IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISE CUMMINGS, individually and on behalf of her minor child,	)	
Plaintiff,	)	
v.	)	C.A. No. 6948-VCP
THE ESTATE OF RONALD E. LEWIS, ROBERT L. JOHNSON, co-executor of the Estate of Ronald E. Lewis, LEONARD L. WILLIAMS, co-executor of the Estate of Ronald E. Lewis, MARGARET LEWIS, RONALD E. LEWIS, JR., BRANDON LEWIS, and KEVIN MOSLEY,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: November 1, 2012
Decided: March 14, 2013

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PARSONS, Vice Chancellor.

The plaintiff in this case seeks an award against the estate of her daughter's father under Delaware's after-born child statute, 12 *Del. C.* § 301. The plaintiff also seeks enforcement of a severance agreement. After bringing this suit against the estate, the plaintiff also commenced litigation in a New Jersey court and the Delaware Family Court seeking, in both cases, an award of child support against the estate. After learning of the child support claims, the defendants in this case, including the estate, moved for leave to amend their answer to include a request for several instructions on the relationship between the plaintiff's child support claims and her claim to recover an intestate share under Delaware's after-born statute. In addition, the defendants seek to add an affirmative defense to the plaintiff's claim for enforcement of the severance agreement. The plaintiff opposes the defendants' motion for leave to amend.

After considering the parties' briefing on the defendants' motion, I grant the motion in part and deny it in part.

I. BACKGROUND

A. The Parties

Ronald E. "Butch" Lewis died testate on July 23, 2011.[1] Lewis was the founder, president, and CEO of Butch Lewis Productions, Inc. ("BLP"), a New York corporation.

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[1] Pl.'s First Am. Verified Compl. ("Compl.") ¶ 3. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Complaint and assumed to be true for purposes of the pending motion for leave to amend.

Lewis was a well-known boxing promoter and manager, film and music producer, and philanthropist.

Plaintiff, Louise Cummings, was involved romantically with Lewis between October 2006 and Lewis's death on July 23, 2011. Cummings worked for BLP. A.L. is the daughter of Cummings and Lewis, but neither Cummings nor Lewis knew Cummings was pregnant before Lewis died.[2] A.L. was born on April 15, 2012.

Defendant Estate of Ronald E. Lewis (the "Estate") was created as a result of Lewis's death. Defendants Robert L. Johnson and Leonard L. Williams[3] are co-executors of the Estate pursuant to Article III of the Last Will and Testament of Ronald E. Lewis dated April 26, 1999 (the "Will"). Defendants Margaret Lewis, Ronald E. Lewis, Jr., Brandon Lewis, and Kevin Mosley are Lewis's adult children.

B. Facts

1. The after-born and child support claims

At the time of his death, Lewis resided in Delaware.[4] Lewis recognized four children in the Will: Margaret, Ronald, Jr., Brandon, and Kevin.[5] On October 19, 2011, Cummings instituted this action seeking to establish Lewis as A.L.'s father and to recover

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[2] D.I. No. 42 (Sept. 17, 2012). All docket item numbers ("D.I. No.") refer to the docket in this case, *Cummings v. Estate of Lewis*, C.A. No. 6948-VCP.

[3] Co-executor Williams passed away shortly before issuance of this Memorandum Opinion.

[4] Estate's Reply Br. in Supp. of Its Mot. for Leave to File Am. Answer & Verified Countercl. for Instructions ("Defs.' Reply") 3.

[5] Compl. ¶ 18 & Ex. A, Will, art. 1 § 1.

the equivalent of an intestate share of the Estate under 12 *Del. C.* §§ 301 and 310 ("Section 301" or the "After-Born Statute"). On June 26, 2012, to ascertain whether Lewis is A.L.'s father, I ordered genetic testing according to a proper testing protocol.[6] On September 17, 2012, after DNA tests had proved that Lewis is A.L.'s father, I entered an Order to that effect.[7]

On August 23, three days after receiving the DNA results, Cummings filed a statement of claim for child support with the New Castle County Registry of Wills (the "Statement of Claim") to preserve that claim against the Estate.[8] Five days later, on August 28, 2012, the Estate filed a Motion for Leave to File an Amended Answer and Verified Counterclaim for Instructions (the "Motion to Amend").[9] On August 29, 2012, Cummings brought suit in the New Jersey Superior Court seeking child support for A.L.[10] On October 4, 2012, pursuant to her Statement of Claim, Cummings also filed a Petition for Support in the Delaware Family Court.[11] Both child support claims are pending.

