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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 CORRECTED COMBINED REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

SUMMARY OF ARGUMENT

Response to Appellee's Summary of Argument on Her Cross-Appeal

1. Denied. Margaret did not attempt to set aside the Trust's dispositive provisions, and, accordingly, did not violate the No-Contest Clause.

2. Denied. The Court of Chancery did not err in denying Mary Harding's request to shift fees under 12 Del.C. § 3584.

STATEMENT OF FACTS

Margaret incorporates by reference the Statement of Facts section in her Opening Brief.

ARGUMENT

I. THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

A. QUESTION PRESENTED

Are there genuine issues of material fact in dispute so that it was improper for the Master in Chancery and Vice Chancellor to grant Appellee, Mary Harding's Motion for Summary Judgment as to Margaret's claims?[1]

B. SCOPE OF REVIEW

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).

[1] Petitioner/Appellant is referred to as "Margaret". Respondent/Appellee is referred to as "Mary Harding".

C. MERITS OF ARGUMENT

Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Answering and Opening Brief") first argues that there is no genuine issue of material fact in dispute. Mary Harding is using the wrong starting point in her analysis of her position. This case, which has now been in litigation for five years, boils down to whether John David Cist's ("Mr. Cist") Trust instrument and amendments are unambiguous. If the language "transfers to our children…during our lifetimes…" is clear and unambiguous as Margaret argues in her Opening Brief then there clearly exists a dispute of a genuine issue of material fact. If that language is unambiguous, then there is, at the very least, a genuine issue as to whether Mary Harding, as Trustee, showed her brother, David, preferential treatment by allowing him to receive what Margaret claims to be an extremely valuable autograph collection without accounting for same as part of the equalization process. Analyzing whether there is a genuine disputed issue of material fact must come second to construing the language of the Trust instrument and its amendments.

Mary Harding argues that Margaret's Opening Brief "fails to mention any evidence she might offer at trial to prove her claim". (Answering and Opening Brief at p. 19). In addition, Mary Harding states that Margaret has admitted she has no evidence. Margaret's Opening Brief clearly sets forth her position that

granting summary judgment for Mary Harding as to Margaret's claims was improper. Margaret need not restate those arguments. As to Mary Harding's claim that Margaret admitted she has no evidence, Mary Harding cites to a transcript containing 4 pages of Margaret's deposition. (Mary Harding's Appendix at B301). A review of those pages reveals no such admission by Margaret.

In addition, at various times throughout this litigation, Margaret has raised the following issues regarding the Equalization Process as disputed issues of material fact that should be resolved at trial:

1. **Mary Harding's failure to provide the Purported Gift Letter and show proof of when David took actual possession of the autograph collection**

Margaret was aware that her parents possessed a large autograph collection. Margaret understood it to be very valuable. In trying to determine what had happened to it, Margaret was told by Mary Harding's counsel that it was gifted to her brother, David, in 1970. Margaret, through counsel, sought documentation ("Purported Gift Letter") of this gift. Margaret's counsel was informed by Joanna Reiver, Esq.:

> "To accurately quote my client, she replied that there is documentation from Mr. and Mrs. Cist giving the autograph collection to David in 1970. She then added that if your client requests to see it, to be fair each beneficiary must produce documentation of gifts that beneficiary received. My client mentioned a number of items in your client's possession. If your client wishes to pursue this, we will provide you with a list of those items and request to see your client's documentation that they were gifts to her. This will verify that we did

> not, and have not, refused to provide documentation of the gift of the autograph collection."

(AR-1). Yet, Mary Harding continued to refuse to provide the Purported Gift Letter. It was the subject of a Motion to Compel filed by Margaret on March 1, 2014. A review of the docket of the case indicates that this Motion was never granted nor denied. A request was made of David to bring the Purported Gift Letter to his deposition. He refused. He stated, "My position for years has been out of fairness that when people are providing – when I'm requested to provide documentation of prior gifts that others should do the same." (AR-5). This echoes the same response given to Margaret's counsel. Yet, when David was asked who it is that hasn't supplied information about other gifts, he stated he doesn't know. (AR-5). The Purported Gift Letter was the subject of Margaret's Third Request for Production of Documents, which Margaret served after the Master's October 23, 2014 draft bench report that the language "during our lifetimes" as contained in Mr. Cist's Trust documents was unambiguous. Mary Harding responded to that discovery request with an objection and claimed that the word "transfer" was defined by Mr. Cist as including only those transfers occurring one month after each beneficiary graduated college. Through all of this, Mary Harding has failed and refused to produce the Purported Gift Letter. Even after Margaret discovered 2 letters relevant to the gifting of the autograph collection (See Argument III

below), Mary Harding continued to refuse to produce the Purported Gift Letter and refused to confirm or deny whether either of the letters discovered by Margaret were the Purported Gift Letter. Margaret also has no information as to when David actually took possession of the autograph collection, which continues to be a relevant factor as to whether the value of the collection should have been included in David's lifetime tally for purposes of equalization, even if the Court's decision that only transfers made one month after college graduation are counted.

2. Mary Harding's inclusion of gifts to Margaret's husband on her lifetime tally

John David Cist's Trust documents call for the Trustee to take into account all transfers made during his and Mary S. Cist's lifetimes to a child or issue of a child. The document is silent as to transfers made to the spouse of any of their children. Victor Pelillo was instructed to include transfers made to the spouse of a child as well. Mr. Pelillo's November 16, 2011 letter, however, is silent as to transfers to spouses. (Mary Harding's Appendix at B290-B295). This meant that any transfers made to Margaret's husband, William Ughetta, were included on Margaret's lifetime transfer tally. Margaret objected to this. Whether the amount of the charges attributed to Margaret as a result of transfers made to her husband is great or minor is not the issue. The Court should make a determination whether the Mary Harding, as Trustee, properly included these charges as part of the Margaret's tally in the equalization process. (AR-6).

