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OF THE
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Re: *Mack v. Mack*
C.A. No. 4240-VCN
Date Submitted: December 12, 2014

Dear Counsel:

Plaintiff Elaine Mack ("Mother") has moved for reargument, under Court of Chancery Rule 59(f), of the Court's Letter Opinion and Order of November 28, 2014, in which the Court concluded that Mother could not recover from Defendant Beverly Mack ("Daughter") the funds withdrawn (and used for her own benefit) by Daughter from a joint bank account established more than a quarter of a century earlier.[1] Mother also challenges the Court's conclusions regarding a waste claim related to a dwelling which Mother and Daughter jointly owned.

[1] *Mack v. Mack*, 2014 WL 6734856 (Del. Ch. Nov. 28, 2014).

A motion for reargument affords a disappointed litigant the opportunity to show the trial court that it "misapprehended the law or the facts such as would affect the outcome of the decision."[2] It is designed to provide neither an opportunity to "rehash the arguments already decided by the court" nor an opportunity to "rais[e] new arguments."[3]

If the Court were applying moral or ethical principles, Daughter would not have prevailed. The Mother, however, is the plaintiff, and it was her burden to provide the facts that would support application of relevant legal or equitable doctrines to justify a judgment requiring payment to her.

A recurring difficulty in addressing Mother's motion is the changing of her theories of the case. At one point, Daughter could not withdraw funds from the joint account. Now, according to Mother, Daughter could withdraw the funds; she just could not use the funds for her own purposes. In addition, much of Mother's motion is a narrative which reframes the facts and issues from the trial version, and this has been done with a minimalist's approach to the citing of authority. In

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[2] *Interim Health Care v. Fournier*, 1994 WL 148266, at *1 (Del. Ch. Mar. 23, 1994).

[3] *Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678, at *1 (Del. Super. Sept. 9, 2008) (internal quotation marks omitted).

addition, Mother points to questions that the Court raised during the course of the proceedings. She, however, did not focus on those concerns in her post-trial briefing, and it was not for the Court, at the post-trial stage, to have speculated as to the potential arguments that she could have made.[4] Another indication of how the substance of her case has evolved over time can be found in the waste claim regarding the jointly owned dwelling. That claim was not added until a few months before the trial.

Both Mother and Daughter, on opening of the joint account, executed signature cards that allowed each of them to withdraw funds from the account and prescribed no restriction on the subsequent use of the funds. It is the nature of a joint account that "[e]ither party can acquire the whole account either by withdrawing it during the lifetime of the co-owners or by survivorship."[5]

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[4] For example, drawing on a question the Court asked during a colloquy (as part of an argument against one of Daughter's affirmative defenses) fails to frame an argument that the signature cards do not govern the parties' relationship. *See* Pl.'s Post-Trial Br. 48-49.

[5] *Casagranda v. Donahue*, 585 P.2d 1286, 1288 (Mont. 1978); *see also In re Estate of Vogel*, 684 N.E.2d 1035, 1038-40 (Ill. App. Ct. 1997). For present purposes at least, the principles do not vary with whether a joint tenant dies or a joint tenant withdraws funds from the joint account.

Nevertheless, Mother argues that the funds in the account belonged to her and that Daughter had no right to use the funds for her benefit. Reargument is sought of the Court's conclusion that their rights to the funds were as described in the signature cards, that there was no other limitation on Daughter's right to withdraw the funds from the joint account and to use them, and, thus, that Mother had not demonstrated that she was entitled to recover the funds that had been taken from the joint account.