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6 D.I. No. 29 (June 26, 2012).

7 D.I. No. 42 (Sept. 17, 2012).

8 Pl.'s Opp'n to the Estate's Mot. for. Leave to File Am. Answer and Verified Countercl. for Instructions ("Pl.'s Opp'n") 7.

9 *See* D.I. No. 32 (Aug. 28, 2012) ("Defs.' Mot. to Amend").

10 *See* D.I. No. 86 Ex. A (Jan. 7, 2013).

11 Pl.'s Answering Br. in Opp'n to the Estate's Cross Mot. for Partial Summ. J. 5. A Family Court commissioner dismissed that petition on October 31, 2012. *Id.* at 5 n.17. Cummings has sought review of the commissioner's order and, at

2. The Severance Agreement

Before his death, Lewis owned BLP. Cummings alleges that she was the Vice-President of Operations for BLP until its business activities were wound up following Lewis's death.[12] Approximately two months after Lewis died, Cummings and Defendant Johnson, as co-executor of the Estate, entered a Severance Agreement (the "Severance Agreement" or the "Agreement") wherein BLP agreed to pay Cummings two weeks of severance pay for each year she worked for BLP.[13] According to the Agreement, Cummings worked for BLP for five years, and therefore was entitled to receive $16,161.25 in severance pay after taxes.[14] As part of the Agreement, Cummings released any claims she had against BLP.[15]

On May 9, 2012, Cummings amended her Complaint to add claims against the Estate for breach of the Agreement and fraudulent transfer.[16] It is undisputed that Cummings has not received the money allegedly owed to her under the Agreement. The Estate claims, however, that Cummings was employed by BLP for less than one year

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Cummings's request, the Family Court has stayed her case pending resolution of the child support case in New Jersey. *Id.*

12 *Id.* Defendants deny this allegation. Defs.' Mot. to Amend Ex. 1 ¶ 14.

13 Compl. Ex. B.

14 *Id.*

15 *Id.*

16 In her fraudulent transfer claim, Count V of the Complaint, Cummings alleges that BLP commingled its assets with several other companies owned by Lewis and, as a result, the Estate is refusing to honor its obligations under the Agreement.

before Lewis's death, and that she materially misrepresented her length of employment at BLP in order to receive more severance pay.[17] On that basis, the Estate maintains that the Severance Agreement is void or voidable.[18]

C. Procedural History

Although Cummings commenced this action on October 19, 2011, she filed an Amended Complaint on May 8, 2012 (the "Complaint"). Defendants filed their Answer to the Complaint on July 3, 2012. On August 23, 2012, Cummings filed her Statement of Claim for child support against the Estate. In response, Defendants filed their Motion to Amend on August 28, 2012 to request instructions regarding the relationship between Cummings's claim under the After-Born Statute and her claim for child support, and to assert certain defenses against Cummings's claims for child support and for enforcement of the Severance Agreement. Defendants also have filed a cross motion for partial summary judgment (the "Motion for Summary Judgment"), seeking summary judgment on the instructions requested in their Motion to Amend.[19] This Memorandum Opinion constitutes my rulings on Defendants' Motion to Amend.

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17 Defs.' Mot. to Amend Ex. 1 ¶¶ 39–40.

18 *Id.* ¶¶ 4–5.

19 After DNA testing confirmed that Lewis is A.L.'s father, Cummings filed on August 20, 2012, a "renewed motion for an adjudication of parentage of A.L. and for partial summary judgment that A.L. is entitled to an intestate share of the assets of the decedent, Ronald E. 'Butch' Lewis." D.I. No. 31. I entered Cummings's proposed order adjudicating Lewis as A.L.'s father. D.I. No. 42. To date, however, Cummings has not pressed the other portion of her summary judgment motion, which pertains to A.L.'s entitlement to an intestate share.

