DEVELOPMENTS IN DELAWARE TRUST AND ESTATE LITIGATION

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Our last article about developments in Delaware trust and estate case law was published in early 2014.[1] A lot has happened since then.

Since early 2014, the Delaware Supreme Court and the Delaware Court of Chancery have issued notable opinions covering pre-mortem validation of trusts, the protection afforded by spendthrift trusts, capacity challenges, jurisdiction over Delaware trusts, reformation, asset protection trusts, time-barred fiduciary duty claims, reimbursement of counsel fees, and powers of appointment, among others. What follows are summaries and analysis of some of the most notable recent decisions in those areas.

I. PRE-MORTEM VALIDATION

In *IMO Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust*,[2] the Delaware Court of Chancery found that the petitioner's claims were time-barred for failing to contest the validity of a trust within 120 days of notice.

On January 29, 2014, the Delaware Court of Chancery, per Vice Chancellor Glasscock, dismissed the petitioner's case as untimely based on notice given under 12 Del. C. § 3546 ("Delaware's Pre-Mortem Validation Statute"). That ruling was significant because it was the first Delaware ruling, and perhaps the first nationally, that dismissed a case based on notice pursuant to a pre-mortem validation statute. Only a small handful of states have pre-mortem validation statutes.[3] The January 29, 2014 ruling was a bench ruling.[4] After receiving that ruling, the petitioner moved for post-judgment relief seeking to have the court amend, alter, or reconsider the judgment.

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1. William M. Kelleher and Phillip A. Giordano, *Recent Developments in Delaware Trust Litigation: Notable Decisions Addressing Adult Adoptions, Migration, Modification, Construction, Payment of Counsel Fees, and Time-barred Claims*, 15 Del. L. Rev. 21 (2014).

2. Matter of Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, C.A. No. 7743-VCG, 2014 WL 2538887 (Del. Ch. June 4, 2014), *aff'd sub nom.* Ravet v. Northern Trust Co. of Delaware, No. 369, 2014, 2015 WL 631588 (Del. Feb. 12, 2015).

3. Alaska (AS § 13.12.530); Arkansas (A.C.A § 28-40-201); New Hampshire (N.H. Rev. Stat. § 552:18); Nevada (5 Nev. Rev. Stat. 30.040(2)); North Carolina (N.C.G.S.A. § 28A-2B-1); North Dakota (N.D.C.C. § 30.1-08.1-01); and Ohio (R.C. § 2107.081). Notably, Delaware is the only pre-mortem validation state that has a notice statute as opposed to a filing statute. In other words, the other states on this list besides Delaware all require the testator or grantor to petition the court for a declaration that the document is valid.

4. In re Restatement of Declaration of Trust Creating the Survivor's Trust Created under the Ravet Family Trust Dated February 9, 2012, C.A. No. 7743-VCG, 2014 WL 358564 (Del. Ch. Jan. 31, 2014).

Delaware's Pre-Mortem Validation Statute allows settlors to provide notice of a trust to all interested parties, and if the noticed parties do not contest the trust within 120 days of notice, they are barred from ever contesting it. At the time, according to the Pre-Mortem Validation Statute, notice was given when received by the interested party and, absent evidence to the contrary, it was presumed that the interested party received notice if it was delivered to that person's last known address. The key language of the statute reads:

> (a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:
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> (1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.[5]

More than 150 days prior to when the petitioner first attempted to file his petition, the respondents sent packages providing notice of the trust to the petitioner by way of first class mail to the petitioner's home address and his P.O. Box, and by certified mail to both those addresses.[6] The petitioner admitted that those addresses were correct and also that he was frequently home in the days after the mailings were sent.[7] The petitioner also admitted that he checked his P.O. box at least weekly.[8] The Vice Chancellor found that the petitioner's testimony was not credible when he denied receipt of any of the following: the unreturned first class mailings sent to both his home address and his P.O. box, the four certified mail notices sent to his home address and P.O. box, and a Federal Express package subsequently sent to his home address.[9] Notably, the first notices for the certified mail were left at the petitioner's home and P.O. box about 150 days before he filed his petition.[10] The petitioner also presented evidence that he was away from home when the Federal Express package arrived (which wasn't until 121 days before he filed his petition) and that he didn't arrive home from his five-day trip until 119 days before he filed his petition.[11] Still, even on his return, he maintained that he never saw the

5. 12 Del. C. § 3546 (2011). Effective August 15, 2015, Delaware's General Assembly slightly revised Delaware's Pre-Mortem Validation Statute so that notice will be presumed given not just for delivery at the last known address but also when notice is mailed to the last known address. *See* 12 Del. C. § 3546 (2015) ("For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery *notice mailed or delivered* to the last known address of such person constitutes receipt by such person.") (emphasis added).

6. *Ravet*, 2014 WL 2538887, at *1.

7. *Id.* at *2.

8. *Id.* at *1-2.

9. *Id.* at *2.

10. *Id.*

11. *Id.*

Federal Express package at any point.[12] Based on its finding that the petitioner's myriad denials of receipt of notice were not credible, and on its finding that Delaware's Pre-Mortem Validation Statute is a statute of repose with a hard and fast deadline, the court dismissed the petition with prejudice.[13]

In the post-judgment briefing, the petitioner contended that in interpreting 12 DEL. C. § 3546, the court erred by "'giving the [respondents] the benefit of the statute's presumption of receipt even though the [respondents] had no evidence to prove that their alleged first class mailings were actually delivered to [p]etitioner's home or P.O. Box.'"[14] Responding to that argument, the court explained that "[d]espite the [p]etitioner's suggestion, however, I determined in my bench ruling that 'the evidence [presented at trial was] overwhelming…that there was delivery….' To the extent the [p]etitioner suggests I misunderstood the statute's presumption of receipt to require only that notice be mailed, as opposed to delivered, therefore, that argument must fail."[15]

In rejecting another of the petitioner's arguments, the court explained that "I construed only the language of the statute, determining that, to the extent the statute could be interpreted, as the [p]etitioner argued, to create a presumption of delivery (or receipt) rebuttable by 'evidence to the contrary,' such evidence must at a minimum be *credible* evidence."[16] The court explained that it found, and continued to find, that there was no such evidence presented.[17]

It is notable that the court did not address a statutory construction argument that the petitioner had also raised. In that regard, the court stated "[i]mportantly, I addressed the parties' interpretations of the statutory presumption *in the alternative*: I did not determine whether 'evidence to the contrary' modified mailing to the last known address *or* receipt, but explained that *under* any standard, evidence must be credible, and that such evidence is lacking here."[18]

The petitioner also maintained that he discovered some "new evidence" after the judgment, which he contended warranted relief from the judgment.[19] The "newly discovered" evidence that he presented consisted of two first class envelopes, postmarked March 26, 2012, which date falls about a month after February 23, 2012, the first date that respondents' counsel testified he sent the first set of notice letters to the petitioner.[20] The petitioner stated that he located those envelopes in his own files.[21] The court found that the petitioner's production of the March 26 envelopes provided an insufficient basis for relief from judgment for at least two reasons. First, the court found that "despite the [p]etitioner's contention that, '[a]s the envelopes had fallen between hanging file folders [in a box he used as a file cabinet] and out of sight, they could not in the exercise of reasonable diligence have been discovered for use at the January 29, 2014

12. *Ravet*, 2014 WL 2538887, at *2.

13. *Id*. at *1.

14. *Id*. at *2.

15. *Id*. at *2.

16. *Id*. at *3 (emphasis in original).

17. *Id*.

18. *Id*. at *3 (emphasis in original).

19. *Id*. at *2.

20. *Id*. at *4.

21. *Id*. at *2.

hearing,' I believe that with any minimal diligence the [p]etitioner would have discovered the March 26 mailings, which had been in his possession for almost two years prior to the January hearing."[22] And perhaps more importantly, even if it were to admit the "new" evidence, the court concluded that it would not have changed the result.[23] In fact, the court found that the petitioner's claim that he received that later set of mailings, but never opened them, only further diminished the petitioner's credibility.[24]

On February 12, 2015, the Delaware Supreme Court, by way of a two-paragraph order, affirmed the Delaware Court of Chancery's June 2014 ruling dismissing the case as untimely based on notice given under Delaware's Pre-Mortem Validation Statute.[25]

II. FIDUCIARY BREACHES AND SPENDTHRIFT CLAUSES

In *Mennen v. Wilmington Trust Company*,[26] the Court of Chancery concluded that the beneficiaries were entitled to damages in the amount of $72,448,299.93.

Then-Master LeGrow (now Superior Court Judge LeGrow) issued a Final Report in this case on April 24, 2015. Vice Chancellor Laster adopted that Final Report on August 18, 2015.

This matter involved a trust that was once valued at over $100 million but was reduced to roughly $25 million through a series of debt and equity investments at the direction of the individual co-trustee.[27] The question before the court was whether—without applying Monday-morning-quarterbacking—the challenged transactions exposed the trustee to liability.[28]

The trust agreement modified the trustee's default duties and exculpated the trustees from liability unless they acted in bad faith or with willful misconduct.[29] The court concluded that the trustee had engaged in non-exculpated breaches of trust in the vast majority of the transactions at issue.[30] And perhaps most notably, the court found that the bulk of the transactions made in bad faith were not the result of the trustee seeking to gain an immediate pecuniary benefit for himself, but rather most of the challenged transactions were motivated by the trustee's pride.[31] The trustee's personal

22. *Id.* at 4.

23. *Id.*

24. *Id.*

25. Ravet v. Northern Trust Co. of Delaware, No. 369, 2014, 2015 WL 631588 (Del. Feb. 12, 2015).

26. Mennen v. Wilmington Trust Co., C.A. No. 8432-ML, 2015 WL 1914599 (Del. Ch. Apr. 24, 2015), *adopted,* 2015 WL 4935373 (Del. Ch. Aug. 18, 2015).

