his Answering Brief. It is undisputed that Pat had not demanded to receive any legacy or distributive share from the estate upon which Andrew could demand security.

12 Del.C. §2312(b). Section 2312(b) simply does not apply to the facts in this case, and does not serve as a valid excuse for Andrew's actions.

Clearly, Andrew believed he had a basis to oppose Courson's Claim when he made such a demand of Pat, and he had the duty to the Estate and its beneficiaries to do so, regardless of who funded the opposition. The Estate itself had money in its coffers to fund the litigation. Andrew's failure to oppose Courson's Claim when he had a basis to do so because Pat would not finance the opposition was a breach of his fiduciary duties to the estate, and a legal basis to remove him as Executor.

B. Andrew's refusal to ever dispute or litigate his mother's claim is a breach of fiduciary duty.

As to Andrew's admitted outright refusal to ever meaningfully dispute or litigate a child support arrears claim from his mother, Chancery Court erred in ruling this was not a breach his fiduciary duty that demanded his removal as Executor.

Andrew, as Executor, stands in the shoes of Bennie. He is the person who has accepted the obligation to see, to the best of his abilities, that Bennie's wishes are carried out. Of course he has a duty to pay Bennie's just debts. No one has ever disputed that. But Andrew has spent a lot of time, a lot of energy, and frankly, probably a lot of money, to litigate in favor of his mother's Claim for child support arrears. Who stands up for Bennie in all of this? It's not Andrew.

When this Court rules that Pierce v. Higgins applies, and if Courson does seek to follow the Pierce procedures to secure an arrears order from Family Court, who will be the person standing for Bennie at that proceeding? Who will seek to protect Bennie's rights at that proceeding? Who will challenge, as any adversary proceeding demands, the evidence brought to the court at that proceeding? Who will raise and litigate defenses Bennie has at that proceeding?

Not Andrew. He has already told the world that he would not participate in any dispute of his mother's claim in a productive, constructive manner, and has already lent out the attorney representing Bennie's Estate to assist his mother in furtherance of her claim *against* the Estate. The arguments for or against the validity of Courson's Claim for child support arrears have never been presented to a competent court. No acting on Bennie behalf has ever had the opportunity to dispute Courson's Claim and due process requires as much. Even the registration of the 1986 Florida order was perfunctory at best. The attorney who represents Bennie's Estate acted on behalf of Courson to "register" the Florida child support order. Andrew, as the person who stands in Bennie's shoes, was not even served notice of the Petition to Register. No one acting on Bennie's behalf was even given the opportunity to put forth any opposition to the registration, and no one acting on Bennie's behalf has ever been given the opportunity to put forth any opposition to the arrears claim. And if Andrew remains Executor, no one ever will.

But there is Pat, Bennie's life partner. Although not the Executor, and therefore, not in a fiduciary position within the Estate, Pat has been the only person to ever put forth any opposition to Courson's Claim on behalf of Bennie. Pat is the only person to ever put forth in any court that there are other Florida orders issued *after* the 1986 Order that modify the 1986 Order. Pat is the only person to ever put forth that Courson is not nor ever was entitled to compound interest on any arrears amount under Florida law, thus reducing any amount of Courson's claim by over $100,000.00. Pat is the only person to ever put forth that under Florida law, Bennie may have defenses to an arrears petition by Courson, such as laches. A competent court has yet to pass judgment on these fundamental questions because a competent person standing in Bennie's shoes has yet to present a competent court with these fundamental questions. And Andrew never will.

The undisputed facts are that Andrew is unable or unwilling to carry out his obligation to his father's estate with regard to anything involving his mother's Claim. This is a breach of his fiduciary duty as a matter of law, and requires him to summarily be removed as executor.

CONCLUSION

For all the reasons stated herein and in Pat's Opening Brief, Pat respectfully requests this Honorable Court reverse the court below and grant her summary judgment on the Petition to Sell Land and on the Petition to Remove Executor.

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