D. Parties' Contentions

In the proposed amendment to the Answer, Defendants seek instructions from this Court as to eight questions (the "Requested Instructions" or "Instructions"): (1) whether Cummings's claims for child support were filed timely under 12 *Del. C.* § 2102; (2) whether Delaware or New Jersey law governs the child support claims; (3) whether the claims for child support are valid under the facts and circumstances of this case; (4) whether, if Cummings prevails on a claim for child support, she also can recover under 12 *Del. C.* § 301; (5) whether, if Cummings prevails on a claim for child support, that claim would offset, or be offset by, a valid claim under Section 301; (6) whether Cummings must elect one remedy, either child support or Section 301 recovery; (7) whether any amount recovered by Cummings, either as child support or under Section 301, should be classified as payments to creditors or beneficial interests of the Estate; and (8) whether the Severance Agreement is enforceable.[20] Defendants contend that expeditious resolution of these questions is necessary to the prompt and correct distribution of the Estate's assets. Finally, Defendants seek to add an affirmative defense that Cummings's claims for damages based on the Estate's alleged breach of the Severance Agreement is time-barred under 12 *Del. C.* § 2102(b) (the "Affirmative Defense").[21]

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[20] Defs.' Mot. to Amend Ex. 1 ¶ 45.

[21] *Id.* ¶ 7.

Cummings opposes Defendants' Motion to Amend. Cummings argues first that this Court lacks subject matter jurisdiction to give the Requested Instructions. In addition, Cummings contends that the Requested Instructions seek advisory opinions, which this Court cannot give. Finally, Cummings seeks denial of Defendants' motion to add the Affirmative Defense to Cummings's claim for breach of the Agreement on the ground that Defendants unduly delayed in asserting that defense. In the Analysis below, I address each of those arguments in turn.

II. ANALYSIS

A. Standard for Motion for Leave to Amend

Court of Chancery Rule 15 governs motions for leave to amend. Rule 15(a) permits a party to amend its pleading "once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it any time within 20 days after it is served."[22] After this period, a party may amend its pleading "only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[23] Courts generally allow for liberal amendment in the interest of resolving cases on the merits.[24] "A motion to amend may be denied,

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22 Ct. Ch. R. 15(a).

23 *Id.*

24 *See, e.g.*, *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd*, 962 A.2d 916 (Del. 2008) (TABLE); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006).

however, if the amendment would be futile, in the sense that the legal insufficiency of the amendment is obvious on its face."[25] That is, the motion should be denied if the proposed amendment would immediately fall to a motion to dismiss.[26] Moreover, leave to amend should be denied if there is a showing of substantial prejudice, bad faith, dilatory motive, or repeated failures to cure by prior amendment.[27] Ultimately, the decision to grant or deny a motion for leave to amend is left to the sound discretion of the trial court.[28]

B. Does this Court Have Subject Matter Jurisdiction over the Requested Instructions?

The Court of Chancery is a court of limited jurisdiction. It can acquire subject matter jurisdiction over a case in three ways: "(1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction."[29] Under 10 *Del. C.* § 342, the "Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient

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25 *NACCO Indus., Inc. v. Applica Inc.*, 2008 WL 2082145, at *1 (Del. Ch. May 7, 2008).

26 *See St. James Recreation, LLC v. Rieger Opportunity P'rs, LLC*, 2003 WL 22659875, at *5 (Del. Ch. Nov. 5, 2003).

27 *See, e.g.*, *Nat'l Installment Ins.*, 2008 WL 2133417, at *7; *Crowley*, 2006 WL 3095952, at *3; *NACCO*, 2008 WL 2082145, at *1.

28 *See, e.g.*, *Nat'l Installment Ins.*, 2008 WL 2133417, at *7 (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970)); *NACCO*, 2008 WL 2082145, at *1.