27. *Id.* at *1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

fortune was not accessible to him because it was locked in his own trust. As a result, the trustee turned to his brother's trust and treated it as if it was his own bank account from which he could readily withdraw funds to finance a few private companies in which he had a stake and thought would be the "'next big thing.'"[32] The court held that the trustee willfully ignored his duties to the beneficiaries so that he could subsidize his "self-aggrandized standing as a financier."[33]

There was no question that the transactions were bad investments. The issue before the court was whether the trustee made the transactions in bad faith.[34] The trustee unsuccessfully argued that the question of whether he acted in bad faith should be determined by the subjective standard.[35] The court disagreed and applied the objective reasonable judgment standard.[36] The court also found unavailing the trustee's equitable defenses of laches and acquiescence.[37] The court concluded that the beneficiaries were entitled to damages in the amount of $72,448,299.93.

In *Mennen v. Wilmington Trust Company*,[38] the Court of Chancery concluded that the beneficiaries could not pierce the trustee's spendthrift provision of his separate trust.

Then-Master LeGrow issued a Final Report simultaneously with the just-discussed case. Vice Chancellor Laster also adopted that Final Report on June 10, 2015. It came in the context of the plaintiff beneficiaries' summary judgment motion. As mentioned above, the beneficiaries sought the removal of the co-trustees and also damages as a result of alleged breaches of the co-trustees' fiduciary duties. The individual co-trustee has a separate trust created for his benefit. The plaintiffs sought to pierce the individual trustee's separate trust, but that trust has a spendthrift clause.[39] The grantor created four trusts: one for each of his four children and their issue; the defendant individual co-trustee is one of the grantor's children.[40]

The plaintiffs disputed the enforceability of the spendthrift provision against them, arguing first that they are not potential creditors under the trust's terms or 12 Del. C. § 3536, and second that, even if they are potential creditors, they may pierce the spendthrift trust because (1) public policy precludes enforcing a spendthrift trust against tort claimants of the plaintiffs' variety, or (2) the trusts at issue are essentially sub-trusts, and the plaintiffs are entitled to impound the individual trustee's interest in his separate trust.[41]

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32. *Id.* at *1. As explained below, it was this separate trust's spendthrift clause that the beneficiaries sought to pierce in order to satisfy the $72,448,299.93 judgment.

33. *Id*.

34. *Id.* at *22.

35. *Id.* at *23.

36. *Id.* at *23-24.

37. *Id.* at *30-36.

38. Mennen v. Wilmington Trust Co., C.A. No. 8432-ML, 2015 WL 1897828 (Del. Ch. Apr. 24, 2015), *adopted*, 2015 WL 3630508 (Del. Ch. June 10, 2015).

39. 2015 WL 1897828, at *1.

40. *Id.* at *2.

41. *Id.* at *3.

The Master rejected all those arguments. In so doing, she noted that, "[a]lthough the policy arguments against enforcement of spendthrift clauses are interesting and compelling, the passage of Section 3536 made clear that this Court must enforce such clauses, subject only to the limits contained or permitted in the statute."[42] She went on to note that while spendthrift clauses are not "entirely unassailable," the plaintiffs' arguments for an exception under these facts are unavailing.[43] Specifically, the Master concluded that if the plaintiffs were successful at trial, they would merely become creditors of the individual trustee within the meaning of Section 3536.[44] The plaintiffs contended that as tort claimants and family members they should be entitled to pierce the trust.[45] But the Master explained that there is ample precedent that tort claimants are creditors within the meaning of Section 3536.[46] And as far as being family members, the Master noted that the claims at issue were not "support obligations" or the like, but instead traditional fiduciary breach allegations.[47]

The Master further explained that Delaware law does not recognize an exception to spendthrift clauses for beneficiaries who engage in repeated acts of wrongdoing.[48] And the Master found that impoundment also isn't applicable as the trusts at issue are separate trusts and the plaintiffs' impoundment theory would violate Section 3536 (and in any event, would be "legally impossible" because there was no identifiable share in the separate trust).[49] For all those reasons, the Master recommended granting the individual trustee's motion for summary judgment.

After the Court of Chancery issued its final order and judgment on December 8 2015, the plaintiffs appealed and the defendants cross appealed to the Delaware Supreme Court. By opinion dated October 11, 2016, the Delaware Supreme Court remanded the case back to Vice Chancellor Laster with instruction to consider the merits of plaintiffs' exceptions to the Master's spendthrift ruling.[50] The Delaware Supreme Court retained jurisdiction to consider the implications of the Court of Chancery's report.[51] On remand, the court adopted the Master's ruling on the spendthrift issue.[52]

The case was thereafter appealed to the Delaware Supreme Court. On April 17, 2017, by way of a one-page order, the Delaware Supreme Court affirmed the Court of Chancery's ruling that the spendthrift trust could not be pierced.[53]

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42. *Id.* at *4.

43. *Id.*

44. *Id.* at *5.

45. 2015 WL 1897828, at *6.

46. *Id.* at *5-7 (citing Garretson v. Garretson, 306 A.2d 737 (Del. 1973); Gibson v. Speegle, C.A. No. 124 (Del. Ch. May 30, 1984); Parsons v. Mumford, 1989 WL 63899 (Del. Ch. June 14, 1989)).

47. *Id.* at *6.

48. *Id.* at *8.

49. *Id.* at *8-9.

50. Mennen v. Fiduciary Trust Int'l of Delaware, No. 1, 2016, 2016 WL 5933966 (Del. Oct. 11, 2016).

51. Mennen v. Wilmington Trust Co., C.A. No. 8432-VCL, 2017 WL 751201, at *1 (Del. Ch. Feb. 27, 2017).

52. *Id.*

53. Mennen v. Fiduciary Trust Int'l of Delaware, No. 1, 2016, 2017 WL 2152478, at *1 (Del. May 17, 2017).

III. UNDUE INFLUENCE CONTENTIONS, CAPACITY CHALLENGES,AND EQUITABLE FRAUD CLAIMS

In *IMO the LW&T of Blanche M. Hurley*,[54] the Court of Chancery reiterated that just because a testator is old and had suffered from medical issues does not mean that the testator lacks capacity or is susceptible to undue influence.

In this case, then-Master LeGrow recommended the dismissal of a petition filed by two brothers (the "Brothers") who alleged that their grandmother lacked capacity to execute a will in 2012 (the "2012 Will") and that the 2012 Will was the product of undue influence.[55]

Between 2003 and 2012, the decedent amended her will four times, the fourth time being the 2012 Will.[56] The Brothers petitioned the Court of Chancery to invalidate the 2012 Will in favor of the will executed six months earlier.[57] The decedent had left significantly more to the Brothers in that previous will.[58]

The executrix of the estate, the Brothers' sister, moved to dismiss the petition on the grounds that it failed to state a claim for which relief could be granted.[59] The petition alleged that the decedent lacked capacity to execute the 2012 Will because she was 96 years old, had a tumor removed above her ear in 2009, and suffered from other "'serious medical problems.'"[60] Then-Master LeGrow held that, even taking those allegations as true, the petitioners failed to plead a lack of capacity claim.[61]

In dismissing the capacity challenge, the Master stated that "[a] person who makes a will must, at the time the document is executed, be capable of exercising thought, reflection, and judgment, and must know what she is doing and how she is disposing of her property."[62] The Master further stated that "[t]he testator also must have sufficient memory and understanding to comprehend the nature and character of her act."[63] And "in order to possess the requisite capacity, the Decedent must have known that she was disposing of her estate by will, and to whom."[64] In short, the court explained

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54. C.A. No. 8473-ML, 2014 WL 1088913 (Del. Ch. Mar. 20, 2014).

55. *Id*. at *1.

56. *Id*.

57. *Id*. at *2.

58. *Id*.

59. *Id*. at *1.

60. *IMO the LW&T of Blanche M. Hurley*, 2014 WL 1088913, at *2.

61. *Id*. at *3, *5.

62. *Id*. at *4 (citing In re Estate of West, 522 A.2d 1256, 1263 (Del. 1987)).

63. *Id*. at *4 (citing Sloan v. Segal, No. 289, 2009, 2010 WL 2169496 (Del. May 10, 2010); *In re Estate of West*, 522 A.2d at 1263)).

64. *Id.* (citing *In re* Langmeier, 466 A.2d 386, 402 (Del. Ch. 1983)).

that "only a modest degree of competence" is required for a person to have testamentary capacity and that Delaware law presumes that a testator is competent.[65]

The Master found that the allegations were not colorable, especially given that the previous will—the will that the Brothers sought to enforce in the place of 2012 Will—was executed only six months before the 2012 Will and two years after the surgery that the petitioners claimed affected the decedent's capacity.[66]

In *Estate of George M. Reed, Jr. v. Lisa Grandelli*,[67] the Court of Chancery generally rejected claims to recover gifts given by a now-deceased elderly widower to a much younger girlfriend.

"Since the time of King David and Abishag—and, surely, before—certain old men have pursued an interest in certain young women."[68] This quote from Vice Chancellor Glasscock nicely sums up the factual background of this case decided in the Delaware Court of Chancery on April 17, 2015. A "moderately well-to-do recent widower" in his mid-eighties fell for a waitress from a small Southern Delaware town, whose age was approximately that of his granddaughter.[69] During their fourteen-month relationship, the decedent gave the waitress (the "Respondent") gifts worth hundreds of thousands of dollars.[70] After the gift-giving widower's death, his heirs, trust and estate (the "Petitioners") sought to recoup those gifts. What made this case rather unusual was that the Petitioners did not contend that the decedent lacked capacity, that he was vulnerable to the exercise of undue influence, or that the gifts were the product of common law fraud.[71] Rather, the Petitioners argued that the Respondent committed equitable fraud or breach of trust consistent with the Court of Chancery's ruling in *Swain v. Moore*, 71 A.2d 264 (Del. Ch. 1950).[72] The Petitioners maintained that *Swain* dictates that when an elderly person befriends a younger individual, and acts on that affection by making gifts to her, fraud by the younger person is presumed, and the burden is shifted to the younger person to demonstrate entire fairness in the relationship.[73] The court held that Swain cannot be read "this broadly or simplistically."[74]

Despite the Petitioners' argument that the law of gifts was inapplicable (instead being overridden by their interpretation of *Swain*) the court first analyzed the decedent's cash transfers to Respondent.[75] The court held that these cash

65. *Id.*

66. *IMO the LW&T of Blanche M. Hurley*, 2014 WL 1088913, at *4.

