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Case Number 179,2017 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARGARET C. UGHETTA,	)	
	)	
Petitioner-Below, Appellant	)	
	)	
v.	)	No. 179,2017
	)	
	)	
MARY HARDING CIST, individually, as Executrix of the Estate of John David Cist, and as Trustee of the Supplemental Trust Agreement of John David Cist,	)	
	)	
Respondent-Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

FERRY JOSEPH P.A.

David J. Ferry, Jr., Esquire (#2149)
Thomas R. Riggs (#4631)
James Gaspero, Jr. (#5893)
824 N. Market Street, Suite 1000
P.O. Box 1351
Wilmington, DE 19899
(302)575-1555
Attorneys for Petitioner-Below, Appellant

Dated: July 11, 2017

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NATURE OF PROCEEDINGS

This is an appeal from the Master's Final Report dated May 29, 2015 and Transcript Ruling dated December 21, 2016 in Ughetta v. Cist, et al, C.A. No. 7885-MA (the Final Report and Transcript Ruling are attached as Exhibits "A" and "B" to this Brief).[1] The Master's decisions were in error because the Final Report improperly granted summary judgment and the Transcript Ruling denied a motion to compel.

In her Verified Petition Filed on September 21, 2012, Margaret C. Ughetta ("Margaret") alleged that her sister Mary Harding Cist ("Mary Harding"), as Executrix of the Estate of John David Cist and Trustee of the Supplemental Trust Agreement of John David Cist, breached her fiduciary obligations to Margaret by violating the provisions of both the Second Codicil to John David Cist's Will and the Second Amendment to John David Cist's Supplemental Trust Agreement (the "Second Amendment").

The process Mary Harding followed to distribute the Estate's tangible personal property ("TPP") was based on an incorrect reading of the equalization provisions of the Second Amendment. The Second Amendment unambiguously states that in equalizing the shares of the combined estates of John David Cist

[1] The Court of Chancery's Orders dated August 3, 2016 and March 27, 2017 overruling both parties' objections and exceptions are attached as Exhibits C and D, respectively.

("Mr. Cist") and his wife Mary S. Cist ("Ms. Cist") the trustee was to take into account "the cumulative value of transfers to [their] children" made by them "during our lifetimes." (A-183) (emphasis added). Rather than follow this unequivocal direction to look at the value of all transfers made during her parents' lifetimes, Mary Harding instead chose only to account for gifts she and her siblings received one (1) month after graduating from college. No language in the Second Amendment or any of the estate documents supports reading the parents' lifetimes as beginning one (1) month after their children graduated from college.

Initially, the Master agreed that the phrase "during our lifetimes" was unambiguous. (A-286). However, later in the proceedings, the Master did a sudden about face on the issue and found that "during our lifetimes" was ambiguous. In changing position, the Master did not explain what was ambiguous about the term "lifetimes" and how that ambiguity could be resolved by extrinsic evidence. Instead, the Master apparently accepted the testimony of Mr. Cist's counsel that it makes more sense to consider only transfers starting one month after an heir has graduated from college.

Moreover, the extrinsic evidence that was considered, the testimony of Mr. Cist's counsel, is not probative of *his* intent. Mr. Cist's counsel testified at her deposition that the language used in the Second Amendment was *her* language. (A-211-A-212). She also testified that she and Mr. Cist were just trying to get

information to quantify the transfers so that they would not have to define them in the estate planning documents. (A-212-A-213).

Thus, in granting summary judgment the Master erred in three ways. First, because "lifetimes" is unambiguous, the Master should not have considered any extrinsic evidence in construing its meaning. Second, the extrinsic evidence considered did not support a grant of summary judgment. If the word "lifetimes" is ambiguous, the Master should have had held a trial to take evidence to resolve the ambiguity. Third, because the Master's change of position on whether "lifetimes" was unambiguous *sua sponte*, made after summary judgment briefing, did not allow Margaret an opportunity to brief the ambiguity issue or present extrinsic evidence to show that the proper interpretation of "lifetimes" included all life time transfers. Each of these errors supports reversal and remand of the Master's grant of summary judgment.

Mary Harding also refused to adequately and completely answer Margaret's requests for information about the Estate and Trust. In particular, Margaret sought production of documents concerning the gift of a valuable Autograph Collection to David B. Cist ("David"), who is Mary Harding's and her brother. Despite its high value, the Autograph Collection was not included in David's lifetime tally of transfers for purposes of the equalization process. Margaret discovered two letters, one between Mr. Cist and his mother and another by Mr. Cist, concerning the

timing of the gift of the Autograph Collection to David, after the Master had granted Mary Harding's Motion for Summary Judgment. Margaret filed a Motion for Permission to Supplement the Record and to renew the Motion to Compel to obtain the letter Mary Harding claimed gifted the Autograph Collection to David, so that all would be part of the record. Although the Master granted the Motion for Permission to Supplement the Record, she denied Margaret's Motion to Compel. The Master should have granted the Motion to Compel, and the correspondence concerning the Autograph Collection should have been made part of the record and considered by the Master for the Final Report. The Master's denial of the Motion to Compel should be reversed, the correspondence concerning the gift of the Autograph Collection should be produced and it should be considered by the Master on remand.

SUMMARY OF ARGUMENT

I. The Master in Chancery and Vice Chancellor erred in determining that the language of John David Cist's Second Amendment to his Supplemental Trust Agreement was ambiguous thereby using extrinsic evidence to determine his intent. The Master then utilized the extrinsic evidence that had been presented by Mary Harding in her Motion for Summary Judgment to find that Mary Harding had therefore carried out John David Cist's intent regarding the equalization process and granted said Motion. The Master should have allowed the case to proceed to trial, which would have allowed for a full record to be developed. If the decision of the Master that "lifetimes" is ambiguous stands, it will be a significant departure from Delaware law on contract interpretation. If the Master was correct that "lifetimes" is ambiguous, then the Master's decision to grant summary judgment is a departure from the standard this Court has applied for determining when summary judgment is proper to resolve a disputed contract ambiguity. Either way the Master's grant of summary judgment should be reversed.