29 *Heartland Del. Inc. v. Rehoboth Mall Ltd. P'ship*, 57 A.3d 917, 919 (Del. Ch. 2012) (citing *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008)).

remedy may be had . . . before any other court or jurisdiction of this State." This provision has been interpreted merely to codify the traditional maxim by which equity courts defined their jurisdiction,[30] and it "neither grants nor divests equity of any jurisdiction."[31] The General Assembly, however, may restrict this Court's jurisdiction.[32] To abrogate by statute the Court of Chancery's general equity jurisdiction, the General Assembly must do two things: "express the intention to confer that particular part of equity jurisdiction upon some other tribunal exclusively and, at the same time, create in that tribunal remedies which are the equivalent of the remedies that would have been available in the Court of Chancery."[33]

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30 *See Clark v. Teveen Hldg., Inc.*, 625 A.2d 869, 875 (Del. Ch. 1992).

31 *In re Arzuaga-Guevara*, 794 A.2d 579, 586 (Del. 2001).

32 *See DuPont v. DuPont*, 85 A.2d 724 (Del. 1951).

33 *Id.* at 734. The General Assembly's authority to restrict the Court of Chancery's general equity jurisdiction is limited. The Supreme Court has stated that "[t]he Delaware Constitution prohibits the General Assembly from limiting the equity jurisdiction of the Court of Chancery to less than the general equity jurisdiction of the High Court of Chancery of Great Britain existing at the time of our separation from the Mother Country." *CML V, LLC v. Bax*, 28 A.3d 1037, 1044 (Del. 2011) (citing *DuPont*, 85 A.2d at 729). The *DuPont* Court held, however, that this measure of the Court of Chancery's general equity jurisdiction is subject to the "proviso . . . originally found as Section 25 of the Colonial Act of 1726–1736 . . . to the effect that the Chancellor shall not hear and determine any cause where a sufficient remedy exists at law." *DuPont*, 85 A.2d at 729. The Court went on to explain that "it is both a restriction upon the Chancellor in the exercise of the general equity powers of the Court of Chancery and, at the same time, an implied grant of authority to the Legislature to restrict the Chancellor in the exercise of those powers by the creation of a sufficient remedy in some other tribunal and by making such remedy exclusive to the other tribunal." *Id.* Thus, in the words of a recognized treatise, "where the legislature opts by statute to confer, expressly or

The General Assembly did just that in 1971 when it created the Family Court. Under 10 *Del. C.* § 921, the Family Court has "*exclusive original jurisdiction* in all proceedings in this State concerning: . . . any petitions or actions for the education, protection, control, visitation, possession, custody, care, or *support of children*."[34] Thus, the creation of the Family Court divested the Court of Chancery of jurisdiction over claims seeking an award of child support.[35] Likewise, the Family Court has exclusive original subject matter jurisdiction over domestic relations issues vested to it by the General Assembly.[36]

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by necessary implication, exclusive jurisdiction upon another tribunal over causes previously heard and determined by the Court of Chancery, and where a remedy is available from that new tribunal fully equivalent to that available in chancery, it may abrogate the existing equitable jurisdiction of the Court of Chancery." Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2.02[d], at 2-16 (2012); *see also id.* § 2.02[c].

34 10 *Del. C.* § 921 (emphasis added).

35 *See Wife P. v. Husband P.*, 287 A.2d 409, 413 (Del. Ch. 1972) (holding that the statute creating the Family Court "creates in the Family Court an adequate remedy at law sufficient to divest the Court of Chancery of jurisdiction in child support cases").

36 *See Benge v. Oak Grove Motor Court, Inc.*, 2006 WL 345006 (Del. Ch. Feb. 7, 2006), *aff'd*, 903 A.2d 322 (Del. 2006).

The power of this Court to hear and decide cases arising under the Delaware Probate Code,[37] however, is well established.[38] Indeed, "[f]rom the close of the reign of Charles II the Court of Equity in England had jurisdiction to superintend the administration of estates."[39] In addition, "if a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to resolve the remaining portions of the controversy as well."[40]

To the extent, then, that any Requested Instruction amounts to a petition or action "for . . . the support of children," this Court lacks subject matter jurisdiction over it. Accordingly, the Motion to Amend as to such an Instruction would be denied as futile because the amendment presumably would fall to a motion to dismiss for lack of subject matter jurisdiction. Conversely, this Court would have subject matter jurisdiction over any Requested Instruction properly before it under the Probate Code, as well as any

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[37] I refer to Title 12 of the Delaware Code as the "Probate Code." *See Burnes v. Gordon*, 1980 WL 6368, at *1 (Del. Ch. Jan. 14, 1980).