3. Margaret's inability to dispute charges placed on her tally by Mary Harding during the final review period

Margaret objected to charges being added to her tally by Mary Harding in the final review. Margaret was given only five days to review and dispute these charges and Margaret was required to provide documentation to challenge any that she disputed. (AR-10). According to the deposition testimony of Victor Pelillo, Mary Harding was not required to provide documentation to move these charges from her tally to Margaret's tally. (AR-15-AR-17). It was unreasonable for Mary Harding to request Margaret provide documentation to dispute charges placed on her tally based solely on the verbal directions of Mary Harding.

4. Mary Harding's improper valuation used for her and David's interest in The Bluff House, LLC

The Bluff House, LLC is a limited liability company that owns the property known as The Bluff House, an oceanfront home in Wellfleet, Massachusetts on Cape Cod. David was gifted a 40% interest in the LLC in 1998 and another 40% interest in 1999. Mary Harding was gifted the remaining 20% interest in 2000. The value of Mary Harding and her brother's interest in the LLC was based upon the gift tax returns filed for those years. For purposes of the gift tax returns, the value of their interest was discounted due to their receiving a minority interest (this was the case for the transfer of David's 40% interest in 1999 even though he would then own and control 80% of the LLC). (AR-18). David, in particular, received a

windfall from this treatment of his interest in the LLC, compared to the treatment of that interest under the terms of John David Cist's 2006 Trust documents. John David Cist's 2006 Trust document called for an advancement to David due to his receipt of an 80% interest in the LLC for $1,250,000. Under the terms of John David Cist's operative Trust documents and due to the discounted value from the gift tax return, however, David was charged only $300,600 on his lifetime tally for his 80% interest in The Bluff House, LLC. (AR-39). Although Margaret does not dispute that the value of David's and Mary Harding's interests in the LLC should be determined by their value at the time of the transfers, Margaret has taken exception to the discounted gift tax value used rather than a fair market value. John David Cist's operative trust documents state that transfers should be valued at the time of the transfer, but are silent as to whether a discounted gift tax return value is appropriate.

Margaret's concerns regarding the valuation of the Bluff House, and the effects of that valuation on the Equalization Process, have never been addressed by Mary Harding or the Court. "I wasn't filing [the lawsuit] because of one single thing. There has been a lack of disclosure, lack of transparency. . . . The way the Bluff House gifting was done, if that was done correctly. There's just a lot of questions that . . . fair market value versus gift tax value.") (AR-47). Notably, the

Master's report does not address the Bluff House matter. This is a factual issue that needs to be presented at trial.

5. Mary Harding's failure to include various items and transfers on her own lifetime tally

Mary Harding testified that she used her mother's American Express card during her mother's lifetime and after her mother's death. (AR-48-AR-49). It is unknown if all appropriate charges were attributed to Mary Harding for the use of her mother's credit card. There was also an indication that Mary Harding was not required to supply full and complete documentation to dispute charges to her lifetime tally. (AR-50--AR-53). Mary Harding testified that "[w]e all sort of had access to Mom's American Express, and I had access to it over a period of time." (AR-54). Mary Harding is unclear though as to when she began using her mother's credit card. Margaret questioned charges to her mother's credit card at her deposition, including charges of $15,000 that were eventually attributed to Mary Harding. (AR-55-AR-67).

Conclusion

The language of John David Cist's Trust instrument and amendments is unambiguous, which creates a disputed issue of material fact regarding the autograph collection currently in David's possession. In addition, Margaret has clearly established that there are disputed issues of material fact that should have been resolved at trial. These disputed issues of material fact include the failure of

Mary Harding to produce the Purported Gift Letter and supply information as to when David took actual possession of the autograph collection, the inclusion of gifts to Margaret's husband on her lifetime tally for purposes of equalization, Margaret's inability to challenge transfers to her lifetime tally due to Mary Harding's verbal instructions to Victor Pelillo, the value attributed to David and Mary Harding's interest in The Bluff House, LLC and Mary Harding's failure to include charges on her own tally. The Court should remand this matter for trial, or, at the very least, remand it for an evidentiary hearing as to the above-referenced issues.

II. THE TRUST INSTRUMENT IS UNAMBIGUOUS

A. QUESTION PRESENTED

Is the language of John David Cist's Trust instrument and amendments unambiguous so that the Master in Chancery and Vice Chancellor erred by considering extrinsic evidence to determine his intent?

B. SCOPE OF REVIEW

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).

C. MERITS OF ARGUMENT

1. The Court should not consider extrinsic evidence of Mr. Cist's intent.

Mary Harding, in her Answering and Opening Brief, as in past briefs filed in this matter, continues her approach of summarily concluding that the Trust

instrument is ambiguous and proceeds to bombard the Court with extrinsic evidence to argue that there can be only one conclusion as to John David Cist's intent.

Arguing that the Trust language is ambiguous, Mary Harding makes four assertions. First, she argues that because the word "transfers" is not directly modified by any word it is not possible to determine which transfers count. Relatedly, she claims that Margaret admits in her Opening Brief that the missing modifier is significant, which is not the case. The inclusion of a sentence in Margaret's Opening Brief that uses the words "the transfers" or "all transfers" is in no way an admission or concession that the lack of a modifier in the Trust amendments is significant. The focus of the inquiry must be the word "transfers" in the context of the phrase "transfers to our children…during our lifetimes." This language is unmistakably clear.