II. The Master in Chancery and Vice Chancellor denied Margaret's Motion to Compel production of a document that has been referred to as the Autograph Collection letter. It is purportedly a letter gifting a valuable Autograph Collection to David B. Cist. This Autograph Collection was not included in David's lifetime tally for purposes of the equalization process. Margaret discovered letters that she

believed called in to question the timing of the gift of the Autograph Collection letter to David, after Mary Harding's Motion for Summary Judgment had been ruled upon. Margaret filed a Motion for Permission to Supplement the Record and renew the Motion to Compel. Despite granting the Motion for Permission to Supplement the Record, the Master denied Margaret's Motion to Compel. The Master should have granted Margaret's Motion to Compel the production of the Autograph Collection letter.

STATEMENT OF FACTS

1. The Parties

This matter is centered upon the Estate and Trust of John David Cist ("Mr. Cist") and, in particular, the events that occurred between the death of his wife, Mary S. Cist ("Mary") in 2008 and his death in June of 2010. Mr. Cist and Mary had 4 children: Dorothea, David, Margaret and Mary Harding. Mr. Cist and Mary both stressed the importance of education to their children. (A-95). David attended University of Delaware, Princeton University, Oxford University and M.I.T. (A-110). Margaret attended Princeton University. (A-93). Mary Harding attended Harvard College. (A-77).

The deposition testimony of Mary Harding indicates that the children had a loving relationship with their parents and each other growing up. (A-78, A-79-A-80). It wasn't until shortly before the death of their mother, Mary, that feelings of resentment began to grow towards Margaret for what Mary Harding and David saw as more favorable treatment of Margaret and her four (4) children by John David Cist and Mary from paying tuition expenses for Margaret's children without any advancement provision in John David Cist and Mary's estate plans for the tuition payments. (A-94-A-97, A-111-A-114, A-117).

2. John David Cist's Relevant Estate Planning Documents

On May 21, 1991, John David Cist, as Trustor, executed his Trust Agreement. Mr. Cist and his wife, Mary S. Cist, were named as trustees. This agreement was amended by a Supplemental Trust Agreement dated June 30, 1993. On December 20, 2006, Mr. Cist executed a Supplemental Trust Agreement (hereinafter referred to as the "Supplemental Trust Agreement") (A-119), naming himself and his wife as trustees. The Supplemental Trust Agreement established several trusts upon the death of Mr. Cist—a Generation-Skipping Transfer ("GST") Tax Exemption Trust, a Marital Trust, and a Residuary Trust. The provisions of the Supplemental Trust Agreement establishing the Marital and Residuary trusts directed that certain advancements reduced the share of the trust set aside for three of the Cist children. Pursuant to Section II(B)(2)(m)(1-3) and Section II(B)(3)(f)(1-3), Dorothea B. Cist's share was reduced by $250,000.00, David B. Cist's share was reduced by $1,250,000.00, and Mary Harding's share was reduced by $900,000.00 so long as she received any portion of the real property at 1102 Brandon Lane, the family home. There was no reduction of the share set aside for Margaret.

On November 17, 2008, Mr. Cist executed a First Amendment to his Supplemental Trust Agreement and a First Codicil to his Will. (A-173; A-180). On January 6, 2010, Mr. Cist executed the Second Amendment to Supplemental

Trust Agreement of John David Cist. (A-183). The Second Amendment contained a Background section, Paragraph D, which provided the following:

> *This amendment is intended to express my goal that, insofar as possible, the combined estate of my late wife, Mary S. Cist, and me shall be divided into equal shares – one share for each child of ours living at the time of my death, and one share for each child of ours deceased at such time but with issue then surviving. For purposes of this division:*
>
> 1. *The trustee shall add to the value of my wife's and my combined estates the cumulative value of transfers to our children (including transfers to, or for the benefit of, issue of a child as transfers to that child, and including payments made on behalf of a child or issue even if such payments were not deemed transfers under IRC Section 2503(e) for gift tax purposes) made by my wife and/or made by me during our lifetimes, as well as made upon death pursuant to my wife's will and/or trust and/or pursuant to my will and/or trust, as well as by beneficiary designation. These gifts shall be included at their date-of-gift (i.e., transfer) values.*
>
> 2. *After calculating the aggregate amount to which each such child (or issue of a child) has received and is entitled to receive from all sources as provided above, the trustee shall modify (i.e., reduce or increase) the shares for my children (or issue of a child) under this Agreement as necessary so that the aggregate amount received by such child (or issue of a child) from all such sources is equal to the aggregate amounts received by each other child (or issue of a child) of mine from all such sources.*
>
> 3. *Such equal shares shall be further modified (i.e., reduced or increased) if required pursuant to the No-Contest Provision included below.*
>
> 4. *I intend to make substantial equalizing transfers during my lifetime after the execution of this supplemental trust agreement. Such lifetime equalizing transfers reflect my intent to devise my one-half interest in real property at 1102 Brandon Lane to my daughter Mary Harding Cist upon my death, by reducing my lifetime transfers to such daughter. The trustee shall take such transfers into account in making distribution hereunder to achieve my intent as nearly as possible, so that if such*

> *equalizing transfers were completed during my lifetime, upon my death my one-half interest in the real property at 1102 Brandon Lane will be distributed to Mary Harding Cist, and the balance of my remaining estate and trust assets shall be divided equally among my children, or the issue of a deceased child, per stirpes.*

Joanna Reiver, Esq. represented John David Cist regarding his estate planning beginning sometime in August of 2008. Mr. Cist was concerned with being fair to all four of his children. (A-208). Ms. Reiver recommended that Mr. Cist could revise his estate planning documents to provide for equalization. (A-209). Ms. Reiver drafted the First Amendment to Supplemental Trust Agreement. (A-210-A-211). Ms. Reiver drafted Paragraph D, Section 1 based upon her discussions with Mr. Cist and what he wanted to accomplish. (A-211-A-212). Ms. Reiver explained at her deposition Mr. Cist did not want to look back to transfers prior to each of his children having graduated college. (A-212). When asked why Paragraph D, Section 1 doesn't state that the trustee should use that period of time rather than transfers made during Mr. and Mrs. Cist's lifetime, Ms. Reiver states, "We were just trying to – we were still attempting to get – when I say we, I mean, Mr. Cist and me with Kristen's help were still trying to get information so that we could quantify the transfers, so that we wouldn't have to define them." (A-212-A-213). The plan was for Mr. Cist to quantify the numbers to be used for the cumulative prior transfers so there would be no need to define the time frame for transfers. However, Mr. Cist never signed off on any final numbers. (A-214).