[38] *See, e.g.*, *In re Estate of Jones*, 2008 WL 731666 (Del. Ch. Mar. 6, 2008); *In re Graham's Estate*, 275 A.2d 253 (Del. Ch. 1971); *In re Ortiz' Estate*, 27 A.2d 368 (Del. Ch. 1942).

[39] *Glanding v. Indus. Trust Co.*, 45 A.2d 553, 555 (Del. 1945); *see also Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) ("The most common example of equitable rights in this court are fiduciary rights and duties that arise in the context of trusts, corporations . . . and the administration of estates.").

[40] *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008) (emphasis omitted) (citing *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978)).

related portions of the controversy not subject to the exclusive jurisdiction of the Family Court.

1. The timeliness of Cummings's child support claims

Defendants' first Requested Instruction asks this Court to determine whether Cummings's child support claims are timely under 12 *Del. C.* § 2102, a provision of the Probate Code that provides that "[a]ll claims against a decedent's estate which arose before the death of the decedent . . . are barred against the estate, . . . unless presented as provided in § 2104 of this title within 8 months of the decedent's death . . . ." Cummings argues that a question as to the timeliness of her claims concerns the validity of a child support claim and that the Family Court, therefore, has exclusive jurisdiction over that family law issue. The timeliness question, however, does not depend on family law.

In this Instruction, Defendants do not ask this Court to determine whether Cummings is entitled to child support or the amount of that entitlement. Rather, they ask for a determination whether Cummings's claims are time-barred under the Probate Code. In other words, Defendants seek guidance as to whether, notwithstanding the subject matter or merits of Cummings's claims, the claims against the Estate to recover child support are untimely under the Probate Code.

This Court unquestionably has jurisdiction to interpret the Probate Code's statute of limitations.[41] Cummings has not identified any statute that divests this Court of such

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[41] *See, e.g.*, *Ruggerio v. Estate of Poppiti*, 2005 WL 517967, at *7 n.11 (Del. Ch. Feb. 23, 2005); *Pamintuan v. Dosado*, 844 A.2d 1010 (Del. Ch. 2003); *Estate of Howard*, 1997 WL 695575 (Del. Ch. Oct. 22, 1997).

jurisdiction, nor does the Court know of any such statute. Additionally, contrary to Cummings's assertions, it is doubtful that the Family Court has jurisdiction to hear issues arising under the Probate Code, including statute of limitations defenses to child support claims involving deceased parents.[42]

Thus, Defendants' first Requested Instruction falls within this Court's traditional equity jurisdiction.

2. The validity of the child support claims and the governing law

Defendants' Requested Instructions Two and Three seek determinations regarding the validity of the child support claims under the facts and circumstances of this case and regarding whether Delaware or New Jersey law governs those claims. Thus, those Instructions seek a determination by this Court of the merits of Cummings's actions for the support of her child. As previously stated, however, the Family Court has exclusive jurisdiction over such claims.[43] Moreover, the merits of the child support claims are inextricably intertwined with the issue of which state's laws should govern the claims. The Family Court and the New Jersey court are entirely capable of making such "choice of law" determinations, which are often fact intensive inquiries turning on which state has

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42 *Pierce v. Higgins*, 531 A.2d 1221, 1227 (Del. Fam. 1987).

43 *Wife, S. v. Husband, S.*, 295 A.2d 768, 769 (Del. Ch. 1972) ("This Court held that the General Assembly by this section intended to grant the Family Court exclusive jurisdiction over child support cases." (citing *Wife P. v. Husband P.*, 287 A.2d 409 (Del. Ch. 1972))).

more ties to the claim.[44] In contrast, this Court could not decide this choice of law question without analyzing material factual issues pertaining to Cummings's child support claims that more properly should be addressed in the Family Court or the New Jersey court.

I therefore conclude that this Court lacks subject matter jurisdiction to address Requested Instructions Two and Three, and that amending the Answer to add those requests would be futile.