67. 8283–VCG, 2015 WL 1778073 (Del. Ch. Apr. 17, 2015).

68. *Id*. at *1

69. *Id*.

70. *Id*.

71. *Id*. at *3.

72. *Id.*

73. *Id*.

74. *Id.*

75. *Id*.

transfers were clearly gifts.[76] Delaware law holds that a gift is made by complete and unconditional delivery of property, with donative intent, and the acceptance of the property by the donee.[77] "The donee has the burden of establishing, by clear and convincing evidence, all facts essential to the validity of a purported gift."[78] This burden arises, the court said, "out of the rebuttable presumption, often seen in the context of resulting trusts, that a purchaser of property intends that purchased property to inure to her own benefit."[79]

In rejecting the Petitioners' argument that the law of gifts should not be applied because the facts in the case were analogous to those in *Swain*, the court distinguished this case from *Swain*.[80] The court held that the decedent in this case—unlike the elderly man in *Swain*—was not dependent on the Respondent.[81] The court explained that like the Respondent, the decedent was also receiving what he wanted from their relationship (specifically, attention from a much younger partner that made him happy and fulfilled).[82] In contrast, *Swain* involved an elderly, lonely widower, estranged from his own family, who was befriended by a young couple living nearby.[83] He eventually began making gifts of money to them, and even paid for construction of part of their new house with the understanding that he could live out the rest of his life with them.[84] In *Swain*, the elderly man moved in with the younger couple and, as a result, became dependent upon them, and had made gifts to the couple by which he impoverished himself.[85] But that type of scenario was not the case here.

The court explained that *Swain* was a trust case because the elderly man in that case became dependent on a younger couple and a confidential relationship arose in which the younger couple owed fiduciary duties to him.[86] Here, the decedent did not rely upon the Respondent and he remained close to his own family.[87] The decedent was not taken advantage of and knew exactly what he was doing when he gave his young girlfriend gifts. As the court put it, "[i]t would be simple paternalism, however, to suggest that solely because of advanced age, an individual may not indulge in pleasures at his own expense that he finds appropriate, even if that expense appears to others to be foolish or excessive."[88]

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76. *Id*. at *4.

77. *Id*. at *3 (citing Hudak v. Procek, 806 A.2d 140, 150-51 (Del. 2002)).

78. *Id*. (citation omitted).

79. *Id*.

80. *Id*.

81. *Id*. at *4.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*.

87. *Id*.

88. *Id*. at *5.

The court further held that any transfers that were noted in writing to be loans should be paid back to the estate.[89] The court also found that one transaction amounted to fraud. Regarding that transaction, the Respondent told the decedent that she wanted to go on vacation with her family to Key West.[90] The Respondent actually went to Key West with her other boyfriend.[91] The Respondent claimed that she disclosed this to the decedent.[92] The court found that to be a lie, and consequently ordered her to refund the cost of that trip back to the estate.[93]

IV. STANDING TO CONTEST A WILL

In *McCarty v. McCarty*,[94] the Court of Chancery found that the petitioner lacked standing to file a will contest due to her status as a contingent beneficiary.

In this case, then-Master in Chancery Kim Ayvazian recommended that one petitioner be dismissed from a case filed to contest a will. The petitioner in this case was the decedent's mother, and also the legal guardian of the decedent's daughter.[95] The petitioner did not deny that her status was only that of a contingent beneficiary in the event of intestacy should anything happen to the decedent's daughter but, nonetheless, the petitioner maintained that she had standing.[96] The Master concluded otherwise and, in so doing, cited *Conner v. Brown,*[97] which found that "no person may contest a will who has no interest in the estate which may be affected by the probate of the proposed will; and the interest must be pecuniary and one detrimentally affected by the will, and not a mere sentimental interest."[98] Here, the decedent's daughter would be the sole intestate heir of the decedent's estate, not the decedent's mother.[99] The Master further noted that should anything happen to the decedent's daughter during the course of litigation, the decedent's daughter's estate would be substituted as the real party in interest.[100]

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89. *Id*.

90. *Id*. at *6.

91. 2015 WL 1778073, at *6.

92. *Id*.

93. *Id*.

94. C.A. No. 8705-MA, 2014 WL 1995013, at *1 (Del. Ch. May 15, 2014), report and recommendation adopted, 2014 WL 2042428 (Del. Ch. May 16, 2014).

95. 2014 WL 1995013, at *1.

96. *Id*.

97. 3 A.2d 64 (Del. Super. 1938).

98. *McCarty*, 2014 WL 1995013, at *1.

99. *Id.*

100. *Id.*

V. JURISDICTION OVER DELAWARE TRUSTS

In *IMO Daniel Kloiber Dynasty Trust U/A/D December 20, 2002*,[101] the Delaware Court of Chancery defines the extent to which Delaware has exclusive jurisdiction over Delaware trusts and found that it does not have exclusive jurisdiction when it is competing with its sister states, but that it does have primary jurisdiction over the administration of Delaware trusts.

Dan and Beth Kloiber were in the lengthy process of getting a divorce in Kentucky.[102] Daniel Kloiber ("Dan") is the primary beneficiary of a Delaware trust (the "Dynasty Trust").[103] In the Kentucky divorce proceedings, Beth Kloiber ("Beth") maintained that the Dynasty Trust was marital property, but the Kentucky family court had not yet ruled on that question.[104]

The Kentucky family court had a status quo order in place.[105] Dan resigned as special trustee of the Dynasty Trust.[106] Per the terms of the Dynasty Trust, the special trustee has the authority to instruct the trustee on making distributions and on investing trust assets.[107] When Dan resigned as special trustee, he appointed his son, Nick Kloiber ("Nick"), to be the special trustee.[108] The Delaware Court of Chancery stated that, after his appointment, "Nick proceeded to take action contrary to the status quo orders" and that "[t]he Kentucky Family court issued a rule to show cause why Nick should not be held in contempt."[109] The Delaware trustee filed a petition in Delaware arguing that the Delaware Court of Chancery had primary supervision over the Dynasty Trust and must intervene to enjoin Beth Kloiber from asking the Kentucky court to assert jurisdiction over the Delaware trustee and the trust.[110] For his part, Nick sought a TRO in Delaware to prevent Beth from seeking to enforce the status quo orders, including through the pending Kentucky rule to show cause.[111]

In reaching its decision denying Nick's TRO application, the court addressed whether 12 Del. C. 3572(a) provides that the Delaware Court of Chancery has exclusive jurisdiction over the Dynasty Trust under Delaware's Qualified Dispositions in Trust Act.[112] Section 3572(a) states that "[t]he Court of Chancery shall have exclusive jurisdiction over

101. 98 A.3d 924 (Del. Ch. 2014).

102. *Id*. at 927.

103. *Id*.

104. *Id*. at 928.

105. *Id*.

106. *Id*.

107. *Kloiber*, 98 A.3d at 927.

108. *Id*. at 928.

109. *Id*.

110. *Id*.

111. *Id*.

112. *Id*. at 938-939.

any action brought with respect to a qualified disposition."[113] The court found that that language is only intended to provide which Delaware trial court—if the case is to be heard in Delaware—is to have jurisdiction.[114] The Vice Chancellor explained that, "[w]hen a Delaware state statute assigns exclusive jurisdiction to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case."[115] The Vice Chancellor further noted that Delaware couldn't do that even if it so wanted as the states are peers and as there are constraints on a state within the federal republic that is the United States.[116]

The Vice Chancellor also stated that under the *Peierls* cases, the Delaware Court of Chancery does have primary jurisdiction over administrative issues relating to Delaware trusts.[117] But the court also explained that that jurisdiction is permissive, not mandatory or exclusive. Specifically, the court noted that "[o]ther courts may still exercise jurisdiction over matters of trust administration so long as doing so would not constitute 'undue interference' with supervision in the primary jurisdiction."[118] The Vice Chancellor added that other state courts may exercise jurisdiction when they have jurisdiction over the trustee or over trust assets.[119]

Importantly, at the same time that the Vice Chancellor denied the TRO motion, he entered a status quo order.[120] The parties had agreed a status quo order should be entered, but couldn't agree on the exact form.[121] Thus, the court's involvement was needed.[122] All the parties had agreed that the Delaware court could exercise jurisdiction over Nick, the Dynasty Trust, and the trustee. The Delaware court saw that as an opportunity to assist the Kentucky court and a Delaware status quo order as the vehicle to do so.[123] Among other things, the Delaware status quo order provided that the Dynasty Trust could act only in the ordinary course.[124] The Delaware court stated that the Delaware status quo order might mitigate the need for the Kentucky family court to reach trust administration matters, including the issue of whether Dan must be placed back in charge as Special Trustee.[125]

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113. *Id*. at 938.

114. *Id*. at 939.

115. *Id*.

116. *Id*.

117. *Id*. at 943-44.

118. *Id*. at 946 (citing to *In re* Peierls Family Testamentary Trusts (Peierls Testamentary), 77 A.3d 223, 228 (Del. 2013)).

119. *Kloiber*, 98 A.3d at 946.

120. *Id*. at 949.

121. *Id*.

122. *Id*.

123. *Id*.

124. *Id*. at 949.

125. *Id*. at 950.