The primary source for providing the numbers to Ms. Reiver was David B. Cist, Mr. Cist's son and the brother of Margaret and Mary Harding. (A-217). Ms. Reiver believed that Victor Pelillo, an accountant hired by Mr. Cist, was also working on the numbers but Ms. Reiver did not believe she spoke to Mr. Pelillo prior to Mr. Cist's death. Id.

P. Kristen Bennett, Esq. (an associate of Ms. Reiver) was asked the purpose of the language "insofar as possible" contained in Paragraph D of the First Amendment to the Supplemental Trust Agreement (Paragraph D of the First Amendment to the Supplemental Trust Agreement is almost identical to Paragraph D of the Second Amendment with the exception of Section 4), and responded as follows: "I believe that his [John David Cist] intent was to equally distribute his estate so that the total given to each child during their lifetime was going to be equal." (A-220). Ms. Bennett also confirms that the word "transfer" and the word "gift" are used synonymously in Paragraph D. (A-221). When asked whether the gifts or transfers included every gift and every transfer from the birth of the children, Ms. Bennett stated that that was not how she understood it. Mr. Cist had been reviewing his own records to determine the amount that had been transferred to each of his children. (A-222-A-223). The information Mr. Cist supplied to Ms. Reiver and Ms. Bennett began with transfers made in 1985 but Mr. Cist was still trying to locate older records. (A-224). According to Ms. Bennett, the First and

Second Amendments to the Supplemental Trust Agreement were considered stop-gap documents that would be more fully restated once Mr. Cist had completed the equalization process during his lifetime. Mr. Cist passed away before this was complete. (A-225). New irrevocable trusts, one for each child of Mr. Cist, had been drafted and signed. (A-226). Ms. Bennett believed that there were tentative numbers to fund the trusts, but due to problems, including knowing what the lifetime gift transfers were at any given time, what the projected distributions from Mrs. Cist's Trust were at any given time, what the estate and gift tax consequences were at any given time, and how to deal with Mr. Cist's one-half interest in Brandon Lane, the trusts were never funded. (A-227-A-231).

3. <u>The Equalization Process</u>

In her Petition, Margaret alleged that Mary Harding had breached her fiduciary duty regarding the equalization process by refusing to answer numerous questions and requests made by Margaret and by refusing Margaret's request to reconsider the unreasonable and burdensome equalization process. Additionally, through the course of taking depositions in this matter, Margaret discovered that Mary Harding had chosen an arbitrary starting date of one month after each beneficiary graduated from college to begin the equalization process calculations. No such start date appears anywhere in the Trust documents. The date was selected by Mary Harding. The Trust did not direct Mary Harding to choose her

own start date. Mary Harding testified at her deposition it was her belief that Ms. Reiver and Mr. Pelillo came up with a methodology for when to begin the tallies for purposes of the equalization. (A-83-A-84). They felt a child was now on his or her own after college graduation and decided to begin the equalization process at that time. Mary Harding participated in that methodology. Mary Harding's recollection was that Ms. Reiver's input was that the starting date reflected the time a child left home and became a breadwinner. Mary Harding could not say what Mr. Cist's full intentions were regarding a start date for the equalization process tallies. (A-85).

Victor Pelillo ("Mr. Pelillo") was hired by the Estate to complete the equalization process, purportedly because of his prior work with Mr. Cist. Regarding the work Mr. Pelillo performed for the Estate, he testified he was asked to pull together a list of all transfers to children after they graduated from college that would be considered a gift, but not necessarily for tax purposes. (A-236). This task from the Estate was different than the tasks previously given by Mr. Cist and David B. Cist, both in the volume of information and the level of detail. (A-237). Mr. Pelillo had no input into the start date of July 1 of each child's graduation year. Id.

Mary Harding provided Mr. Pelillo with all financial statements she had at 1102 Brandon Lane. Those statements covered the period of time from 1980

onward. There were certain bills that Mary Harding did not turn over to Mr. Pelillo, and thus Mr. Pelillo was unable to include those bills in the tallies. Mary Harding based this decision on a desire to keep to the parameters Mr. Cist established by the documentation he provided to Mr. Pelillo. (A-86-A-90). Prior to this time, Mr. Pelillo was employed as Mary Harding's accountant. (A-81-A-82). Mr. Cist was referred to Mr. Pelillo by Mary Harding. (A-234-A-235). Mary Harding testified at her deposition that if Mr. Cist did not include a particular bill or expense in the equalization calculations Mr. Pelillo performed prior to Mr. Cist's death, then she would not have Mr. Pelillo include that bill or expense in the lifetime tally calculations. (A-89-A-90).

Mr. Pelillo testified at his deposition that he concluded that Mr. Cist wanted to include gifts to spouses in the equalization calculation based upon Mr. Cist previously including a $20,000 gift to William Ughetta. (A-238). Mr. Pelillo also acknowledged that the October 28, 2011 letter of Joanna Reiver did not ask him to include gifts to spouses in the lifetime tallies. (A-239-A-240). Mr. Pelillo later testified that gifts made to William Ughetta were included on Margaret's lifetime tally based upon directions from Joanna Reiver. (A-243-A-244). Mr. Pelillo testified at his deposition that expenditures for improvements made to 1102 Brandon Lane were not attributed to Mary Harding because he has not been

directed to do so. Mr. Pelillo testified that he was not aware that Mary Harding lived at Brandon Lane. (A-241-A-242).