Second, Mary Harding argues that it is not a reasonable expectation to construe "transfers" to include every gift made, as that would make the Trustee's task impossible. This argument lacks merit for two reasons. First, at no point has Margaret argued that the Trustee attempt to accomplish a task that would be impossible due to a lack of records. There has been no dispute that John David Cist kept records beginning in and around 1980. There has also been no dispute that the starting point for the equalization process of one month after college

graduation was a product of the scrivener of the documents, Ms. Reiver, reinterpreting the estate planning documents she drafted that were intended to be completely restated at a later point in time. Second, Mary Harding's claim that the Trustee would be required to go back to 1958 is an attempt to cloud the true issue of David possessing the autograph collection without counting its value in his lifetime tally.

Third, Mary Harding argues that Paragraph D(4) of the Trust amendment was intended, by specific examples, to define "transfers" to be counted. However, if that were the case, the Trustee would have used the calculations David and Mr. Cist came up with before Mr. Cist's death. This was not the case. (Mary Harding's Appendix at B75-B76, which is Exhibit A to Victor Pelillo's October 22, 2009 letter to David and Mr. Cist compared to the final lifetime tally values of the beneficiaries as indicated in the April 13, 2012 letter of Ms. Bennett at (AR71-AR-73). Further, Victor Pelillo testified that the job he was hired to do by the Estate was different than the job he was hired to do by David and Mr. Cist and was more expansive. (A-236-A-237).

Finally, Mary Harding argues that Mr. Cist's two trust attorneys understood the Trust language to address only post-graduation transfers. Yet, that was not stated in the documents themselves, which would have been simple to do had that been Mr. Cist's intent at the time the Trust amendments were drafted. This, again,

is Mary Harding looking first to extrinsic evidence to justify her interpretation of the Trust amendments, rather than looking to the actual language of the amendments.

2. If the Court finds the Trust language is ambiguous, resolution of the ambiguity requires a trial.

Even if the Court were to agree with Mary Harding that the language of the Trust instrument and amendments is ambiguous, that does not end this matter. The issue of the proper interpretation of the language of the Trust instrument and its amendments is one that should not be resolved by summary judgment, but only at trial. The record that has been established throughout this litigation is replete with testimony that calls into question the credibility of the witnesses. For example, on page 11 of Mary Harding's Answering and Opening Brief, she states, in the section titled "The Evidence of What Mr. Cist Did that Explains His Intent", that Victor Pelillo, in his October 22, 2009 report (Mary Harding's Appendix at B340-45), asked questions about 41 items that included pre-graduation transfers and that Mr. Cist determined those items were not needed for the purposes of equalization. Mary Harding cites to the testimony of David (Mary Harding's Appendix at B315 at p. 265). A close examination of that page and page 264 of David's deposition testimony, though, paints a much murkier picture:

> [Mr. Ferry] So you were saying to exclude them but he decided to keep them in?

> [David] He advised that these should – that his document should not change.
>
> [Mr. Ferry] Did you agree with that decision?
>
> [David] I said I'd tell Dad about it and he would make the decision.
>
> [Mr. Ferry] Did you tell your dad about it?
>
> [David] Yes.
>
> [Mr. Ferry] Did he make a decision?
>
> [David] Not that I know of, no. I think he decided this was good enough and he didn't need to work on the 41 items.

The deposition testimony of Victor S. Pelillo, CPA (AR-69-AR-71) only adds to the inconsistencies:

> [Mr. Ferry] [referring to the 41 items in the October 22, 2009 report] My question is: Did you get a response to that? Did you get information that you needed in order to complete the assignment as you requested in this letter?
>
> [Mr. Pelillo] No. I could not complete the assignment. I did not complete the assignment.
>
> [Mr. Ferry] Okay. And do you know why you didn't get the additional information?
>
> [Mr. Pelillo] No.
>
> ***
>
> [Mr. Ferry] Did you have any communication with him after that or with anybody else indicating he [John David Cist] couldn't provide it, he was too sick, anything like that?

> [Mr. Pelillo] I received an e-mail from David that they had worked up a number to distribute between themselves.
>
> [Mr. Ferry] Okay. So in response to this letter with these 41 separate questions or issues that you had, you got an e-mail from David saying what?
>
> [Mr. Pelillo] They have basically came up with an allocation of their assets, a true-up, in essence, of what assets were going to be distributed to the various children based on the number they came up with.

A review of the 41 items on Mr. Pelillo's list shows that some ended up on the lifetime tallies, such as David's MIT tuition at No. 28. Many of the items that did not end up on the finalized lifetime tallies were for Mary Harding's college tuition, including Nos. 4, 7, 12, 14, 16, and 17 through 19. Mary Harding herself though testified that she did not know Mr. Cist's intentions for a start date of the equalization process. (A-85).

All of the above occurred during a period when Mr. Cist's attorney, Ms. Reiver, testified that the intention was to quantify the equalization numbers so that they wouldn't have to be defined in the documents, and then to fully restate Mr. Cist's Trust instrument. (A-212-A-213). It is clear that Mr. Cist never came to a conclusion as to any final numbers to be included as part of the equalization process. (AR-78AR-82). The scrivener of the language at issue, Ms. Reiver, in her deposition testimony contradicted the plain meaning of that very same language in order to give effect to Mary Harding's interpretation of the Trust amendment. (AR-74). In addition, the Master's decision in her Final Report dated

May 29, 2015, hinges on her reading of Paragraph D(4) of the Trust amendment. (Master's Final Report at ps. 35-37). Ms. Reiver's testimony at her deposition does not support the Master's conclusion. Ms. Reiver's testimony was that Paragraph D(4) did not further define or refine the concept of lifetime transfers. (AR-74-AR-77).