Mother presented a course of conduct argument during the trial. That argument was understood to be one of modifying the terms of the signature cards. Now, she emphasizes that, instead of modifying the relationship reflected in the signature cards, it is evidence of the nature of the initial or primary agreement. In other words, Mother now argues that because Daughter made little use of the funds in the joint account over the years, it follows that she had agreed from the

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Mother testified that her only purpose in creating the joint tenancy was to facilitate the payment of family bills in an emergency. The Court accepts that as her intent and that it motivated her to open the joint account. However, that intent, even with her overt expression of it, does not transform the fundamental nature of the joint account that she established with Daughter, especially in light of the clear language in the signature cards. An expression of intent, without more, does not create a binding term.

beginning not to make use of those funds. Perhaps that is something of a factual argument in support of Mother's position that the relationship of the joint account was different from that of a normal joint account, as evidenced by the signature cards. Similarly, Mother makes the factual assertion that the use of the funds in the joint account for family emergencies was discussed and Daughter never affirmatively rejected that notion. If one accepts those facts, and they are far from clear, they may support Mother's theory, but ultimately, Mother has not proven that Daughter agreed (either before or after opening the joint account, or even at the time of opening the joint account) that the normal joint account arrangement would not be established.[6] It is this lack of agreement that undermines all of

[6] In post-trial briefing, Mother referred to the opening of the joint account and her discussions with her children. She did not, however, set forth an argument that an agreement by silence established Daughter's obligations. There was no analysis of the legal standard. *See* Restatement (Second) of Contracts § 69 (1981) (listing the limited circumstances in which "silence and inaction operate as an acceptance"—generally speaking, where the offeree accepts a benefit knowing that the offeror expects compensation; where the offeree has reason to understand that silence serves as acceptance and intends to accept through silence; and where prior dealings make it reasonable to expect acceptance absent notice otherwise). Furthermore, there was no effort to explain how the facts would satisfy that doctrine.

Mother's contentions that would support her entitlement to the funds that Daughter withdrew from the joint account.

At the heart of Mother's argument is the unjust enrichment theory. As the plaintiff, she bears the burden to demonstrate that Daughter lacked justification for taking the funds.[7] Her argument fails on this very premise because a joint account, without any enforceable strings, whether found in law or in equity, allows the joint tenant not only to withdraw the funds, but also to use the funds for the joint tenant's individual purposes. The argument that Mother sponsors to the effect that Daughter could withdraw the funds but could not use the funds depends upon some separate obligation, established through fiduciary duty, contract, or other means.[8]

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[7] *See Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012) (listing the elements of an unjust enrichment claim).

[8] Mother cites *Fectau v. Cleveland Trust Co.*, 167 N.E.2d 890 (Ohio 1960), for the principle that a joint account's full relationship is not established merely by looking at the bank document. Pl.'s Post-Trial Br. 37. That case recognizes that facts and circumstances may vary the terms of the account relationship. The Court has done what *Fectau* anticipated—it looked to Mother's arguments to see if some limitation had been imposed on Daughter's entitlement both to remove and to use the funds from the joint account. Mother's argument depends upon an agreement with Daughter that the joint account would not be treated as a joint account normally is. She does not assert that inherent in the nature of a joint account is the consequence that, when one joint tenant withdraws the funds, the joint nature of

The default understanding that a joint tenant may use the funds in the joint account as she pleases would control in the absence of some limitation that Mother could prove. It is obvious that Mother now wishes that she had not trusted Daughter and that she had imposed enforceable terms and conditions on Daughter's ability to use the funds for her personal benefit, but that simply did not happen.

Mother complains that the Court assumed that the signature cards, as the only written agreement defining the relationship, also established what could be done with the funds after they were withdrawn from the bank. That, however, is simply not how the Court reached its decision. With the right to withdraw the funds comes the right to use the funds unless there is some other limitation. It is not Daughter's responsibility to prove that she was entitled to use the funds; it is Mother's burden to prove that there were enforceable restrictions on Daughter's ability to use the funds, and such limitations were not proven. Obviously, there are circumstances in which a person may withdraw funds from a bank account but may not use them for her own purposes. A trustee, for example, may withdraw funds,

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the property remains in effect. There is no argument that this would be the law of Delaware.

but no one would suggest that a trustee, because of her fiduciary duties, automatically is entitled to use those funds for her personal purpose. Unfortunately for Mother, there are no fiduciary duties at work here; this is simply a matter of a joint tenancy arrangement and it is the nature of the joint tenancy arrangement that allowed Daughter to do what she did.