Further, the Delaware court notably wrote, "[t]he long-term interests of the two courts are the same as their short-term interests. The Kentucky Family Court needs to resolve the Kentucky Divorce Proceeding. This court has an interest in having matters of trust administration that are governed by Delaware law decided here so that the Delaware Supreme Court can ensure they are decided correctly. Just as this court has no interest in interfering in the conduct of judicial proceedings before a court of a different state, this court also has no interest in having Delaware law deployed to defeat the marital property laws of another state."[126]

In sum, the Delaware court explained, "[t]he question of whether an eventual judgment issued by the Kentucky Family Court can be enforced against the trust estate is not a matter where this court needs to act now to carve out and defend a future jurisdictional role. The Kentucky Divorce Proceeding should be completed first. If that case results in a final, non-appealable judgment against the Dynasty Trust, and if the judgment holder seeks to enforce it, then (but only then) will there be important questions of Delaware law to be decided."[127]

VI. LOST HEIRS

In *IMO the Estate of Blums*,[128] the Court of Chancery determined the decedent's heirs after hearing testimony and reviewing an affidavit from the decedent's long-lost European relatives.

In this case, Zigfrids Blums ("the Decedent") died without a will, leaving a substantial estate and no readily apparent heirs. Throughout his lifetime, the Decedent repeatedly told friends he had no living relatives.[129] An extensive genealogy search by the administrator of the Decedent's estate uncovered two possible heirs.[130] The lineage of one of those possible heirs was in dispute.[131] To resolve the matter, the court had to review the family history of Decedent through the turbulent period of the 1920s to the 1950s in Latvia and determine whether the Decedent did have heirs notwithstanding the absence of complete official foreign records.[132]

The Decedent was born in Riga, Latvia in 1926 and immigrated to the United States in 1951.[133] Although he married, he had no children, and his relatively short marriage ended in divorce.[134] The Decedent died in Delaware in 2011, and his estate was valued in excess of $1.2 million.[135] He never made a will.[136]

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126. *Id*. at 951.

127. *Id*.

128. C.A. No 7479-ML, 2014 WL 5860376 (Del. Ch. Nov. 12, 2014).

129. *Id*. at *1.

130. *Id* at *1-2.

131. *Id*. at *2.

132. *Id*. at *5.

133. *Id*. at *1.

134. *In re the Estate of Blums*, 2014 WL 5860376, at *1.

135. *Id*.

136. *Id*.

The estate administrator set out to search for possible heirs.[137] He took out a vague advertisement—which did not mention the possible inheritance—in a Latvian newspaper as part of the effort.[138] A Latvian woman named Vija responded to that advertisement.[139] She provided some details and claimed that her mother was the Decedent's first cousin.[140] Vija reported that she was born in 1944, that she and her mother fled to Germany the same year, and that the family lost touch with the Decedent sometime after he was called up for service in the Latvian SS Legion.[141] Later, when Vija and her mother returned to Latvia after the war, the Communist government charged her mother with being a capitalist and sentenced her to 20 years in prison.[142] All the family's records and photos were confiscated at the time of the arrest.[143]

Eventually, the estate administrator revealed to Vija the purpose for his investigation.[144] In response, Vija provided a more detailed family history, which was consistent with her earlier reports.[145] The estate administrator was able to obtain some partial confirmation from existing Latvian archives.[146] But the birth certificate for Vija's mother was never located after a diligent search.[147]

Before Vija's claim to the Decedent's estate was resolved to the estate administrator's satisfaction, a second possible heir was located.[148] Max S. Blum (Max), a German citizen, is the Decedent's first cousin on his paternal side.[149] On June 6, 2014, the estate administrator filed a Petition for Decree of Distribution, asking the court to determine the distribution of the Decedent's estate after hearing evidence presented by the estate administrator and Max.[150] The court held an evidentiary hearing and was convinced that Max was an heir.[151] The only remaining question was whether Vija was also an heir.[152]

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137. *Id*.

138. *Id*.

139. *Id*.

140. *In re the Estate of Blums*, 2014 WL 5860376, at *1.

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id*. at *2.

145. *Id*.

146. *Id*. at *2.

147. *Id*.

148. *Id*.

149. *Id*.

150. *Id*.

151. *Id*.

152. *Id*.

Max argued that the written records did not accurately show that Vija was a blood relative of Decedent.[153] In response, Vija offered an oral history of her mother's family as it had been reported to her in her youth.[154] She also offered an affidavit from a third party that tied her and her mother to the Decedent's family.[155] Max's counsel objected to this affidavit as inadmissible hearsay, but the court admitted the affidavit into the record on the basis that it fell within Rule 803(19) of the Delaware Uniform Rules of Evidence, which establishes an exception to the hearsay rule for "[r]eputation concerning personal or family history."[156] The court also indicated that the affidavit might fall within Delaware Uniform Rule of Evidence 803(23).[157] But upon further reflection, the court noted that that exception applies only to "judgments as to personal, family or general history, or boundaries," and the affidavit is not a "judgment."[158]

The court issued a draft report dividing the estate equally between Max and Vija.[159] The Master reasoned "that although the absence of any birth certificate for [Vija's mother] was unfortunate, that gap in the record likely was explained by the turbulent period that began in Latvia in approximately 1918 and continued through the Second World War and the control of Latvia by the Soviet Union." Given all that was happening at the time, it is not surprising "that births may not have been recorded in the usual manner, or that records may have been destroyed as various forces occupied the country."[160] The court also identified other bases for why Vija's recounting was trustworthy, including the fact that Vija made the statements about the relationship with decedent before she became aware of any possible inheritance as a result.[161]

Max filed a timely notice of exceptions and the parties briefed those exceptions. First, Max argued that the affidavit from the third party should not have been admitted.[162] The Master rejected that contention and found that it was admissible under Delaware Rule of Evidence 803(19).[163] In short, the Master found that the affidavit at issue provided sufficient detail regarding the declarant's familiarity with the family and that the statements fell within Rule 803(19).[164]

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153. *Id*.

154. *Id*.

155. *Id*.

156. *Id*.

157. *Id*. at *2 n.28.

158. *Id*. *2.

159. *Id*. at *5-6.

160. *Id*. at *3.

161. *Id*. at *5.

162. *Id*. at *3.

163. *Id*. at *3-4. Del. R. Evid. 803(19) reads in pertinent part, "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: (19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption or marriage, or among his associates or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of his personal or family history."

164. *In re the Estate of Blums*, 2014 WL 5860376, at *4.

The court also rejected Max's contention that Vija's evidence fell short of the required preponderance standard. After going through a litany of specific reasons as to why that was not the case, the Master also pointed out that "the fact that Vija's statements regarding her relationship to the Decedent were made months before she became aware of any possible inheritance warrants considerable attention."[165]

The Master entered a final report consistent with her draft report.

VII. ASSET PROTECTION TRUSTS

In *TrustCo Bank v. Mathews*,[166] the Delaware Court of Chancery, applying Delaware's Borrowing Statute, dismissed the plaintiffs' claims against three Delaware asset protection trusts as time-barred under Delaware's four-year statute of limitations for fraudulent transfer actions.

In this case, then-Vice Chancellor Parsons of the Delaware Court of Chancery dismissed as time-barred most of the creditor-plaintiffs' claims against three Delaware asset protection trusts (that one of the beneficiaries herself had created) and the trust beneficiaries.[167] The key issue facing the court was whether New York's longer statute of limitations controlled (which perhaps would have saved the claims) or whether Delaware or Florida's statute of limitations applied.[168] New York's statute of limitations for fraudulent transfers is six years or two-years-from-discovery.[169] But Delaware's and Florida's statute of limitations for such claims is four years after the transfer was made or one year after the transfer was or could reasonably have been discovered, whichever is longer.[170]

The court first examined Delaware's Borrowing Statute (10 DEL. C. § 8121), which states

> [w]here a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.[171]

The court confirmed that the Borrowing Statute should not be allowed to be manipulated to constitute a "sword" to defeat claims that would not be otherwise time-barred.[172] To try to get around Delaware's Borrowing Statute, the

165. *Id*. at *5.

166. C.A. No. 8374-VCP, 2015 WL 295373 (Del. Ch. Jan. 22, 2015).

167. *Id*. at *1.

168. *Id*.

169. *Id*.

170. *Id*.

171. *Id*. at *6

172. *Id*. at *7.

plaintiffs claimed that this case involved an exclusively New York dispute.[173] But the court conducted a most significant relationship test and found that Florida and Delaware both had a more significant relationship to the facts of the case than had New York.[174] The court concluded that Florida had the most significant contacts, which contacts included that the real estate foreclosed on was in Florida and that Florida businesses were involved.[175] The court found that Delaware had the second most contacts; Delaware's contacts included the fact that the transfers at issue were made to Delaware trusts governed by Delaware law and that the trustee of the three trusts was a Delaware entity.[176] In contrast, the court found New York's contacts minimal in comparison.[177]

Importantly, the court also wrote:

> even if I did conclude that New York has the most significant relationship, the preceding analysis shows that that relationship certainly does not dominate the focus of this action. That is, the totality of the relevant factors does not reveal a strong New York-centric relationship between the parties and the dispute before this Court. Accordingly, even if I found that New York law should apply, there is nothing in this set of facts that would lead me to conclude that application of the Delaware Borrowing Statute would be inequitable.[178]

The court then concluded that, "[r]egardless of which of these three states has the most significant relationship with this case, therefore, I conclude that Plaintiffs still would be subject to a statute of limitations equivalent to Delaware's of four years from the time the transfer was made or one year from when discovery of the transfer occurred or reasonably should have occurred, whichever is longer."[179]

Plaintiffs had also contended that the restrictions of Delaware's Qualified Disposition in Trust Act ("QDTA") were inapplicable because the settlor had maintained impermissible control over the property transferred to the trusts.[180] But the court wrote that it had "concluded that Plaintiffs' claims relating [to the majority of the transfers at issue] are barred because of either the most significant relationship choice of law analysis, which points to the use of Florida or, perhaps, Delaware law, or Delaware's Borrowing Statute, which requires the application of Delaware's statute of limitations even if New York had been found to have the most significant relationship to this case."[181] As a result, the court found that it need not resolve the first impression issue of whether the QDTA requires application of Delaware's fraudulent transfer statute of limitations without regard to the normal choice of law analysis or the Borrowing Statute.[182]

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173. *Id*. at *9.