There can be no resolution of any ambiguity of the Trust language without assessing, at the very least, the credibility of Mary Harding and David. If the Court concludes the Trust instrument contains an ambiguity, then that ambiguity must be resolved at trial.

Conclusion

The language of the Trust amendments is unambiguous. If, however, the Court finds that it is ambiguous, the Court should remand this matter for a trial, because questions about the credibility of the witnesses are essential to resolve this matter.

III. THE COURT SHOULD HAVE GRANTED THE MOTION TO COMPEL PRODUCTION OF THE PURPORTED GIFT LETTER

A. QUESTION PRESENTED

Did the Master in Chancery and Vice Chancellor err by failing to grant Margaret's Motion to Compel production of the Purported Gift Letter despite granting Margaret'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).

B. SCOPE OF REVIEW

Despite granting Margaret's Motion for Permission to Supplement the Record, the Master in Chancery subsequently denied Margaret's Motion to Compel production of the Purported Gift 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).

C. MERITS OF ARGUMENT

In her Answering and Opening Brief, Mary Harding appears to argue that the lower court should have performed a Rule 60(b)(2) analysis in deciding whether to grant Margaret's motion to compel production of the Purported Gift Letter.[2] As explained in Margaret's Opening Brief, the lower court declined to perform this analysis, instead finding that the autograph collection was never a part of Mr. or Mrs. Cist's respective estates to begin with. Again as explained more fully in Margaret's Opening Brief, it is respectfully submitted that the lower Court's finding on this issue was in error. Moreover, it is respectfully submitted that a Rule 60(b)(2) analysis weighs in favor of Margaret's request that Mary Harding be compelled to produce the Purported Gift Letter.

[2] In Vianix Delaware LLC v. Nuance Commc'ns, Inc., 2011 WL 487588 (Del. Ch. Feb. 9, 2011), the defendant filed a motion to reopen the record on the basis of newly discovered evidence after the close of evidence, but prior to a judgment being entered. Id. at *2-3. In deciding what standard to apply to the defendant's motion, the Court noted that neither Rule 59(a), which applies to motions for a new trial, nor Rule 60(b), which applies to motions for relief from a judgment or order, appeared to apply to the case before it. However, the Court explained that it had equitable discretion to determine whether granting the defendant's motion would "serve the interests of fairness and substantial justice." Id. at *3. Moreover, the Court found that the Rule 60(b)(2) standard for evaluating whether to reopen a judgment to consider newly discovered evidence, although not controlling, was both analogous and instructive, and used Rule 60(b)(2) as a guidepost in the exercise of its general equitable discretion to analyze the merits of the defendant's motion.

Mary Harding conclusorily states that Margaret is unable to meet the following Rule 60(b)(2) standards:

(a) whether the evidence has come to the moving party's knowledge since the trial;

(b) whether the exercise of reasonable diligence would have caused the moving party to discover the evidence for use at trial;

(c) whether the evidence is so material and relevant that it will likely change the outcome;

(d) whether the evidence is material and not merely cumulative;

(e) whether the moving party has made a timely motion;

(f) whether undue prejudice will inure to the nonmoving party; and

(g) considerations of judicial economy.

Whittington v. Dragon Grp., LLC, 2012 WL 3089861, at *3 (Del. Ch. July 20, 2012). Contrary to Mary Harding's assertions, Margaret meets each of these standards.

Margaret submits that she exercised reasonable diligence in discovering the Supplemental Documents. Margaret acknowledges that the Supplemental Documents were included in the over 7,500 documents she scanned and photographed from September 12, 2013, through November 1, 2013. Mary Harding criticizes Margaret for purportedly not using reasonable diligence, since it

took until February, 2016 for Margaret to find the February 1973 Letter. Mary Harding fails to recognize that any delay in discovering the Supplemental Documents is the result of the Trustee's failure to inventory, catalogue, or even photograph the genealogy documents as part of her administration of the Trust assets. Indeed, to this day, only Margaret has made any effort to inventory these important family documents, although all of the other beneficiaries have benefitted from Margaret's efforts. Put simply, Mary Harding's argument on this issue rings hollow. Accordingly, Margaret has satisfied criteria "a" and "b" of the 60(b)(2) analysis.

Margaret has also met criteria "c"-"d". Mary Harding maintains that the undisputed testimony of David Cist is that he did receive the autograph collection in 1970. Again, Mary Harding mischaracterizes the record. David never said that he received delivery of the autograph collection in 1970. In fact, in his deposition testimony David merely states that he has documentation "that says the gift was to David, 1970". (A-102-03). It is this letter that Margaret has been seeking for years. David never testified when he actually received the autograph collection. Moreover, *Mary Harding herself* testified that she did not imagine that David received the autograph collection in 1970. See Deposition of Mary Harding Lawrence Cist at p.190, (AR-68). In fact, she has no idea when the autograph collection physically left her parent's (and now, her) residence. Id.

This is why, notwithstanding Mary Harding's position that they "prove nothing", the Supplemental Documents are so significant. The September 1967 Letter indicates that David was not to receive the autograph collection until he was "old enough to really appreciate it."(A-327)[3]. The February 1973 Letter, apparently written by John David Cist on or about February 21, 1973, 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 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." (A-333).