3. The availability of recovery under Section 301 to a claimant who has been awarded child support against an estate

In Requested Instructions Four, Five, and Six, Defendants ask whether recovery under Section 301 is precluded or offset when a claimant previously has been awarded child support for an after-born child,[45] and whether a claimant must elect to pursue *either* recovery of child support *or* recovery under Section 301. Put differently, the question is whether the language of Section 301 makes recovery under it an exclusive remedy, in the sense that a plaintiff cannot obtain both a Section 301 recovery and additional money in

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[44] *See, e.g.*, *Simms v. Greene-Simms*, 22 A.3d 727 (Del. Fam. 2009); *DCSE-Jennings v. Debussy*, 707 A.2d 44 (Del. Fam. 1997); *Tarburton v. Tarburton*, 1997 WL 878411 (Del. Fam. July 8, 1997); *Boyson, Inc. v. Archer & Greiner, P.C.*, 705 A.2d 1252 (N.J. Super. App. Div. 1998); *Bary v. Mack Trucks, Inc.*, 617 A.2d 681 (N.J. Super. 1992).

[45] An after-born child is defined under Section 301 as "a child born after its parent has made a last will and testament and for which such parent made no provision." 12 *Del. C.* § 301. Under Section 310 of the Probate Code, children born after the death of one of their parents are considered "after-born" if the parent made no provision for that child in that parent's will. 12 *Del. C.* § 310.

the form of child support. Cummings asserts that the Family Court is the proper court to address these Instructions because this issue relates to child support, and the Family Court has exclusive jurisdiction over such matters. The Requested Instructions, however, seek guidance on the proper interpretation of Section 301 of the Probate Code.[46] As discussed *supra*, this Court has jurisdiction to interpret the Probate Code and to assist fiduciaries in the proper administration of estates.[47]

Relying upon *Pierce v. Higgins*,[48] Cummings asserts that the Family Court is the proper forum for these Requested Instructions. But, Cummings's interpretation of *Pierce* is misguided. In *Pierce*, the Family Court determined that it lacked subject matter jurisdiction to adjudicate claims arising under the Probate Code, and explicitly refused to interpret the statute in question.[49] Although the Family Court *mentioned* 12 *Del. C.* § 2102 in *Pierce*, it did not "*constru*[*e*] 12 *Del. C.* § 2102," as Cummings suggests.[50] In fact, *Pierce* rejected the argument advanced by Cummings.

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46 Defs.' Mot. to Amend Ex. 1 ¶¶ 24–27.

47 12 *Del. C.* § 2331 ("The jurisdiction of the Court of Chancery shall extend to and embrace the distribution of assets and surplusage of the estates of decedents"); *see also In re Estate of McCracken*, 219 A.2d 908, 910 (Del. Ch. 1966) ("There can be no question of this court's jurisdiction to entertain an action for the distribution of a personal estate.").

48 531 A.2d 1221, 1227 (Del. Fam. 1987).

49 *Id.* (stating "the running of the three month statute of limitations [under 12 *Del. C.* § 2102] . . . is really a matter for Chancery to address" and authorizing a transfer the case to this Court for a determination).

50 Pl.'s Opp'n 13 (emphasis added).

Cummings also asserts that, because "another court of competent jurisdiction could address the requested 'instructions,'" this Court lacks jurisdiction.[51] This argument, however, rests on a misinterpretation of 10 *Del. C.* § 342. The Delaware Supreme Court has rejected Cummings's assumption that Section 342 affirmatively limits the jurisdiction of this Court.[52] Thus, the mere fact that another court has jurisdiction to hear a case does not divest this Court of subject matter jurisdiction. Absent express, unequivocal language from the General Assembly granting exclusive jurisdiction over an equitable subject matter to another court, this Court retains at least concurrent jurisdiction over all matters in equity.[53] Cummings has not identified any statutory language suggesting that the General Assembly intended to divest the Court of Chancery of jurisdiction over actions under 12 *Del. C.* § 301. Rather, as previously mentioned, this Court's jurisdiction to assist in the administration of estates has been established for centuries.[54]

For these reasons, Cummings's arguments that this Court lacks subject matter jurisdiction over the proper interpretation of Section 301 are without merit. Therefore, I

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51 *Id.*

52 *See In re Arzuaga-Guevara*, 794 A.2d 579, 586 (Del. 2001).