4. <u>The Autograph Collection</u>

David B. Cist testified at his deposition that in 1970 he was gifted an Autograph Collection from his parents. The collection consists of 5 leather-bound books. He estimated there are 500 or more autographs. David B. Cist did not know if the collection had ever been appraised and did not know its value. (A-103-A-109). Despite requests to do so, David B. Cist refused to supply documentation related to the Autograph Collection at his deposition. (A-100-A-104). After the hearing of October 23, 2014, Margaret again requested documentation related to the Autograph Collection. Despite the Court's ruling that the language "during our lifetimes" was unambiguous, Mary Harding continued to take the position that the gift of the Autograph Collection to David B. Cist was not a "transfer". (A-245-A-246). Mary Harding had decided it is her discretion, and her discretion alone, as to what constitutes a transfer and what does not constitute a transfer.

5. <u>The Summary Judgment Motion</u>

On July 22, 2013, prior to the conclusion of discovery and before any depositions had been scheduled, Mary Harding filed a Motion for Summary Judgment. On July 31, 2013, Margaret filed a motion to allow discovery pursuant

to Court of Chancery Rule 56(f). The Master granted Margaret's motion and Margaret deposed six witnesses and Mary Harding deposed Margaret.

During a teleconference on June 13, 2014, the Master directed the parties to brief whether the language of the estate planning documents of Mr. Cist was clear and unambiguous regarding the issues of the distribution of TPP and the equalization process. (A-341). A resolution of these issues would determine whether the Master would need to consider extrinsic evidence regarding Mr. Cist's intent. In her briefing, Mary Harding claimed that the language of Paragraph D(1) was ambiguous. Margaret contended that the term was unambiguous.

6. <u>The October 23, 2014 Draft Bench Report</u>

An oral argument was held on October 23, 2014 at the conclusion of which the Master issued an oral draft report finding that the language "during our lifetimes" in Mr. Cist's Trust documents was clear, plain and unambiguous. Additionally, the Master determined that the phrase,

> "…*the cumulative value of transfers to our children (including transfers to, or for the benefit of, issue of a child as transfers to that child, and including payments made on behalf of a child or issue even if such payments were not deemed transfers under IRC Section 2503(e) for gift tax purposes)",*

was ambiguous. The Master stated, "I think to the extent possible, whatever transfers or gifts that Mr. and Mrs. Cist made to their children need to be included

in the equalization process. But first we have to determine what was meant by 'transfers' or 'gift' in that language I quoted earlier." (A-286-A-287).

7. Master's Final Report

The Master began the section of the Final Report titled "A. Fairness Concerns" (p. 4 of Final Report at Exhibit "A") with a recitation of David B. Cist's concerns that Margaret was receiving more from her parents than her siblings. The Court indicates that this letter may have prompted Mr. and Mrs. Cist to reconsider their estate plans; however, this was something David B. Cist specifically denied at his deposition. (A-115-A-116). It is important to note as set forth above, despite David B. Cist's 2006 letter, Mr. and Mrs. Cist's 2006 estate plans contained advancement provisions for all of their children except Margaret, and, also, specifically did not treat tuition expenses of grandchildren as an advancement.

On page 31 of the Final Report, as part of the recitation of the undisputed record, the Master writes, "None of her [Margaret] requests was granted by Gibson because it would have given Margaret preferential treatment over the other beneficiaries." The Court cited to the Affidavit of Gibson that accompanied Mary Harding's Opening Brief in support of her Motion for Summary Judgment. It is unclear whether the Court considered that Margaret was at a disadvantage regarding the TPP viewing and selection process as compared to Mary Harding. Mary Harding lived at 1102 Brandon Lane, where the TPP was located. Mary

Harding therefore had unlimited access to the TPP. Mary Harding brought items of TPP down from the attic for Gibson to display. In addition, there was significant amounts of TPP, such that it took Gibson approximately 83 hours to set up same yet the beneficiaries were only given nine hours to view it.

On page 35 of the Final Report, the Master *sua sponte* modified the draft bench report of October 23, 2014. Despite earlier deciding that the language "during our lifetimes" is unambiguous, the Court now concluded that that phrase is ambiguous when read in conjunction with Paragraph D(4) of the Second Amendment. The Court continued that the extrinsic evidence presented "shows that Mr. Cist did not intend to include any gifts or transfers to his children before they graduated college…". (p. 39 of Final Report at Exhibit "A"). The Court stated that "Margaret has pointed to no specific evidence of Mr. Cist having had a contrary intent that would create a genuine issue of material fact in dispute." (p. 40 of Final Report at Exhibit "A").

On page 39 of the Final Report, the Court did acknowledge that Margaret had argued that the decision to start the equalization process one month after each beneficiary graduated college directly and unfairly benefitted David by shielding his Autograph Collection from being included in the process. The Autograph Collection consists of five leather-bound books with the name "John David Cist" on the cover. (A-104-A-105). Although David could not give an exact number, he

agreed that it was reasonable to estimate that each volume contained approximately 100 autographs, for a total of 500 autographs. Id. Although David could not remember with specificity the contents of the Autograph Collection at his deposition, he did recall that one autograph was of the famed 17th Century diarist Samuel Pepys. (A-106-A-107). The Autograph Collection also contains autographs of sports figures, twentieth century actresses and actresses, military figures, and authors. (A-105-A-106). Both David B. Cist and Mary Harding refused to provide documentation they claimed showed the Autograph Collection was gifted to David in 1970. Margaret had time and again requested this documentation to substantiate the claim made by David B. Cist.