The implication of the Supplemental Documents is clear. The autograph collection was not gifted to David in 1970; rather David was not to receive the autograph collection, if at all, until he was "old enough to really appreciate it." Moreover, as of February 1973, there remained the possibility that David would not receive the autograph collection at all if such distribution was not appropriate in Mr. or Mrs. Cist's opinion. To this day, Mary Harding refuses to provide any documentary evidence to the contrary.

[3] David would have been approximately 8 years old in 1970.

Finally, Margaret meets criteria "e"-"g". Mary Harding does not dispute that Margaret repeatedly asked for the Purported Gift Letter, that at the time the issue was presented to the lower Court the question of whether David ever actually received the autograph collection in the 1970s was an issue that remained to be decided, and that the motion to compel production of the Purported Gift Letter remained pending at that time. Nor can Mary Harding identify any prejudice she or the beneficiaries suffered by the Court's consideration of two extra pages of documents when considering this question.

Mary Harding's Answering Brief as described above leaves very little in the way of argument that actually addresses the points raised in Margaret's Opening Brief with respect to the Motion to Supplement—*i.e.* whether the Master's recommendation that Margaret's motion to compel production of the Autograph Gift Letter be denied was in error. Mary Harding fails to address a single point raised by Margaret in her Opening Brief. She does not address Margaret's argument that Mary Harding failed to meet her burden to establish by clear and convincing evidence that Mr. Cist was merely holding the autograph collection in trust. She does not dispute the fact that her position from the very beginning of these proceedings has been that Mr. Cist in fact gifted the autograph collection to David. She does not dispute the fact that her own attorney claimed Mr. Cist owned the autograph collection and gifted it to David in 1970. She does not dispute the

fact that her own attorney claimed the Purported Gift Letter itself confirms that Mr. Cist and his wife gifted the autograph collection to David. She does not dispute the fact that at no time during these proceedings has any party ever indicated that the autograph collection is immaterial because it was never owned by Mr. Cist.

Instead, Mary Harding claims that she did not dispute these facts because Margaret "had not disclosed she found the September 1967 letter showing it belonged to Mr. Cist's mother." See Answering and Opening Brief at n.11. It bears repeating that the 1967 Letter was a part of the genealogy materials that were in Mary Harding's possession and control since the day she was appointed Trustee. Mary Harding's defense here is apparently that she, as Trustee, did not feel particularly compelled to gather the genealogy materials and inventory them so that they could be properly valued and distributed. As a result, Margaret took it upon herself to perform this incredibly labor-intensive service in order to attempt to preserve items of significant historic value for the family—a service which has provided a benefit to all of the Trust's beneficiaries. It is reflective of the Mary Harding's attitude towards Margaret from the beginning of this matter that, instead of being grateful for Margaret's willingness to take on a task that Mary Harding herself had a duty to perform but refused to do, she instead criticizes Margaret's speed in reviewing the thousands of uncatalogued and non-inventoried documents.

Moreover, Mary Harding's position is, on its face, nonsensical; she argues that she (and every other member of the family, for that matter) only took the position that Mr. Cist owned the autograph collection because Margaret had not disclosed that she found the 1967 Letter. However, Margaret did not find the letter until she was permitted to inspect the genealogy documents in 2013. Mary Harding has maintained throughout these proceedings, beginning long before 2013, that the autograph collection was a gift from Mr. Cist to David. Mary Harding's position is a tacit admission that she did not undertake any reasonable effort to investigate the circumstances surrounding the transfer of the autograph collection to David as would be required of a fiduciary.

Conclusion

In light of the foregoing, it is respectfully submitted that the lower Court should have granted the Motion to Compel production of the Purported Gift Letter. At the very least, this matter should be remanded for an evidentiary hearing regarding the circumstances surrounding the transfer of the autograph collection.

IV. MARGARET DID NOT VIOLATE THE NO-CONTEST CLAUSE

A. QUESTION PRESENTED

Did Margaret violate the No-Contest Clause in the Trust? This question was presented by the Trustee's summary judgment brief that asked the Master to apply the No-Contest Clause, and responded to by Margaret in her Combined Answering and Opening Brief filed on July 31, 2015 (See pp. 40-44, D.I. 150).

B. SCOPE OF REVIEW

Review of the application of the No-Contest Clause is *de novo*. Motorola, Inc. v. Amkor Tech, Inc., 849 A.2d 931, 935 (Del. 2004).

C. MERITS OF ARGUMENT

1. Margaret Has Not Challenged The Terms Of The Trust

The Trust's No-Challenge Provision provides:

> If any beneficiary under this instrument files an action in any court seeking to set aside any aspect of the document, or to challenge any aspect of the disposition provided herein, the bequest to such beneficiary shall be partially ineffective and void, and the bequest such beneficiary would have received, but for such challenge, shall be reduced by one-half (*i.e.*, fifty percent). The contestant's share shall also bear the costs of attorney's fees and costs incurred by the contestant as well as attorney's fees and costs incurred by my fiduciaries in defending the action. The portion by which such contesting beneficiary's bequest is reduced shall be distributed in equal shares to the non-contesting beneficiaries. The provisions of this provision shall also apply to takers in default, if any, provided in such bequest hereunder. This provision shall apply in the case of challenges based on fraud, mistake, undue influence, or incapacity, or upon any other basis.