Mother seeks to avoid the persuasive, if not controlling, authority of *Walsh v. Bailey*.[9] *Walsh* focused on the text of a signature card; the signature card in that case and the signature cards in this case are comparable. In *Walsh*, the Court concluded that parol evidence was not appropriate to alter or supplement the terms of the signature card. Daughter previously moved for summary judgment on this ground, and the Court denied that motion.[10] Yet, in light of the difficulty of reviewing limited, informal discussions several decades earlier, *Walsh*'s wisdom of relying upon the parol evidence rule is amply demonstrated. The reasoning of *Walsh* is consistent with the reasoning employed by the Court.

The Court concluded as a matter of fact that there was no separate agreement between Mother and Daughter beyond the signature cards about the use of the

[9] 197 A.2d 331 (Del. 1964).
[10] *See Mack v. Mack*, 2013 WL 3286245 (Del. Ch. June 28, 2013).

funds in the joint account.[11] Mother focuses less now on whether there was an express agreement and, instead, relies upon the notion of an implied agreement. In her post-trial brief, Mother's implied agreement argument was based upon the history of the account. She argues that it evidences the nature of the relationship. Whether an implied agreement modified the terms of the signature cards or whether an implied agreement was what Mother refers to as the primary agreement is not material at this point because the account history does not persuade the Court that there was any agreement that would modify the normal joint account relationship as prescribed by the signature cards.

Mother also contends that because Daughter did not use the account much during the several years and because she did not monitor the account, she lost the right to use the funds in it. Even if that factual predicate had been established by Mother, she offers no authority for the proposition. In sum, Mother did not, essentially as a matter of fact, demonstrate any limitation on Daughter's right to remove the funds from the joint account and to use them for Daughter's purposes.

[11] The signature cards are the best evidence of what was intended. Their "memory" has not faded over decades. They are not subject to the vagaries of incidental, personal conversations.

With the passage of time and the imprecision of memory, proving that something other than the signature cards defined rights to the funds in the joint account was undoubtedly difficult. As noted, it is not Daughter's duty to show that she was entitled to withdraw the funds. It was Mother's burden to show there was some limitation and in that effort she failed.

The result here stems from the consequences of titling property in joint names. This outcome is, of course, not a happy one, but it does not justify recrafting the law of joint tenancy.

Mother additionally brings a waste claim against Daughter for damages to a dwelling which Mother and Daughter held as joint tenants. Mother argues that the damage amounts to waste—not because Daughter caused it, but because she did not agree to rent or to sell the property as Mother proposed. According to Mother, the failure to pursue those transactions makes Daughter liable for the damage caused by others, as well as for the weather damage that followed from exposure of the interior of the dwelling.

The issue of waste, as framed by Mother, would require the Court to impose liability for third-party tortious damage to the premises upon Daughter. The Court

noted that Daughter was not living in the premises and, thus, was not in actual physical control. At one point, she had put a lock on the gate which could be viewed as trying to protect the premises.[12] Mother and Daughter had a disagreement about whether to rent the premises and about who should be living in the premises. That debate among joint tenants does not impose a liability, under a theory of waste, on the joint tenant whose approach to managing the property can be second-guessed. Mother concedes that partition was an option available to her but argues the Court should not have considered other possibilities because partition had not been raised as an affirmative defense. This is not a matter of an affirmative defense; it is a matter of what the parties could have done.

Mother had a time-tested means of resolving the deadlock. She cannot simply do nothing and then blame Daughter because she does not like what happened in the interim. In essence, Mother seeks to create a duty of one joint tenant to agree to rent or sell the property if neither of the tenants wants to reside in the property, but she offers no persuasive authority as to why that should be an

[12] Even if the lock installed by Daughter provided her with constructive possession of the dwelling, that does not make her liable for the damage caused by others. Installing a lock to provide additional security, while the motives may be contested, does not impose upon Daughter the status of an insurer.

additional burden on a joint tenant. In sum, both Mother and Daughter were victims of third-party tortfeasors. Both could have taken different steps which, with the benefit of hindsight, most likely would have avoided some or all of the loss. That, however, does not render Daughter liable for waste.

For the foregoing reasons, the standards of Court of Chancery Rule 59(f) are not satisfied by Mother's motion for reargument which, accordingly, is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K