8. Motions following the Master's Final Report

Included in Mr. and Mrs. Cist's estates were vast collections of family documents with historical significance (the "genealogy documents"). Despite Margaret's requests, Mary Harding never undertook to provide an inventory or in any other way to catalogue the genealogy documents. Because there were no pictures, catalogues, or any other inventories of the genealogy documents, Margaret herself undertook to photograph and/or scan as many of the documents as she could when she had the opportunity to visit the storage areas. She visited the areas on several occasions. She amassed copies of over 7,500 documents and went

through the scans and photographs of these documents as quickly as reasonably possible.

During this process, Margaret first saw a letter that appeared to be dated September 1967 (A-327), and appeared to be from Mr. Cist's mother to him setting forth gifts that she considered making to her son and grandchildren, including the Autograph Collection. The September 1967 Letter indicates that David was not to receive the Autograph Collection until he was "old enough to really appreciate it."[2]

In February of 2016, during her on-going review of the scanned and photographed documents, Margaret first discovered a letter from February 1973 apparently authored by Mr. Cist (A-333); the September 1967 Letter and the February 1973 letter are collectively referred to as "the Supplemental Documents"). The February 1973 Letter states,

> "This was read over with Mother on February 21, 1973… it is understood between us that these distributions will be made as indicated- when appropriate, and the development of the children designated- unless the course of development of the child is such that Mary and/or I believe that Meg [Mr. Cist's mother] would no longer think the particular distribution appropriate. Under this circumstance, Mary and or I would, after due wait to be sure, allocate as we believe Meg would then desire."

[2] Having written this sentence in 1967 when David was about four or five years old, it is difficult to believe that only three years later in 1970-when David testified that the collection was given to him, even though he was then only seven or eight years old-Mr. Cist felt David was "old enough to really appreciate it."

This letter indicates that the Autograph Collection mentioned in the September 1967 letter had not been gifted to David as of 1973. It also indicates the possibility that the Autograph Collection could be distributed to someone other than David, including his father, Mr. Cist.

On June 21, 2016, Margaret filed her Motion for Leave to Supplement and Renew Motion to Compel by which she sought permission to introduce into the record the Supplemental Documents, as well as to renew her motion to compel production of the Autograph Collection gift letter.

After full briefing and at the end of argument the Master issued her oral final report. The Master permitted the Supplemental Documents to be entered into the record. However, the Master ruled that the Supplemental Documents were not relevant because the Autograph Collection was not a gift from Mr. Cist to David, but, rather, was a gift from David's grandmother to him.

The Master explained:

> *These gifts were from the grandmother. They are not relevant to the lifetime gifts of Mr. Cist or Mrs. Cist, not relevant to the equalization process.*
>
> *If anything, Mr. and Mrs. Cist were holding these gifts in trust as their children aged, but it was dictated by what their grandmother wanted. So I will . . . recommend that the letters come into the record, but it is not relevant or material to the equalization process.*
>
> *Therefore, the motion to compel I recommend to be denied. . .*

(Opinion at p. 32, Exhibit "B").

The Master then clarified her ruling:

> *I am denying the motion to compel production because, as I read those letters, and of course, another person, the Vice Chancellor, may read it differently, those letters do not indicate that there is any reason to compel the production of the note because what you're seeking is proof that this gift was given to David sometime either before or after one month after his graduation.*
>
> *So it could be what you could determine whether or not it needs to be part of the lifetime gift in the equalization process. But I'm saying, as I read it, it's not relevant because it's not a gift from either Mr. or Mrs. Cist. It's a gift from the grandmother.*

Id. at 33, Exhibit "B". Neither Margaret nor Mary Harding had made this argument and the Master reached this conclusion on her own.

Thereafter, both parties filed exceptions and both sets of exceptions were overruled. In overruling the exceptions, the Vice-Chancellor did not offer her own independent analysis as to whether the autograph letter should be produced. Instead, the Vice-Chancellor simply stated that she "agree[d] with the analysis conducted in the report." (Order Dated March 27, 2017, Exhibit "D").

Margaret filed a Notice of Appeal to the Supreme Court on April 26, 2017. This is the Appellant's Opening Brief in support of her Appeal.

ARGUMENT I

I. QUESTION PRESENTED

Did the Master in Chancery and Vice Chancellor err in failing to find that Paragraph D of John David Cist's Second Amendment to his Supplemental Trust Agreement was unambiguous, such that the Court should not have heard extrinsic evidence to determine John David Cist's intent with regards to the phrase "during our lifetimes"? Margaret preserved this question, after timely filing a Notice of Exceptions, in her Combined Answering Brief and Opening Brief filed on July 31, 2015 (See pp. 52-64, D.I. 150).

II. SCOPE OF REVIEW

The Master in Chancery granted Respondent summary judgment on the issue of whether the term "during our lifetimes" was ambiguous and held that "Mr. Cist did not intend to include any gifts or transfers to his children before they graduated college..." (Final Report at ps. 39-40, Exhibit "A"). Review of the Master's order granting summary judgment is de novo as to both facts and law "to determine whether or not the undisputed facts, viewed in the light most favorable to the opposing party, entitle the moving party to judgment as a matter of law." Motorola, Inc. v. Amkor Tech., Inc., 849 A.2d 931, 935 (Del. 2004); Telxon Corp. v. Meyerson, 802 A.2d 257, 262 (Del. 2002) (reviewing de novo trial court's grant of summary judgment); Eagle Indus., Inc. v. Devilbiss Health Care, Inc., 702 A.2d

1228, 1232 (Del. 1997) (reviewing de novo Court of Chancery's summary judgment ruling that contractual provision unambiguous).

III. MERITS OF ARGUMENT

In holding that the term "during our lifetimes" was ambiguous and that extrinsic evidence indicated that Mr. Cist's real intent was that only transfers he and his wife made to their children after they graduated from college should be counted as part of the equalization process, the Master erred in three ways. First, as the Master indicated in its October 23, 2014 hearing, the term "during our lifetimes" is unambiguous on its face and thus any consideration of extrinsic evidence to determine its meaning was improper. Second, the Delaware courts typically do not resolve contract ambiguities on motions for summary judgment, and the extrinsic evidence the Master considered to resolve the non-existent ambiguity does not provide any evidence of what Mr. Cist's intent was or what the term "during our lifetimes" means. Thus, it was improper to grant summary judgment. Third, by changing its position after briefing on summary judgment was complete, the Master deprived Margaret of the opportunity to present extrinsic evidence that shows that "during our lifetimes" was intended to mean that all transfers should be included in the equalization process or present argument that it was improper for the Court to consider extrinsic evidence at all in determining whether the term was ambiguous.