53 *Id.*

54 *Glanding v. Indus. Trust Co.*, 45 A.2d 553, 555 (Del. 1945); *see also Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003).

reject Cummings's contention that it would be futile to permit Defendants to amend the Answer to add Requested Instructions Four, Five, and Six.

4. The classification of any recovery

In Requested Instruction Seven, Defendants ask this Court for guidance as to whether any recovery by Cummings under Section 301 or pursuant to her child support claims would be classified as a payment to a creditor or a beneficial interest. Cummings contends that this Court lacks jurisdiction to give this Requested Instruction because "family courts routinely (although often unpublished) encounter issues related to . . . the classification or priority of child support."[55]

The proper priority of claims against an estate is governed by 12 *Del. C.* § 2105. While Cummings is correct that the Family Court often encounters issues related to the priority of child support in relation to other obligations, the Family Court does so under Section 505 of Title 13 of the Delaware Code (governing domestic relations), not under Title 12, the Probate Code.[56] Section 505, entitled "Priority among dependents," ranks child support claims only in relation to other domestic claims, such as spousal alimony.[57] When a debtor is deceased, however, 12 *Del. C.* § 2105 governs the proper priority of

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55 Pl.'s Opp'n 13.

56 13 *Del. C.* § 505; *R.B. v. A.B.-D.*, 2008 WL 2898334, at *8 (Del. Fam. June 13, 2008); *see also R.F. v. R.F.*, 2007 WL 4792978, at *2 (Del. Fam. Nov. 13, 2007); *D.I.B. v. T.I.B.*, 2012 WL 4854722, at *2 (Del. Fam. Oct. 14, 2002); *Salter v. Salter*, 1993 WL 265044, at *5 (Del. Fam. Apr. 2, 1993).

57 *Compare* 13 *Del. C.* § 505, *with* 10 *Del. C.* § 2105.

claims against an estate.[58] This Court has jurisdiction to interpret and apply Section 2105,[59] including, at least arguably, claims involving the proper priority of a claim or award of child support against an estate.[60]

This Court, therefore, has subject matter jurisdiction to address Instruction Seven, and there is no basis for Cummings's argument that it would be futile to amend the Answer to include a request for that Instruction.

5. The enforceability of the Severance Agreement

Requested Instruction Eight relates to whether the Severance Agreement between Cummings and the Estate is enforceable. In particular, Defendants assert that the Severance Agreement is void or voidable because Cummings made material misrepresentations regarding the length of her employment at BLP in negotiating that Agreement.

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58 *See In re Estate of Lauve*, 1992 WL 1368952, at *1 (Del. Ch. Nov. 7, 1992) (prioritizing claims, including child support, against an estate under 12 *Del. C.* § 2105); *see also* 12 *Del. C.* § 2105 (addressing the proper priority of a claim for child support *arrears* against an estate).

59 *See, e.g.*, *In re Estate of Bernstein*, 2012 WL 5362296, at *5 (Del. Ch. Oct. 31, 2012); *In re Estate of Danyus*, 2008 WL 4710811, at *1 (Del. Ch. Oct. 14, 2008); *In re Estate of Tinley*, 2002 WL 31112197, at *2 (Del. Ch. Sept. 11, 2002); s*ee also supra* notes 52–53 and accompanying text. In addition, this Court is unaware of a single case in which the Family Court has interpreted or applied 12 *Del. C.* § 2105.

60 *See In re Estate of Lauve*, 1992 WL 1368952, at *1.

I first note that Cummings initially injected the Severance Agreement into this action by relying on it as the basis for Counts IV, V, and VI of the Complaint.[61] Cummings's brief is unclear as to whether she now questions this Court's jurisdiction to decide claims that she initiated.[62] In any event, this Court has jurisdiction to hear and decide cases involving both the Probate Code and the enforcement of contracts against an estate.[63] Thus, I conclude that Instruction Eight falls within this Court's equity jurisdiction.