(B-197). Contrary to Mary Harding's claims, Margaret has not directly challenged key terms of the Trust, and has not triggered the No-Contest Clause. Margaret has not asked this Court to vary, set aside, or overturn any aspect of the Will or Trust. Nor has Margaret sought to challenge any disposition provided for in the Will or Trust. On the contrary, Margaret is attempting to enforce the express language of the Trust document. This is not a contest of the Trust. It is a contest of the Trustee's failure to properly administer the Trust.

The No-Contest provision applies to a beneficiary who files an action to set aside any aspect of the document. Margaret has not sought this relief. There is not a single request to set aside any portion of any Trust document. The No-Contest provision also applies to any action filed to challenge any aspect of the disposition provided for in the Trust document. Mary Harding has argued that Margaret's actions fall into this broader category based upon Margaret's request to remove Mary Harding as Trustee. This is incorrect. As noted by the Master, "a removal petition does not challenge the trustor's selection of a successor trustee, only the selected trustee's performance of her fiduciary duties." (Master's Report, May 29, 2015, attached to Opening Brief as Exhibit "A" at n. 134, citing McCaslin v. England, 2013 WL 127787 at *4 (Cal.App. 4 Dist. Mar. 29, 2013)). In other words, a request to remove a trustee does not fall within the purview of a challenge to the trust itself; it is not an attempt to set aside any of the trust's provisions.

Accordingly, Margaret's request for the removal of Mary Harding as trustee does not implicate the No-Contest Provision.

In her Answering and Opening Brief, Mary Harding does appear to concede that the Petition does, in fact, fall within the conduct permitted by 12 Del.C. § 3329. See Answering and Opening Brief at p.39. However, Mary Harding now alleges that Margaret "crossed the line into actually contesting an 'aspect of the disposition provided' for by the Trust" when she began to argue that the Trust's equalization language required including all transfers to a child since birth. Id. Mary Harding's theory is that Margaret has been seeking to change the Trust disposition, as opposed to seeking a trust interpretation. Mary Harding's argument is without merit. Margaret's position, as explained more fully supra and in her Opening Brief, is that the Trust's language is unambiguous in that it seeks to include all lifetime transfers when making equalization calculations. Mary Harding's position is that, notwithstanding the express terms of the Trust, only transfers made after a beneficiary graduated college should be included. In other words, the parties differ in the interpretation of the Trust language. As the Master correctly noted:

> Mary Harding herself has argued that certain terms in Mr. Cist's trust are ambiguous. It is, therefore, reasonable for the parties to have advocated for different interpretations of the language of Mr. Cist's trust pertaining to the TPP distribution and the equalization process. While Mary Harding views this as an indirect challenge to the trust that has frustrated Mr. Cist's intent and prolonged the administration

> of the trust, courts do not view disputes over the interpretation of instruments as violating a no-contest clause.

(Master's Report, May 29, 2015, attached to Opening Brief as Exhibit "A" at p.44.)

Mary Harding's reliance on Margaret's Answers to Interrogatories ("Answers") is similarly misplaced. Mary Harding contends that, in those Answers, Margaret "objects" to being charged for her children's tuitions in the equalization process, and, accordingly, the No-Contest provision has been implicated. See Answering and Opening Brief at p.40. The Master correctly concluded that Mary Harding's contention has no merit because Mary Harding has not challenged the tuition payments in either the Petition or in her briefing. (See Master's Report, May 29, 2015, attached to Opening Brief as Exhibit "A" at n. 134). Put another way, Margaret has not asked this Court to set aside the tuition payments. Accordingly, the No-Contest Clause has not been implicated.

Mary Harding also argues that Margaret's mention of "transfers to her husband" in her Answers somehow implicates the No-Contest Provision. Put simply, it does not. Nowhere in the Trust does it specifically say that transfers to a spouse should be considered in a beneficiary's respective Tally. Moreover, Margaret's objection specifically argues that the transfers to her husband were gifts, which should not be counted in her Tally. In short, Mary Harding can point to no provision in the Trust that is being sought to be "set aside" by Margaret's

comments in her Answers relating to the transfers to her husband. Rather, Margaret is simply questioning Mary Harding's method of administering the Trust. As such, the No-Contest provision has not been violated.

2. Margaret's Attempt To Avoid The No-Contest Clause Does Not Lack Merit As A Matter Of Law

Finally, Mary Harding argues that Margaret's attempt to avoid the No-Contest clause lacks merit as a matter of law. The only caselaw Mary Harding cites in support of her argument is two cases from California, and a case from New York. None of these cases are persuasive. Mary Harding cites, for example, McKenzie v. Vanderpoel, 61 Cal.Rptr.3d 129, 137 (Cal.Ct.App. 2007) for the proposition that the No-Contest Clause prohibits more than just a challenge to the validity of the Trust as a whole—instead, it prohibits anyone from seeking to set aside any provision of the trust. This somewhat unremarkable proposition simply doesn't apply in the case at hand because Margaret is not seeking to set aside any provision of the Trust.

Mary Harding's reliance on Nairne v. Jessup-Humblet, 124 Cal.Rtpr.2d 726, 728 (Cal.Ct.App. 2002) and In re Ellis, 683 N.Y.S.2d 113 (N.Y.App.Div. 1998) is similarly misplaced. Mary Harding cites these cases for the proposition that a no-contest provision can be violated where the testator's unequivocally expressed intent is frustrated by a subsequent challenge. Again, these are not the circumstances in which the parties find themselves in the instant action.