1. "During our lifetimes" is clear and unambiguous and this should be determined without consideration of extrinsic evidence.

When interpreting a contract, Delaware courts follow the "objectivist" approach. As this Court has explained:

> "…the role of a court is to effectuate the parties' intent. In doing so, we are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended."

Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006) (citing cases)(footnote omitted). This is done by determining "what a reasonable person in the position of the parties would have thought the language means." *Id*. "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Id.

This means that when interpreting an agreement, like the Trust here, the court should start with the contract language itself and if it is "clear and unambiguous," it should be given its "ordinary and usual" meaning. Where there is no facial ambiguity, there is no room for extrinsic evidence to construe the contract. Again this Court has held:

> Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. When the language of a ... contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented....

Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d at 739. This means that no ambiguity exists where a court can determine the meaning of a contract from its plain language. Where ordinary meaning leaves no room for uncertainty, the courts will not use extrinsic evidence to create an ambiguity where none exists.

During the October 23, 2014 Argument and Oral Report, the Master followed these well-established principles of Delaware contract law. She rejected Mary Harding's arguments that "during our lifetimes" was ambiguous as well as Mary Harding's invitation to try to construe its meaning through extrinsic evidence. (A-247). And indeed, holding that "our lifetimes" is unambiguous seems unassailable. There can be no reasonable dispute about who the "our" is; it refers to Mr. and Ms. Cist. Nor can there be any dispute about what constitutes the Cist's lifetime or when their lifetimes started or ended. "During our lifetimes" clearly identifies a specific period of time. There is no ambiguity in the term,

In the May 29, 2015 Final Report the Master abandoned these bedrock principles of contract interpretation and created an ambiguity where none exists. Moreover, it is clear that the ambiguity arose by the Master's consideration of extrinsic evidence. (Final Report at 38-40)(Exhibit "A"). Based on testimony, the Master concluded Mr. Cist did not want to look back to transfers prior to each of his children having graduated college. (Final Report at 39)(Exhibit "A").

The Final Report attempts to justify the Master's *sua sponte* reversal of position on the ambiguity issue on the grounds that the Master had previously "disregarded the language in Paragraph D(4) altogether because Mr. Cist had died prior to making the lifetime equalizing transfers" that Paragraph D(4) contemplated. (Final Report at 36)(Exhibit "A"). The Master observed that if, contrary to what actually occurred, Mr. Cist had made the substantial equalizing transfers paragraph D(4) contemplated, there would be very little and maybe nothing for his successor trustee to do under the equalization process under paragraph D(1). (Final Report at 37)(Exhibit "A"). This, the Master concluded, could make paragraph D(4) superfluous. Although the Master did not identify which terms in paragraph D(1) would become ambiguous, the ambiguity apparently opened the door to consider extrinsic evidence as to what is meant by the term "during our lifetimes."

This application of contract interaction principles is unsustainable. As an initial matter, the Master's suggestion that Paragraph (D)(1) and Paragraph D(4) can be read to render one or the other superfluous does not bear scrutiny. Perhaps, if Mr. Cist had succeeded in making the "substantial equalizing transfers" before he died, there would have been less for his successor trustee to do under Paragraph D(1). But the fact Mr. Cist did not make the intended transfers, and that the equalization process under Paragraph D(1) was necessary, only highlights why

both paragraphs were necessary. Similarly, if Mr Cist had made some but not all of the transfers he intended to make under Paragraph D(4), the equalization process under Paragraph D(1) would still be necessary. The superfluity the Master saw does not exist.

In addition, the Master made no effort to explain what ambiguity the supposed superfluity creates. In particular, the Master does not explain how the superfluity makes "during our lifetimes" any less clear than it is. Nor does the Master explain how the resort to testimony eliminates any superfluity or clarifies the meaning of the words "during our lifetimes." The supposed superfluity and ambiguity, even if they existed, does not permit the Master to consider extrinsic evidence as to any and all of the Trusts terms.

But that is precisely what the Master did. The Master considered testimony and reinterpreted "during our lifetimes" to mean "during our lifetimes, but one month after the child graduates from college." By construing the clear and unambiguous language of Paragraph D(1) to have these extra unspoken words, the Master erred. The Master's summary judgment decision should be reversed. This Court should enter summary judgment in Margaret's favor and find that "during our lifetimes" is unambiguous and remand this case for further proceedings in accordance with that mandate.

2. Even if "during our lifetimes" were ambiguous, the deposition testimony does not support summary judgment.

Even if this Court were to agree with the Master that "during our lifetimes" is ambiguous, reversal of summary judgment on the issue would still be required. Delaware courts do not resolve disputes about ambiguous contract terms through summary judgment motions. The extrinsic evidence about what the ambiguous terms mean is reviewed at trial where it can be subjected to cross-examination and weighed by the trial court. Moreover, the deposition testimony that the Master relied on was insufficient to support summary judgment here. None of the witnesses testified about any conversation or other communication with Mr. Cist about what he meant "during our lifetimes" or that he had any intent that it mean anything other than what its words actually mean. Accordingly, summary judgment was improperly granted here.