174. *Mathews*, 2015 WL 295373, at *10.

175. *Id*.

176. *Id*.

177. *Id*.

178. *Id*. at *11.

179. *Id*.

180 *Id*. at *12.

181. *Id*.

182. *Id*.

Regarding the QDTA, the court stated that "[t]he QDTA limits a creditor's available remedies when attempting to avoid a 'qualified disposition.' A 'qualified disposition' is a 'disposition by or from a transferor…to 1 or more trustees, at least 1 of which is a qualified trustee, with or without consideration, by means of a trust instrument.'"[183] The court also noted that "[t]he QDTA requires that any claim by a creditor—a term defined to include Plaintiffs—to avoid a qualified disposition must be brought pursuant to 6 DEL. C. §§ 1304 or 1305, Delaware's fraudulent transfer statutes" and that "[t]he QDTA also specifically provides that a creditor's claim will be extinguished unless, as relevant here, it is brought within the time constraints of 6 DEL. C. § 1309, Delaware's statute of limitations for fraudulent transfers."[184] But, as it was unnecessary, the court "decline[d] to reach the question of whether the QDTA requires application of 6 DEL. C. § 1309."[185]

The end result was that the assets in the three Delaware asset protection trusts were protected against the plaintiffs' claims.

VIII. TIME-BARRED CLAIMS ALLEGING FIDUCIARY BREACHES

In *IMO the Thomas Lawrence Reeves Irrevocable Trust Under Agreement Dated February 26, 1997*,[186] the Delaware Court of Chancery found that the beneficiaries' claims against the individual co-trustees were time-barred because of the unreasonable delay in raising those claims.

In this case, the beneficiaries of an irrevocable trust, who also were individual co-trustees of the trust (the "Beneficiaries"), contended that the corporate co-trustee mismanaged the trust over a period of fifteen years "by unilaterally making investments without the authorization of the individual trustees, failing to implement any investment strategy for the trust, and charging excessive fees."[187] The corporate trustee sought to resign from the trust, but first it filed a petition seeking a court order stating that all of the Beneficiaries' claims are barred by laches or the statute of limitations.[188]

The record was undisputed that the individual trustees frequently complained to the corporate trustee about the issues that they contended supported their claims.[189] "In emails and letters dating back to 2004, the individual trustees complained that the corporate trustee invested without authorization, failed to consult the individual trustees or develop investment objectives or an investment strategy, and charged excessive fees."[190] But, despite consulting counsel, other trust companies, and the corporate trustee about those complaints, the individual trustees took no other action before they filed their counterclaims in 2013.[191] Then-Master LeGrow, in her final report in this case, granted summary judgment

183. *Id*. at *11.

184. *Id*.

185. *Id*. at *12.

186. C.A. No. 8071-ML, 2015 WL 1947360 (Del. Ch. Apr. 29, 2015).

187. *Id*. at *1.

188. *Id*.

189. *Id*. at *1-2.

190. *Id*. at *1.

191. *Id*.

to the petitioner (the corporate co-trustee) because she found that the Beneficiaries delayed unreasonably and that, as a result, their claims are time-barred.[192]

The Master explained that there are two applicable statutes of limitations[193] in this case: "(1) 10 DEL. C. § 8106, which bars personal tort claims arising three years after the date of the action, and (2) 12 DEL. C. § 3585, which precludes a claim for breach of trust that occurs: (1) two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim;…. [] A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence."[194] The Master concluded that the Beneficiaries' claims were time-barred under both statutes.[195]

After distinguishing other precedent (namely *McNeil v. Bennett*[196] and *Volftsun/Landy*[197]), the Master stated that "[h]ere, the record shows the individual trustees did not repose any trust in the corporate trustee and repeatedly complained about the corporate trustee's actions, but nonetheless took no action to pursue their claims. It is unclear what else, short of self-flagellation, [the corporate co-trustee] could have done to put [the Beneficiaries] on notice of their claims."[198] Notably, the Master also explained "that the *McNeil* court did not, as Respondents argue, create a two-tiered system of liability under which professional trustees bear heightened responsibilities or under which lay trustees may avoid their own obligations by shifting blame to a professional trustee."[199]

The Master also held that the "continuing wrong" doctrine didn't fit here.[200] The Beneficiaries had alleged that the wrongdoing began from the inception of the trust at issue and because it has not yet been corrected, it qualified as a continuing wrong.[201] But the Master stated that it is well-recognized that "'the failure to remedy a wrong does not mean that the wrong is continuing.'"[202] She further explained that accepting the Beneficiaries' reading of the continuing wrong doctrine "would frustrate the purpose behind requiring parties to bring timely claims and bring nearly every claim within the category of a continuing wrong."[203]

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192. *Reeves*, 2015 WL 1947360, at *1.

193. While statutes of limitations do not strictly bind the Court of Chancery as it is a court of equity, laches generally follow the statute of limitations. *Id*. at *7.

194. *Id*. at *7-8.

195. *Id*. at *9-10.

196. 792 A.2d 190 (Del. Ch. 2001), *aff'd in part, rev'd in part sub nom.* McNeil v. McNeil, 798 A.2d 503 (Del. 2002).

197. C.A. No. 4653–VCL (Del. Ch. Oct. 24, 2012) (transcript).

198. *Reeves*, 2015 WL 1947360, at *9.

199. *Id*.

200. *Id*.

201. *Id*. "The continuing wrong doctrine is a legal theory that applies when a series of related wrongful acts are 'so inexorably intertwined that there is…one continuing wrong.'" *Id*. (citing Desimone v. Barrows, 924 A.2d 908, 925 (Del. Ch. 2007)).

202. *Id*. (citing *Desimone*, 924 A.2d at 925).

203. *Reeves*, 2015 WL 1947360, at *9.

Exceptions were initially taken to the Master's report, but those exceptions were withdrawn.[204] The Vice Chancellor adopted the Master's report on July 2, 2015.[205]

IX. MODIFICATION OF TRUST DENIED

In *In Re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek*,[206] the Delaware Court of Chancery denied a beneficiary's unopposed petition to modify the terms of a testamentary trust because, ultimately, the settlor's intent controls.

The beneficiary's father established the Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek (the "Trust") in his Last Will and Testament (the "Will").[207] Vice Chancellor Laster acknowledged that there is no universal agreement as to whether "the wishes of living beneficiaries should prevail over the wishes of a dead settlor," but he explained that in Delaware "the settlor's intent controls," and the policy of Delaware is "'to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.'"[208]

The plain language of the Will expressed the decedent's intent to give his trustees the discretion to decide how to invest the corpus of the trust, while reserving for the beneficiary the option to invade the principal of the Trust to a limited extent.[209] Notably, the Will did not allow for the beneficiary to obtain complete control of the corpus of the Trust, or authorize her to determine how to invest it.[210]

The beneficiary and her children (contingent remainder beneficiaries) had expressed their desires that the Trust's investments remain heavily concentrated in International Business Machines Corporation ("IBM") stock, but the trustee had recommended diversifying the Trust.[211] Despite the fact that the Trust is not a directed trust, the trustee allowed the beneficiaries' desires to control.[212] Noting this, Vice Chancellor Laster wrote that nowhere in the Trust did the grantor "say that the trustees can retain an investment…even if they believe that it would be in the best interests of the Trust to sell it."[213]And in this case, the trustees had attempted in recent years to distance "themselves from the actual investment decisions," in-part by delegating to two of the beneficiary's adult children (the "Investment Managers") all the duties and powers related to investing the assets of the Trust.[214]

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204. 2015 WL 4093157.

205. *Id*.

206. 118 A.3d 182 (Del. Ch. 2015).

207. *Id*. at 183.

208. *Id*. at 194 (citing 12 Del. C. § 3303(a)).

209. *Id*. at 184-85.

210. *Id*. at 184.

211. *Id*. at 186-87.

212. *Id*. at 186.

213. *Id*. at 187.

214. *Id*.

In October of 2014, the beneficiary petitioned to modify the terms of the Trust by asking the court to approve what the petition named the "Restated Will", with the intention to "'formalize the current investment management structure and replace the ad hoc mechanism of delegations of investment responsibilities to the Investment Managers.'"[215] Vice Chancellor Laster identified the "heart of the change" in the Restated Will as an attempt to "convert the Trust from a traditional trustee-managed structure into a directed trust" by creating the position of Investment Advisor (to be appointed by majority vote by the beneficiary and her adult children), and by turning over to the Investment Advisor the trustee's liabilities and discretion to invest the corpus of the Trust.[216]

Denying the beneficiary's petition, the court determined that the Will never established a directed trust, and that the limits placed both on the beneficiary to access the corpus, and on the trustees to invade the principal on the beneficiary's behalf (to a limited extent), "evidences [the testator's] intent" that "[t]he beneficiaries are not supposed to exercise the degree of control over the Trust that the Restated Will would give them."[217]

The Vice Chancellor recognized that "English law has long made the wishes of the beneficiaries paramount," and that recent statutory initiatives in the United States have signaled a major shift away from the *Claflin* doctrine[218] towards prioritizing the wishes of beneficiaries.[219] However, the Vice Chancellor found that, according to the Delaware Supreme Court, "[t]he cardinal rule of law in a trust case is that the intent of the settlor [controls]."[220]

In following this rule and the policy decisions of the State, the court rejected the beneficiary's argument that the court "should assert and exercise the…power to modify a trust instrument whenever all current beneficiaries consent," even when "grounds for reformation do not exist."[221] The Vice Chancellor explained that reformation is reserved for definite limited circumstances, and that under Delaware law "the petitioners are not permitted to rewrite [the decedent's] Will to suit their current convenience."[222]

Although the beneficiary's petition was rejected, the Vice Chancellor acknowledged that Delaware law allows a testator "to create a new trust containing all of the features" that the beneficiary's petition sought to have added.[223] The authors of this article believe that if the testator had intended to create a directed trust, or had the instrument that he executed included language representing his intent to empower the beneficiaries with the ability to influence the assignment of investment responsibilities for the Trust or to empower the trustees to waive or transfer their duties to another party, it is likely that the court would not have rejected the beneficiary's petition.