Margaret has not challenged any disposition provided for in the Trust document. Margaret has not claimed that the dispositions listed in the Trust are invalid. She has not requested that the language of the Trust be modified in any way. Rather, she is claiming that the Trustee has failed to honor those dispositions listed in the Trust, and that the Trustee has failed to properly administer the Trust based on its clear and unambiguous terms. Margaret has challenged whether the Trustee has breached her duty by failing to carry out the terms of the Trust document and by acting hostilely toward Margaret. In light of the foregoing, there is no basis for Mary Harding's argument that the No-Contest Provision should be invoked in this matter.

Conclusion

Mary Harding has failed to establish that any actions taken by Margaret were actions seeking to set aside any aspect of the Trust document. Nor can Mary Harding establish that any actions taken by Margaret were actions seeking to challenge any disposition provided for in the Trust document. It is clear that Margaret has not challenged the validity of the Trust or the language of the Trust. Instead, Margaret has merely challenged Mary Harding's administration of the Trust.

V. AN AWARD OF FEES IS NOT APPROPRIATE UNDER 12 DEL.C. § 3584

A. QUESTION PRESENTED

Should the Court of Chancery have awarded attorney's fees to Mary Harding under 12 Del.C. § 3584? This question was presented by the Trustee's motion seeking an award of fees, and responded to by Margaret in her Combined Answering and Opening Brief filed on July 31, 2015 (See pp. 45-52, D.I. 150).

B. SCOPE OF REVIEW

The application of statutory fee-shifting is subject to an abuse of discretion review. Copeland v. Kramarck, 2006 WL 3740617, *4 (Del.Ch. Dec. 11, 2006) ("Section 3584 is permissive rather than mandatory").

C. MERITS OF ARGUMENT

Mary Harding argues that this Court should award her attorneys' fees on an independent basis pursuant to 12 Del. C. §3584. That statute provides: "In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." This statute acts as a supplement to the Court's well-known authority to assess attorneys' fees under the "American Rule" if a party is found to have acted in bad faith either before or during the litigation. In re Trust for

Grandchildren of Gore, 2013 WL 771900, at *2 (Del. Ch. Feb. 27, 2013). This is more commonly known as the "bad faith exception" to the standard principle that attorneys' fees are not typically assessed against other parties. Id. "Delaware follows the general rule that, regardless of the outcome of litigation, each party is responsible for paying his or her own attorneys' fees." In re SS & C Technologies, Inc., 948 A.2d 1140, 1149 (Del. Ch. 2008).

There is no one single standard to apply for the bad faith test, "rather, bad faith is assessed on the basis of the facts presented in the case." Beck v. Atlantic Coast PLC, 868 A.2d 840, 851 (Del. Ch. 2005). There are certain types of litigation conduct that lend credence to a declaration of bad faith:

> Courts have found bad faith conduct where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims. **Specific behavior that has been found to constitute bad faith in litigation includes misleading the court, altering testimony, or changing position on an issue. The bad faith exception is not lightly invoked.**

Id. (emphasis added). In a motion seeking attorneys' fees such as the present Motion for Summary Judgment, the moving party "bears the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct." Id. Additionally, in order to assess attorneys' fees, a party must be found to have acted in *subjective* bad faith as opposed to an objective standard. SS & C Technologies at 1150.

Mary Harding maintains that the Master incorrectly applied the "bad faith" standard, and that "justice and equity" require fee shifting in this case because

Margaret: i) asserted claims that plainly lacked merit; ii) continued to press claims after discovery showed the claims lacked merit; and iii) asserted inconsistent claims. Mary Harding, citing to a string of decisions in other jurisdictions, argues that the Court of Chancery's reading of § 3584 as generally requiring conduct akin to bad faith to shift fees between the parties is too narrow. However, the Master's decision was entirely consistent with prior decisions by Delaware Courts on this issue. In fact, it is clear that Delaware courts are reluctant to shift fees pursuant to Section 3584 absent a finding that the party to be charged acted in bad faith. See e.g. In re IMO Trust for Grandchildren of Wilbert L., 2013 WL 771900, at *2 (Del. Ch. Feb. 27, 2013) (noting, "Although the statute grants the Court somewhat greater flexibility in exercising its discretion to shift attorneys' fees, the conduct which the Objecting Grandchildren cite in support of their application is tied to the concept of the bad faith exception to the American Rule.); See also In re Jean I. Willey Trust, 2011 WL 3444572, at *8 (Del. Ch. Aug. 4, 2011) (finding no basis to shift fees under Section 3584 where party did not breach any fiduciary duty or act in bad faith); Paradee v. Paradee, WL 3959604, at *15 (Del. Ch. Oct. 5, 2010) (applying the bad faith standard where a party brought a claim for fee-shifting under Section 3584, and noting that a lesser breach of fiduciary duty alone will not merit departing from the American Rule); In re Olympic Mills Corp. Coachman Inc., 2010 WL 3810784, at *2 (Bankr. D.P.R. Sept. 27, 2010) aff'd sub nom. In re

Olympic Mills Corp., 2012 WL 4667598 (D.P.R. Sept. 28, 2012) (noting, "Delaware courts typically only exercise this discretion [under Section 3584] in cases involving bad faith."); Merrill Lynch Trust Co., FSB v. Campbell, 2009 WL 2913893, at n. 95 (Del. Ch. Sept. 2, 2009) (explaining that while Section 3584 sets a standard that is more relaxed than that of the American Rule, its application, nonetheless, should be informed by the precepts underlying the American Rule). In light of the foregoing, and as will be set forth below, the facts of this case do not warrant a shifting of fees and costs under Section 3584.