Summary judgment will only be granted when the court determines that there are no genuine issues of material fact remaining and the movant has proven that she is entitled to judgment as a matter of law. Ct. Ch. R. 56(c). At the summary judgment stage, the trial court's role is to identify any issues of disputed fact--it is not the trial court's role to decide issues involving disputed issue of material fact through summary judgment. Merrill v. Crothall- American, Inc., 606 A.2d 96, 99 (Del. 1992). In deciding a summary judgment motion, the trial court

must accept as true any and all undisputed factual assertions made by either party, and must accept the non-moving party's version of all disputed facts. Id. at 99-100. The trial court must also draw all rational inferences in favor of the non-moving party. Id. Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if an examination of the facts reveals that it is necessary to inquire further to ascertain the correct application of law to the circumstances. See Wilson v. Triangle Oil Co., 566 A.2d 1016 (Del. Super. 1989) and Lillis v. AT&T Corp., 2006 WL 3860915 (Del. Ch. Dec. 21, 2006).

In cases involving the interpretation of a contract, summary judgment is appropriate only if the language of the contract is unambiguous. United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 830 (Del. Ch. 2007). In United Rentals, the Court of Chancery held that in order to be successful on its motion for summary judgment, URI had to establish that its interpretation of the contractual provision at issue was the only reasonable interpretation. Id. at 830. As this Court has explained:

> "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity. But when there is uncertainty in the meaning and application of contract language, the reviewing court must consider the evidence offered in order to arrive at a proper interpretation of contractual terms. This task may be accomplished by the summary judgment procedure in certain cases where the moving party's record is not *prima facie* rebutted so as to create issues of material fact. If

> there are issues of material fact, the trial court must resolve those issues as the trier of fact."

GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 783-84 (Del. 2012). Thus, if the Master's finding that "during our lifetimes" is ambiguous is correct, then her grant of summary judgment was improper because resolving the ambiguity entails resolving issues of material fact. As set forth above in United Rentals, it is Mary Harding's burden to show that her interpretation is the only reasonable interpretation. This she has not done and therefore summary judgment must be denied.

Summary judgment was particularly inappropriate in this case given the absence of evidence concerning Mr. Cist's intent in using the term "during our lifetimes." The absence of a record that would support summary judgment is not surprising. In connection with the summary judgment briefing, there was a factual dispute regarding what Mr. Cist intended to include as a "transfer" during his and his wife's lifetimes for purposes of the equalization process. Margaret had taken one position on this issue, and Mary Harding had taken an opposing position. However, in her Opening Brief in support of her summary judgment motion, Mary Harding did not argue that the terms of the Trust were ambiguous and that her interpretation of the Trust was the correct one. Rather, Mary Harding's arguments were based upon Margaret's alleged acquiescence (as to the TPP distribution) and the business judgment of the Trustee (as to the equalization process). Therefore,

the issue as to Mr. Cist's intent was not directly before the Master. Nor is it surprising that the parties did not present a fuller record to the Master on the issue at the time. The Master had previously indicated in the October 23, 2014 Oral Report that she believed that "during our lifetimes" was unambiguous.

As a result, the record before the Master was bereft of evidence as to Mr. Cist's intent as to what the terms mean. Although there was testimony concerning what Ms. Reiver and others thought Mr. Cist desired generally, there was nothing that supports any intent by him to cut back the scope of "during our lifetimes" to a shorter period that excluded transfers made before a beneficiary had graduated from college. Thus resolving the ambiguity, if this Court thought one existed, would require additional extrinsic evidence. An integral part of that additional extrinsic evidence is a determination of the credibility of Mary Harding and the drafters of the Trust documents and precise answers about what Mr. Cist said to them to support their interpretation of his intent. This is determination that can only be made through live witness testimony. It is necessary for the Court to hear testimony and determine what Mr. Cist intended in his Trust documents and it is respectfully submitted this should be done at trial and not on a paper record.

3. If "during our lifetimes" is ambiguous, Margaret Ughetta is entitled to the opportunity to present extrinsic evidence showing that Mr. Cist intended that all transfers during the Cist's lifetimes should have been included in the equalization process.

The Master concluded on page 40 of her Final Report that "Margaret has pointed to no specific evidence of Mr. Cist having had a contrary intent that would create a genuine issue of material fact in dispute." As an initial matter, this is a misallocation of the burden of proof because, as discussed immediately above, Mary Harding has not established a prima facie case of what Mr. Cist's intent was. It is also unfair to Margaret because she never had the opportunity to submit extrinsic evidence to rebut that contention. At the October 23, 2014 Argument and Oral report, the Court indicated that it believed the phrase was unambiguous. The parties proceeded to complete summary judgment briefing on the issue of how to construe the term "transfer" as well as other issues. However, the issue of what extrinsic evidence could properly resolve the meaning of "during our lifetimes" was not presented to the Court because it was unnecessary, in light of the Court's ruling that the term "lifetimes" was unambiguous.

In the May 29, 2015 Final Report, the Master *sua sponte* reversed position and concluded that the term "during our lifetimes" was ambiguous, finding that the term meant to exclude transfers made to the Cist children before their graduation

from college. As noted above, Margaret did not have a fair opportunity to present extrinsic evidence regarding the meaning of "during our lifetimes" because that was not an issue until the Court's *sua sponte* reversal—*after* summary judgment briefing had been completed. Thus, even if this Court were to agree with the Master that "during our lifetimes" is ambiguous and believed the ambiguity was susceptible to resolution through a summary judgment motion, it should still reverse the Master's decision granting summary judgment, and remand the issue for further proceedings based on a full record.

ARGUMENT II

I. QUESTION PRESENTED

Did the Master in Chancery and Vice Chancellor err by failing to grant Petitioner's Motion to Compel production of the Autograph Collection letter despite granting Petitioner's Motion for Permission to Supplement the Record? Margaret preserved this question, after timely filing a Notice of Exceptions, in her Opening Brief filed January 20, 2017. (See pp. 8-18, D.I. 213).

II. SCOPE OF REVIEW

Despite granting Petitioner's Motion for Permission to Supplement the Record, the Master in Chancery subsequently denied Petitioner's Motion to Compel production of the Autograph Collection letter, in effect holding that the letter was irrelevant because the Autograph Collection was gifted to David from his grandmother, as opposed to his parents, and his parents simply held the Autograph Collection in trust for David. This Court reviews a trial court's application of discovery rules for abuse of discretion. ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 731 A.2d 811, 815 (Del. 1999). To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner. Spencer v. Wal-Mart Stores E., LP, 930 A.2d 881, 887 (Del. 2007).