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215. *Id*.

216. *Id*. at 188.

217. *Id*. at 193.

218. *Id*. at 193-94. The *Claflin* doctrine dictates that the settlor's intent is paramount. Claflin v. Claflin, 20 N.E. 454 (Mass. 1889).

219. *Flint*, 118 A.3d at 193-94.

220. *Id*. at 194 (citing Chavin v. PNC Bank, 816 A.2d 781, 783 (Del. 2003); Annan v. Wilm. Trust Co., 559 A.2d 1289, 1292 (Del. 1989); Dutra de Amorim v. Norment, 460 A.2d 511, 514 (Del. 1983)).

221. *Id*. at 195.

222. *Id*. at 198.

223. *Id*. at 194.

X. POWERS OF APPOINTMENT

In *IMO: The Estate of James Vincent Tigani, Jr., deceased, and the J. Vincent Tigani Jr., a/k/a James Vincent Tigani, Jr. Revocable Trust, U/A dtd, April 10, 1995*,[224] the Delaware Court of Chancery addressed the standing of a vested beneficiary subject to divestiture to challenge the capacity of a donee to exercise her power of appointment.

In her Final Report,[225] then-Master LeGrow addressed the standing of a vested beneficiary, subject to divestiture and the required capacity to execute a will exercising a power of appointment. In resolving the standing issue, the Master addressed two novel questions of law: (1) whether a contract to exercise a testamentary power of appointment is valid, thereby stripping the appointee/beneficiary of standing to challenge the trustee's fairness at the time the contract is executed (rather than at the donee's death), and (2) whether that same contract also acted as a release of the donee's power of appointment, likewise stripping the appointee/beneficiary of standing to challenge the trustee's fairness at the time the contract is executed.[226]

In this case, a son ("Petitioner") tried to remove his mother ("Respondent") as the executrix of his father's estate and also as the trustee of his father's trust.[227] The facts revealed the deterioration of a parent-child relationship over a period of a few years amid several uncomfortable and often angry verbal exchanges between the two parties.[228] Many years before his death, the decedent (who was the grantor of the estate and trust at issue) executed a pour-over will ("the Will") and revocable trust ("the Trust").[229] The decedent designated Petitioner and his other two children, as residual beneficiaries of his "substantial estate."[230] However, Petitioner's residual interest was subject to a limited testamentary power of appointment ("the Power of Appointment") granted to Respondent.[231]

The relationship between Petitioner and his parents was a complicated one. Prior to the decedent's death, the decedent and Respondent were considering disinheriting him.[232] However, the decedent died, never disinheriting Petitioner.[233] After the decedent's death, the Petitioner and Respondent's relationship quickly deteriorated. Immediately following the decedent's death, Petitioner demanded information from Respondent regarding his father's estate.[234] Petitioner then filed a lawsuit against his mother alleging that she was delusional and unfit to be trustee.[235]

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224. C.A. No. 7339-ML, 2016 WL 593169 (Del. Ch. Feb. 12, 2016).

225. The court issued a Draft Report on September 30, 2015 from which it adopted all the findings in the Final Report.

226. *Tigani*, 2016 WL 593169, at *15.

227. *Id.* at *1.

228. *Id.*

229. *Id.* at *3.

230. *Id.* at *1.

231. *Id.*

232. *Id.* at *6.

233. *Id.* at *7.

234. *Id.* at *8.

235. *Id.*

The lawsuit attracted local media attention and was reported in the local newspaper.[236] As a result, Respondent decided to completely disinherit Petitioner.[237] Respondent then filed a motion to dismiss the petition. Respondent further amended her trust to remove Petitioner and his issues as beneficiaries of her trust.[238] The Master explained that, at this point, the case "became side-tracked by issues of standing and testamentary capacity" because now Petitioner was challenging those changes to the Will and her trust.[239] As such, the Master issued a draft oral report recommending that the Court deny the motion to dismiss and instructed the parties to take limited discovery regarding the changes to Respondent's testamentary documents.[240] The Master also stated that she would resolve Petitioner's standing issue once the parties had completed discovery.[241]

After that hearing, in July 2012, Respondent further amended her estate plan in an undisguised effort to eliminate any question regarding Petitioner's standing.[242] On July 31, 2012, Respondent signed a codicil to her 2011 will (the "July 2012 Codicil").[243] In that document, Respondent "irrevocably" exercised the Power of Appointment and directed that the assets in the Trust should be distributed upon Respondent's death in equal shares to her other two children.[244] "The July 2012 Codicil further stated that 'no property subject to the Limited Powers of Appointment I am now irrevocably exercising shall be distributed to my son, [Petitioner], or any of his issue.'"[245] And finally, the July 2012 Codicil contained a contract between Respondent and her two other children stating that she was exercising the Power of Appointment in favor of them and excluding Petitioner in exchange for their promise to assist her with her car and maintenance for the remainder of her life.[246]

Respondent argued that the contract to exercise the Power of Appointment was presently enforceable, and thus stripped Petitioner of his status as a beneficiary.[247] She further argued that the contract also acted as a release of the Power of Appointment, which also stripped Petitioner's status as a beneficiary.[248]

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236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at *1.

240. *Id.* at *9.

241. *Id.*

242. *Id.* at *9.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at *13.

248. *Id.*

Regarding whether a "contract to appoint" is valid in Delaware or not, the Master concluded that Delaware law does not recognize a "contract to exercise a power of appointment" as a presently-enforceable agreement.[249] She stated that there is no Delaware caselaw on point and thus she had to rely on the Restatement and other secondary sources for guidance.[250] According to the Master, those sources "indicate that contracts to exercise a testamentary power of appointment are not valid, with limited exceptions."[251] A donor who extends to a donee a testamentary power of appointment "essentially requires the donee to 'wait and see' and take into account later developing facts before exercising the power."[252] The Master determined that Respondent attempted to take control of the power before the donor intended for her to obtain the authority to do so.[253] Additionally, the Master decided the Petitioner's contract to appoint was invalid because it "confers a benefit on a donee when the donee is not a permissible appointee."[254]

With regard to whether the contract to exercise the Power of Appointment also acted as a release of the power to appoint Petitioner, the Master stated that even if the contract did act as a release, the release did not change his status as default beneficiary.[255] In other words, if in the event the Respondent did not exercise her power of appointment at all, Petitioner would still take a third of the Trust assets as a default beneficiary, and the release of her power to appoint him could not change that fact. Furthermore, the Master reasoned that "most courts in other jurisdictions have concluded that a taker in default has an interest in the property that is the subject of the power of appointment and has standing to compel an accounting from a trustee."[256] Consequently, the Master held that because Respondent failed to identify "any reason why Delaware should deviate from this majority rule," and due to the risk that the adoption of the minority rule could allow Respondent to insulate herself "from any form of judicial review of her actions as trustee," her attempt to divest Petitioner as a taker in default of the Power of Appointment did act as a "release" of the Power of Appointment over the Trust, but it did not alter the Petitioner's position as a taker in default of the Power of Appointment.[257]

Because the release did not alter Petitioner's position as a taker in default and the power to exercise the Power of Appointment could only be exercised at her death, the Master held that Petitioner was still a vested beneficiary subject to divestiture, and thus still had standing because he is a "beneficiary" as defined by 12 Del. C. § 3327.[258] The Master wrote that the "statute's use of the general term beneficiary, without any language restricting the class of beneficiary to whom it refers, fairly encompasses" Petitioner.[259]

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249. *Id.* at *15.

250. *Id.*

251. *Id.* at *17.

252. *Id.*

253. *Id.*

254. *Id.* at *18.

255. *Id.* at *16-18.

256. *Id.* at *14.

257. *Id.* at *14-16.

258. *Id.* at *14.

259. *Id.*

Regarding Respondent's capacity, the Master concluded that Respondent maintained the requisite capacity to make changes to her estate planning documents in the immediate aftermath of her husband's death.[260] The Master—mostly relying on a comparison between the consistencies of Respondent's expert witnesses' testimony with the inconsistency of Petitioner's expert witness—concluded that Petitioner's claim did not satisfy the two-part test established by the court in *Tracy v. Prudential Life Insurance Co. of America*,[261] which requires: (1) A testator to have an insane delusion; and (2) for the testator to change the beneficiaries of the estate because of that delusional belief.[262] On Respondent's capacity, the Master concluded, clearly Respondent "misunderstood [Petitioner] on a number of occasions" but that those misunderstandings and the resulting prejudice didn't constitute insane delusions.[263] The Master, relying on the lack of consistent evidence or testimony provided by Petitioner, determined that Respondent obviously dislikes the Petitioner, and that it "is plain that she has ample reason to be angry with him, and he with her," but that "[n]one of that rises to a level that permits this Court to substitute its judgment for that of a testator."[264]

In *IMO: Raymond L. Hammond Irrevocable Trust Agreement and PNC Bank Delaware Trust Company, as Trustee, Dated October 5, 2007*,[265] the court concluded that the power of appointment at issue was not exercised as the required formalities to do so were not complied with.