Mary Harding asserts that Margaret's complaints regarding the information she received from Mary Harding were groundless and demand a shifting of fees and costs. Margaret made many requests for information to Mary Harding regarding the administration of the Trust that went unanswered, or answered in an incomplete manner. Indeed, the Master summarized the facts as follows:

> Given that Petitioner does not appear to have been included in the numerous meetings, discussions, and correspondence concerning Mr. Cist's estate planning that occurred between and among her siblings, her father, her father's attorneys, and Pelillo beginning in August 2008 until Mr. Cist's death in June 2010, I do not find it surprising that Margaret has repeatedly sought information about and questioned the administration of her father's Trust.

(Master's Report, May 29, 2015, attached to Opening Brief as Exhibit "A" at p.44.) In light of these circumstances, it cannot be said that Margaret acted in bad

faith by requesting information from Mary Harding, or that justice and equity otherwise demand that fees and costs be shifted.

Mary Harding also alleges that Margaret's claims regarding the administration of the "by lot" requirement of the Trust, and the implementation of the Equalization Process, have no merit. It bears repeating: Margaret has not challenged the distribution provided for by the Trust. Rather, she has challenged the methods by which the Trustee has decided to carry out the distribution provisions of the Trust. These are two distinct and separate challenges. In any event, Margaret's challenge to Mary Harding's administration of the "by-lot" requirement, even if unsuccessful, does not rise to the level required for this Court to shift fees to her. In light of the perceived ambiguities in the Trust, Margaret's claims regarding the implementation of the Trust's provisions simply cannot serve as the basis for an award of fees under Section 3584.

Mary Harding also argues that Margaret challenged the Equalization Process Mr. Cist initiated before his death and mandated be followed in his Trust. As mentioned *supra*, Margaret has shown that the process initiated by Mr. Cist prior to his death is not the same as the process set forth in the Trust document. The fact that Mr. Cist took certain actions prior to his death does not mandate that those exact actions be repeated again in the Trust administration. Mr. Pelillo testified that the task he was given by Mr. Cist in 2009 was different than the task he was given

by the Estate. (A-236-37). For example, although Mr. Cist included transfers to William Ughetta in the calculations performed in 2009, his Trust document does not state transfers to a spouse are to be included in the equalization calculation. Despite this, Mr. Pelillo was directed by Mary Harding to include transfers to a spouse. (A-238). At the very least, this creates a genuine issue of material fact as to whether or not Mary Harding has properly interpreted the Trust provisions and has properly carried out the Equalization Process. Additional evidence and testimony is needed for the Court to determine what the proper process should have been for the Equalization Process.

Additionally, Margaret objected to the burdensome requirements placed upon her to review the documents Mr. Pelillo reviewed in calculating the lifetime tallies. This process was not provided for in Mr. Cist's Trust documents. Instead, it was a decision unilaterally made by Mary Harding without any input from the beneficiaries. Margaret repeatedly objected to the process decided upon by Mary Harding for the Equalization Calculations, and has asserted that the process used by Mary Harding was not a process that was in accordance with the language of the Trust itself. Thus, there is a genuine issue of material fact as to whether or not Mary Harding's process was done in accordance with the Trust. Again, even if this Court were to ultimately find for Mary Harding on these issues (as the Master did), there is simply no basis to find that Margaret acted in bad faith, or to find that

justice and equity require that Mary Harding's costs and fees be shifted to Margaret.

Finally, Mary Harding alleges that Margaret's claims were "ever changing" and "inconsistent", and, therefore, warrant fee shifting. In support of this, Mary Harding cites Choupak v. Rifkin, 2015 WL 1589610, at *18 (Del.Ch.Apr. 6, 2015), stating that this case simply stands for the proposition that "changing positions during litigation warrants fee shifting." It should first be noted that Margaret has not "changed positions" in this matter. Mary Harding takes issue with Margaret's claims that the "by lots" and TPP distribution were not carried out correctly, that deadlines were unreasonable, that there were mistakes in the Tallies, and that equalization should go back to childbirth based upon the "lifetime transfer" language in the Trust. Mary Harding has failed to identify, nor can she, how any of these positions are inconsistent or ever-changing. As has been set forth throughout this brief, they are *entirely* consistent with Margaret's theory of this case. Further, even if this Court were to find that Margaret's positions were somehow inconsistent (which, again, Margaret denies), nothing in the Choupak decision would support shifting of fees.

To summarize Choupak as a case that stands for the proposition that "changing positions during litigation warrants fee shifting" is a complete misreading of that decision. In Choupak, the Court found that Rivkin, the

Defendant/Counter-Plaintiff, had forged documents, filed a removal motion based on an address that did not exist, failed to produce a privilege log despite being ordered by the court to do so, provided false and misleading interrogatory responses, lied about possessing documents, and committed perjury by testifying falsely. Id. at *22-23. As a result of these actions, the Court found that Rivkin's conduct "was sufficiently egregious to justify shifting fees under the bad faith exception to the American Rule." Id. at *23 (emphasis added). In essence, Mary Harding is arguing that Margaret's actions have risen to the level of bad faith (notwithstanding her position at other times that bad faith is not applicable). As the Master correctly found, there is nothing on record to indicate that Margaret has acted in bad faith such that an award of fees and costs is warranted.

Conclusion

In light of the foregoing, it is respectfully submitted that Mary Harding cannot establish that she should be awarded her fees and costs against Margaret.

CONCLUSION

For the foregoing reasons, Margaret respectfully requests that the Court reverse the decision of the Court of Chancery granting Mary Harding's Motion for Summary Judgment as to Margaret's claims and remand the matter for trial.

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