III. MERITS OF ARGUMENT

It is respectfully submitted that the Court's ruling that the gift letter does not need to be produced because the Autograph Collection was gifted to David by his grandmother, and was simply held in trust by David's parents, was an abuse of discretion, as will be discussed below.

The Court in effect held, as a matter of law, that the Autograph Collection was gifted to David from his grandmother, as opposed to his parents, and his parents simply held the Autograph Collection in trust for David. It is well-established under Delaware law that, in order for a gift to be effective, the owner must have intended to make a gift and he must have made actual or constructive delivery of the subject matter of the gift. Bothe v. Dennie, 324 A.2d 784, 787 (Del. Super. 1974). Moreover, in order for a donor to make constructive delivery of the subject matter of a gift during his lifetime, the donor must relinquish in favor of the donee all present and future dominion and control over the gift property and any further possession and control by the donor must be in recognition of the right of the donee. Id.

Under the Restatement of Trusts, the required manifestation of intention to create a trust may be expressed in writing or by conduct. Otto v. Gore, 45 A.3d 120, 130 (Del. 2012) (internal citations omitted). "[T]he intent to create a trust can be demonstrated 'by definite, explicit and unequivocal words, or by circumstances

so revealing and compelling as to manifest the intention with all reasonable certainty.'" Id. When determining whether a settlor has formed the requisite intent to create a final, enforceable trust, courts look to intrinsic and extrinsic evidence, including the circumstances surrounding the creation of the trust and the conduct of the settlors. Id. at 130–31. A petitioner bears the burden of demonstrating the existence of an oral express trust by clear and convincing evidence. Bodley v. Jones, 32 A.2d 436, 438 (Del.1943).[3]

In the case at hand, there is at the very least a factual question as to whether David's grandmother ever made delivery of the Autograph Collection to David, either directly to him, or by way of a trust. Throughout these proceedings, all of the parties have apparently agreed that the Autograph Collection was owned by Mr. Cist. For example, on April 22, 2011, Mary Harding's counsel sent a letter to Margaret's counsel stating, in relevant part, "Our clear recollection of yesterday's teleconference is that you asked if there is documentation that David B. Cist

[3] Although the Court did not address whether it found the existence of a resulting trust, as opposed to an express trust, it is doubtful that the doctrine of resulting trusts would be applicable in the instant case. "It has been said that resulting trusts are available largely, if not exclusively, in two contexts: (1) when a party pays the purchase price for property that is transferred to another (*i.e.*, purchase-money resulting trusts), and (2) 'when there is a failure, in whole or in part, of an express trust or the purpose of an express trust or when the purpose of an express trust is achieved without exhausting the income or corpus of the trust.'" Taylor v. Jones, 2006 WL 1510437, at *4 (Del. Ch. May 25, 2006). Moreover, the existence of a resulting trust must also be established by clear and convincing evidence.

received the autograph collection as a gift. To accurately quote my client, she replied that there is documentation from Mr. and Mrs. Cist giving the autograph collection to David in 1970." (A-334). Similarly, in Respondent's Response to Petitioner's Request for Admissions, Mary Harding stated, "It is admitted that Mary S. Cist and/or John David Cist, in or around 1970, gave David B. Cist an autograph collection." (A-338).

In fact, Mary Harding has never argued that this was not a gift from Mr. Cist to David. Rather, the gist of Mary Harding's refusal to produce the gift letter has always been essentially this: Mr. Cist purportedly gifted the Autograph Collection to David in or around 1970 (again, when David was about seven or eight years old). Since Mary Harding claims that lifetime transfers do not include any transfers made to any beneficiary prior to one month after that beneficiary graduated from college, Mary Harding contends that the Autograph Collection does not need to be included in David's lifetime tally.

At no time during these long proceedings has any party ever indicated that the Autograph Collection is immaterial because it was never owned by Mr. Cist, and was simply being held by him in trust for David's benefit. Rather, the dispute has been over *when* Mr. Cist gifted the Autograph Collection to David. The 1973 Letter supports this position. It makes clear that it was possible that Mr. and Mrs. Cist may not have ever felt it was appropriate to distribute the Autograph

Collection to David. It is possible that, instead, Mr. Cist felt it best to retain the Autograph Collection himself. Indeed, all of the family members appear to have been operating under the belief that Mr. Cist did, in fact, claim the Autograph Collection as his own.

Accordingly, it is respectfully submitted that there is no evidence (let alone clear and convincing evidence) that David's grandmother intended for Mr. Cist to hold the Autograph Collection in trust for David. At the very least, there is a question of fact on this issue that should not be decided as a matter of law without hearing from the parties on the matter. This is especially true given the fact that the autograph letter being sought has a direct bearing on the outcome of this question. Put another way, the autograph letter is relevant to *when* the autograph letter was purportedly gifted, *to whom* it was purportedly gifted, and *by whom* it was gifted. As such, the autograph letter is absolutely relevant to the question of whether the Autograph Collection was properly excluded from David's lifetime tally, and should be produced. In denying Petitioner's motion to compel production of the autograph letter, the Master acted in an arbitrary and capricious manner by ignoring these recognized rules of law. Spencer v. Wal-Mart, 930 A.2d at 886-87 (". . . [W]hen a court . . . has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.")

(Citations omitted). Accordingly, it is respectfully submitted that the Master's decision was an abuse of its discretion, and should be overturned.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the decision of the Court of Chancery and remand the matter for trial.

FERRY JOSEPH P.A.

/s/ David J. Ferry, Jr.
David J. Ferry, Jr., Esquire (#2149)
Thomas R. Riggs (#4631)
James Gaspero, Jr. (#5893)
824 N. Market Street, Suite 1000
P.O. Box 1351
Wilmington, DE 19899
(302)575-1555
Attorneys for Petitioner-Below, Appellant

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