This case concerned a power of appointment (the "Power of Appointment) included in Raymond Hammond's ("Raymond") qualified disposition trust (the "Trust Agreement").[266] In the Trust Agreement, Raymond reserved for himself a special testamentary power of appointment, to be exercised if he specifically referenced the Trust in his will (the "Will").[267] According to the Trust Agreement, if Raymond died without exercising the Power of Appointment and without a spouse, the trust assets were to pass to a residuary trust for the benefit of four individuals, including Kyle Kozak ("Kyle").[268] The disagreement between the parties was whether Raymond, who failed to specifically reference the Trust in the Will, effectively exercised the Power of Appointment.[269]

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260. *Id.* at *22.

261. 101 A.2d 321, 326 (Del. Ch. 1953).

262. *Tigani*, 2016 WL 593169, at *20-21.

263. *Id.* at *21.

264. *Id.* at *22.

265. C.A. No. 10463-ML, 2016 WL 359088 (Del. Ch. Jan. 28, 2016).

266. *Id.* at *1.

267. *Id*. at *2.

268. *Id*.

269. *Id.* at *1.

Before Raymond died, he and his wife, Lisa, divorced.[270] However, they maintained a close relationship.[271] Upon separating in 2010, they entered into an agreement regarding their marital property rights and obligations.[272] The separation agreement stated that Lisa "shall remain, for her lifetime, the irrevocable beneficiary of [Raymond's] [T]rust with PNC and shall remain the beneficiary even after the divorce."[273] In 2012, Raymond executed the Will and named Lisa as the executor and sole heir of his estate.[274] However, the Will failed to reference specifically the Power of Appointment included within the Trust Agreement.[275]

Following Raymond's death in 2014, Lisa sought an order from the New Jersey court that issued the divorce decree to declare her to be the Trust's sole beneficiary.[276] In response, PNC Bank Delaware Trust Company (the trustee of the Trust) filed a Petition for Instructions in its attempt to determine whether Lisa is a beneficiary of the Trust.[277] Both Lisa and Kyle answered the Petition, and Kyle filed a motion for judgment on the pleadings.[278]

Lisa, in her motion, conceded that Raymond never complied with the "technical terms" of the Power of Appointment, but she argued that, under *Carlisle v. Delaware Trust Co.*, despite the Trust Agreement's unambiguous terms, the court must consider extrinsic evidence to make a determination that Raymond intended to exercise the Power of Appointment.[279] Kyle, in his motion, argued that the court should interpret the Trust "according to the settlor's intent at the time the [T]rust was created," and that, because the Power of Appointment wasn't properly exercised, the court should not consider Lisa's arguments about Raymond's intent and whether it changed after he created the Trust.[280] Additionally, Kyle argued that evidence of Raymond's intent during or after the divorce was immaterial because, regardless of Raymond's intent, the court lacked the power to modify the Will.[281]

Noting the absence of any "real dispute" between the parties regarding Raymond's intent when he settled the Trust, Master LeGrow concluded that the Trust Agreement was unambiguous.[282] The Master wrote that Lisa's argument that Raymond intended for her to "continue as beneficiary of the Trust during her lifetime despite the divorce" failed for two reasons: (1) Lisa failed to point to any part of the Trust that was ambiguous so her extrinsic evidence of Raymond's intent after creating the Trust was immaterial and; (2) Raymond's intent at any time other than when he created the Trust

270. *Id*. at *3.

271. *Id*.

272. *Id*.

273. *Id*.

274. *Id*.

275. *Id*.

276. *Id*.

277. *Id*.

278. *Id*.

279. *Id*. at *4.

280. *Id*. at *3.

281. *Id*.

282. *Id*. at *4.

was irrelevant since "[a] settlor's intent at the time a trust is established is the controlling inquiry," and because "an intent developed after creating a trust is irrelevant for purposes of construing the trust."[283]

The Master decided that Raymond failed to effectively exercise the Power of Appointment due to the formality (that he must specifically refer to the Trust in the Will) that he included in the Trust Agreement.[284] Although Delaware law requires only that a donee's "intention to execute the power" be "apparent and clear," the Master pointed to a settlor's ability to create a power of appointment which includes strict "formalities" that "the donee must observe in order to execute the power."[285] According to the Master, formalities "replace the judicial inquiry into whether the donee's intent to execute the power was apparent and clear."[286] Therefore, the Master rejected Lisa's argument that the court must consider extrinsic evidence of Raymond's intent after the creation of the Trust because "where a power contains such formalities, judicial inquiry into a donee's intent is not necessary because observance of the formalities is conclusive, and exclusive, proof of intent."[287]

The Master concluded that the court lacked the power to reform a will and recommended that the court grant Kyle's motion for judgment on the pleadings.[288]

XI. FIRST-FILED RULE APPLIED TO TRUST LITIGATION

In *IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust*,[289] the Court of Chancery opted not to stay a Delaware trust dispute in favor of Florida litigation that involved many, but not all, of the same parties and issues.

This case was filed on May 5, 2015, by the trust protector of the Ronald J. Mount 2012 Irrevocable Dynasty Trust (the "Dynasty Trust").[290] The trust protector sought a determination regarding the validity of the trust and also instructions on the proper administration.[291] The larger dispute relates to the settlor's son's contention that three individuals close to the settlor (including the settlor's new wife, his daughter, and the newly appointed Trust Protector of the Dynasty Trust) exercised undue influence over the settlor in the final stages of his life in order to obtain greater control over his substantial assets.[292] The Dynasty Trust, established in 2012, included the settlor's son as a lifetime beneficiary.[293] The settlor's son alleged that when the settlor's health deteriorated, the settlor's caregiver (who eventually became his new

283. *Id*.

284. *Id*. at *5.

285. *Id*. at *5.

286. *Id*.

287. *Id*. at *6.

288. *Id*.

289. C.A. No. 10991-VCN, 2016 WL 297655 (Del. Ch. January 21, 2016).

290. *Mount*, 2016 WL 297655, at *2.

291. *Id*.

292. *Id*.

293. *Id*. at *1.

wife), the settlor's daughter, and the newly appointed trust protector of the Dynasty Trust, acted as "allies" in an effort to gain control over the Dynasty Trust.[294]

On May 12, 2015, the settlor's new wife, the settlor's daughter, and the trust protector sought probate in Florida of the settlor's will as amended by two codicils.[295] On June 1, 2015, the settlor's son challenged the will on grounds of undue influence and sought probate of an earlier will.[296] He also petitioned for annulment of the settlor's marriage to his new wife, challenged the settlor's irrevocable trust on grounds of undue influence, and sought the removal of the new wife, the settlor's daughter, and the trust protector as fiduciaries for the settlor's estate and various trusts.[297]

The settlor's son filed his answer and counterclaims in Delaware. In those counterclaims, he repeated many of the allegations that he raised in the Florida matter.[298]

The Delaware Court of Chancery acknowledged that substantial pieces of the wide-ranging litigation between the parties are based in Florida "where substantial discovery has occurred and the proceedings appear to be progressing."[299] While the court didn't expressly focus on it, it may be notable that neither the Dynasty Trust nor its trustee was a party in the Florida action.

The settlor's son moved to stay the action filed in Delaware in favor of the Florida proceedings, arguing that a stay is a "matter committed to the exercise of the court's discretion."[300] The trust protector maintained that the son must demonstrate that litigating the case in Delaware would cause "overwhelming hardship" in order to overcome the trust protector's choice of Delaware as the forum to litigate the issues concerning the Dynasty Trust.[301]

The Vice Chancellor first analyzed the stay motion under the first-filed rule.[302] The Vice Chancellor noted that that rule generally instructs a court to respect a plaintiff's choice of forum unless the defendant can demonstrate that litigating in the forum subjects the moving party "to overwhelming hardship and inconvenience."[303] That is a high standard to overcome and—as the Delaware action was clearly first-filed—the court found that in this case the settlor's son failed to meet the burden.[304]

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294. *Id*.

295. *Id*. at *2.

296. *Mount*, 2016 WL 297655, at *2.

297. *Id*.

298. *Id*.

299. *Id*. at *2.

300. *Id*. at *3.

301. *Id*.

302. *Mount*, 2016 WL 297655, at *3-4.

303. *Id*. at *3 (internal citations omitted).

304. *Id*. at *5-6.

The Vice Chancellor then analyzed the factors that could possibly warrant a stay under the *forum non conveniens* doctrine.[305] After going through those factors, the Vice Chancellor concluded that a stay was not appropriate under that doctrine either and he denied the motion.[306]

The Vice Chancellor did, however, recognize that coordination with the Florida case made a lot of sense and he instructed the parties not to duplicate efforts needlessly.[307] Specifically, the Vice Chancellor added a footnote saying, "[c]oordination of discovery between the Delaware action and the Florida action should be accomplished by the parties and their counsel. The Court will become involved in coordinating discovery, if necessary."[308]

XII. MISSING WILL

In *IMO of the Last Will and Testament of Edward B. Sandstrom, Deceased*,[309] the Master in Chancery concluded that the terms of missing will pages were to be honored.

In this case, which arose out of the unexplained disappearance of the first page of a will, then-Master Ayvazian dismissed several exceptions taken to her earlier draft report in which she concluded that the petitioners had shown by a preponderance of the evidence that (1) a valid will was executed by the decedent; (2) the terms of the missing page; and (3) the missing page was unintentionally lost or destroyed and the decedent did not alter his testamentary intent prior to his death.[310]

In this case, the first page of the testator's will ("the correct page") was unintentionally lost or destroyed shortly after the testator, while hospitalized, signed an amended version of his last will and testament ("the Will").[311] With a different first page ("the incorrect page") attached to the front of the Will, the document was admitted to probate by the testator's son shortly after the testator's death.[312] Exactly what happened to the correct first page of the Will remained unclear. However, due to the scrivener's error, the incorrect first page of the Will created an ambiguity as to whether the testator intended to devise his property in Lewes, Delaware to the respondent (his son) or to the petitioners (a close family friend and her husband).[313]

Master Ayvazian recommended that the court revoke the probate of the Will and admit to probate a copy of the corrected first page as the first page of the testator's Will. The Master's decision was based largely on the extrinsic evidence introduced at trial, specifically, the affidavit and the testimony of the attorney who drafted the Will.

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305. *Id*. at *3-4. Those factors are: (1) relative ease of access to proof; (2) availability of compulsory process for witnesses; (3) view of the premises; (4) whether the controversy involves application of Delaware law which the courts of Delaware should more properly decide; (5) pendency of similar actions in another jurisdiction; and (6) other practical considerations which would serve to make the trial easy, expeditious, and inexpensive. *Id*. at *4-5.

306. *Id*. at *4-5.

307. *Id*.

308. *Id*. at *4 n.12.

309. C.A. No. 8948-MA, 2016 WL 1304841 (Del. Ch. Apr. 4, 2016).

310. *Sandstrom*, 2016 WL 1304841, at *1, *11.

311. *Id*. at *4.

312. *Id*. at *6.

313. *Id*. at *11.

The respondent contended that an affidavit and the trial testimony of the attorney who created the Will should have been excluded from the record for violating the attorney-client privilege.[314] Additionally, the respondent argued that the petitioners failed to establish the necessary prima facie case to overcome the common law presumption of *animo revocandi* where: (1) the terms of the missing first page cannot be demonstrated because only the testator and the attorney (who, according to the respondent, was restricted by the attorney-client privilege from disclosing information) had knowledge of its terms; and (2) there was no evidence of any search for the missing first page.[315]

The Master concluded that the respondent waived his right to object to the attorney's testimony and affidavit by failing to assert the attorney-client privilege before or during trial.[316] Regardless, the Master wrote that the respondent's argument was "without merit because under Delaware Rule of Evidence 502(d)(2), there is no attorney-client privilege where both parties are claiming through the same deceased client."[317] According to the Master, "Delaware courts, along with most other state courts, allow a decedent's attorney to testify to communications concerning the drafting of a will."[318]

Additionally, the respondent argued that the petitioners were required to prove that they had searched for the original correct first page of the Will, and that they failed to do so.[319] He argued the petitioners' "failure to conduct a search of the hospital dooms their efforts to prove a missing will."[320] However, according to the Master, because the Will was in the respondent's possession during the two days between the execution of the Will and the delivery of the Will by the respondent to a third party with the incorrect first page attached, the burden shifted to respondent to demonstrate that the missing corrected first page was destroyed by the testator or at his direction.[321] The Master found that the respondent failed to overcome the burden because he presented no evidence that the Will with the corrected first page was ever returned to the testator and destroyed by the testator or that the corrected first page was destroyed at the testator's direction.[322]

Lastly, the respondent argued the petitioners failed to adequately plead a missing will theory.[323] The Master decided the respondent's argument was "too late," and that he, in accordance with Rule 15(b), had impliedly consented early on to the trial of these issues.[324]

Based on her findings, the Master dismissed all of the respondent's exceptions to the draft report and adopted her draft report as her final report on the matter.[325]

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314. *Id*. at *12.

315. *Id*.

316. *Id*.

317. *Id*.

318. *Id*.

319. *Id*. at *13.

320. *Id*. at *14.

321. *Id*.

322. *Id*.

323. *Id*. at *15.

324. *Id*.

325. *Id*.

XIII. ESTATE ADMINISTRATION AND PRIORITY

In *Frederick-Conaway v. Baird, et al.*,[326] the Delaware Supreme Court found that estate debts are to be paid first by estate assets before using any related trust funds to pay those debts.

Jesse Frederick-Conaway ("Jesse) was the decedent's adult son, and Janice Russell-Conaway ("Janice") was the decedent's second wife and widow.[327] After disputes arose, the Court of Chancery removed them and named Kevin Baird as administrator and trustee.[328] Mr. Baird then petitioned the Court of Chancery to ascertain whether certain transactions in which Jesse and Janice engaged were proper.[329] The Court of Chancery merged the administration of the decedent's estate and trust.[330]

On appeal, the Delaware Supreme Court partially reversed the trial court and ruled on several issues.[331] Most notably, the Supreme Court found that the trial court erred in merging the administration of the decedent's trust and his estate. The Supreme Court found that the trial court incorrectly read the holding in *In Re Estate of Arcaro*[332] to allow for the reordering of priority for the payment of estate debts and honoring bequests.[333] In short, the Supreme Court held that the proper order would have seen the debts paid first by any estate assets before using any trust funds to pay those debts.[334] As such, Jesse and Janice had been incorrect to use trust assets to pay certain estate debts so that they could withdraw their bequests from the estate.[335]

XIV. REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS

In *IMO the Hawk Mountain Trust*,[336] the Vice Chancellor discussed the various methods to evaluate a fee request in a trust dispute and awarded approximately 94% of the amounts sought in the co-trustees' fee applications.

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326. 159 A.3d 285 (Del. 2017).

327. *Baird*, 159 A.3d at 288.

328. *Id*.

329. *Id*.

330. *Id*.

331. *Id*. at 288-89.

332. C.A. No. 4725, 1977 WL 9539 (Del. Ch. Oct. 12, 1977).

333. *Baird*, 159 A.3d at 293.

334. *Id*. at 299-301.

335. *Id*.

336. C.A. No. 7334-VCP, 2015 WL 5243328 (Del. Ch. Sept. 8, 2015).

While the parties still had pending disputes between them in other jurisdictions, the Vice Chancellor found that the fee applications were ripe for review as the Delaware case was resolved.[337] The Vice Chancellor approved the majority of the sought fees, but found that some deductions were appropriate.

The Vice Chancellor referenced three possible bases for fee reimbursement: (1) Delaware common law, (2) 12 DEL. C. § 3584,[338] and (3) the American Rule.[339] He then stated that "[b]ecause I base my conclusions primarily on the applicable principles of Delaware common law, and secondarily on 12 DEL. C. § 3584, I do not reach Petitioners› argument for fees under the American Rule."[340]

In sum, approximately $1.1 million total fees were sought and the court awarded $1,033,800 total.[341] Thus, there was about a 6% reduction. The reductions came for various reasons. The court agreed with some of the respondents' objections, finding that certain work done did not benefit the trust and, thus, was not properly reimbursable.[342] That work included the filing of a dismissed Pennsylvania case (for which the court awarded reimbursement for only some of the related fees) as well as the unnecessary cancellation of an LLC.[343] The court also made a small deduction for work done that benefitted a trust other than the trust that was the subject of this case.[344] The court also ordered a partial deduction for fees incurred to obtain, and then prepare for, a deposition that was never actually taken due to the co-trustees' own strategic choice not to take that deposition.[345]

Regarding whether the total fees sought were reasonable, the court generally concluded that they were. But the court did take a small deduction off of one fee application on the basis that the full fees were not adequately justified.[346] In that regard, the court noted that the petitioners presented no detailed evidence on the following factors of Delaware Lawyers' Rules of Professional Conduct Rule 1.5: "(1) … the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;" "(3) the fee customarily charged in the locality for similar legal services;" and "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services."[347] The court noted that

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337. 2015 WL 5243328, at * 3.

338. That section 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." 12 DEL. C. § 3584.

339. 2015 WL 5243328, at *4. The American Rule provides that litigants must pay their own attorneys' fees and costs. *Id*.

340. *Id*.

341. *Id.*

342. *Id*. at *5.

343. *Id*.

344. *Id*.

345. *Id*.

346. *Id*. at *7.

347. *Id*.

in this case only one of the firms billed more than $500 per hour for their services.[348] Approximately 11.7% of the time spent by that firm involved lawyers charging more than $500 per hour, with the highest rate being $645.[349] The court then found that "[b]ased on the limited record before me, I find that a maximum rate for reasonable attorneys' fees in this matter is $500 per hour."[350] The court therefore capped the reimbursable billing rates at $500 per hour.[351]

It does appear, however, that if all of the factors of DLRPC Rule 1.5 were covered in the application at issue to the court's satisfaction, the court would have allowed reimbursement for hourly rates in excess of $500.00.

In *IMO the Last Will & Testament of Wilma B. Kittila*,[352] the Master reduced the petitioners' fee reimbursement because the dollar value of the sought fees was disproportionate to the size of the estate in dispute.

In this opinion, then-Master LeGrow only partially approved the amounts sought in the non-prevailing party's fee application. The petitioners filed a fee petition, and an accompanying affidavit of fees, whereby they sought the reimbursement of $224,565.46 in attorneys' fees and costs that petitioners had incurred in unsuccessfully challenging the validity of two wills.[353] The estate opposed the petitioners' request and argued the requested amount was disproportionate to the total value of the estate (which was then only $351,330.27 after deducting the estate's attorneys' fees and costs incurred defending the petitioners' challenges).[354]

Upon recognizing that an award of the amount requested by the petitioners would reduce the estate "to approximately half its original size, thereby defeating the testator's intent," and that the additional deduction of the estate's attorneys' fees and costs incurred in defending the action "would leave approximately one quarter of the estate for [the] designated beneficiaries," the Master recommended that the court "order the estate to pay [p]etitioners' attorneys' fees in the amount of $88,032.65" (which was twenty percent of the value of the estate at the time of testator's death).[355] Simply said, the Master recognized "the importance of ensuring that an award of fees does not eviscerate the testator's intent."[356]

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348. *Id*.

349. *Id*. at *7.

350. *Id*.

351. *Id*.

352. C.A. No. 8024-ML, 2015 WL 5897877 (Del. Ch. Oct. 9, 2015).

353. *Id*. at *1. While the challenge was unsuccessful, the Master had earlier determined that the petitioners "had met the burden of showing they were entitled to have at least a portion of their attorneys' fees paid by [the] estate." *Id*.

354. *Id*.

355. *Id*. at *2.

356. *Id*.