In sum, because I find that this Court lacks jurisdiction over Requested Instructions Two and Three, as to the correct choice of law and the validity of the child support claims, I deny Defendants' Motion to Amend as to those Instructions. Cummings has not shown, however, that it would be futile to amend the Answer to add Requested Instructions One, Four, Five, Six, Seven, and Eight (the "Remaining Instructions").

As to the Remaining Instructions, Cummings further contends that they impermissibly seek advisory opinions. Because Delaware courts do not issue advisory

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61 Compl. ¶¶ 50–52.

62 Cummings argues that "this Court also lacks subject matter jurisdiction over the remaining requested 'instructions' as each issue could and should be raised before the New Jersey Court or a court of competent jurisdiction." Pl.'s Opp'n 12. Cummings's arguments, however, seem to focus only on the Requested Instructions related to her Section 301 and child support claims. *Id.* at 12–13. She does not appear to oppose Defendants' Motion to Amend as to Requested Instruction Eight on subject matter jurisdiction grounds. *See id.*

63 *See In re Estate of Berry*, 1995 WL 301415, at *5 (Del. Ch. Mar. 24, 1995).

opinions, Cummings argues that the Motion to Amend to add the Remaining Instructions is futile and should be denied. I consider that issue next.

C. Do the Remaining Instructions Seek Advisory Opinions?

Cummings asserts that the Remaining Instructions, with the exception of Instruction Eight, seek advisory opinions. Specifically, she contends that because, as yet, no child support has been awarded, those Instructions are not ripe.

The justiciability rules applied by Delaware courts closely resemble those used at the federal level.[64] Delaware courts do not rule on cases unless they are "'ripe for judicial determination,' consistent with a well established reluctance to issue advisory or hypothetical opinions."[65] A ripe dispute is one where "the material facts are static" and litigation "sooner or later appears to be unavoidable."[66] "Whenever a court examines a matter where facts are not fully developed, it runs the risk of not only granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law."[67]

An action seeking declaratory relief, such as Defendants seek here, is not exempt from the requirement that the parties must present the court with an actual controversy

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64 *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

65 *Id*. (quoting *Stroud v. Milliken Enters.*, 552 A.2d 476, 479–80 (Del. 1989)).

66 *Id.*

67 *Stroud*, 552 A.2d at 480.

that is ripe for judicial adjudication.[68] In determining whether an action for declaratory judgment is ripe for judicial determination, "a practical judgment is required."[69] "The law of ripeness, once a tangle of special rules and legalistic distinctions, is now very much a matter of common sense."[70] "This 'common sense' approach requires the court to decide whether the interests of those who seek relief outweigh the interests of the court and of justice in 'postponing review until the question arises in some more concrete and final form.'"[71]

1. The timeliness of the child support claims

Defendants ask this Court for guidance as to whether Cummings's child support claims are barred by the statute of limitations under 12 *Del. C.* § 2102. This Instruction does not depend on whether Cummings is or is not entitled to child support as a matter of substantive law. Rather, it seeks a declaration that her claims against the Estate are barred because they were not asserted within the time prescribed in the Probate Code.

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68 *See KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380, 382 (Del. Ch. 1997) ("The obvious benefits of the declaratory judgment must be weighed carefully, however, against the possibility that the declaration will be an advisory opinion. . . . The dispute between the parties, therefore, must be actual, not hypothetical.").

69 *Schick, Inc. v. Amalgated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987).

70 *Stroud*, 552 A.2d at 480 (quoting *Cont'l Air Lines, Inc. v. C.A.B.*, 522 F.2d 107 (D.D.C. 1975)).

71 *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (quoting *Stroud*, 552 A.2d at 480).

Cummings has brought two child support claims, one in New Jersey and one in Delaware. This Instruction seeks guidance solely as to whether the related claims against the Estate were brought soon enough after Lewis's death to be timely under the Probate Code. The only material facts are (1) the date that Lewis died, (2) the date Cummings's child support claim arose, and (3) the dates Cummings filed her child support claims. Because all these material facts relate to past occurrences, the facts relevant to this Requested Instruction are static.

Moreover, common sense indicates that this issue is ripe for judicial resolution now. The purpose of 12 *Del. C.* § 2102 is to facilitate the prompt settlement of estates.[72] The Estate cannot be settled, even in part, until Cummings's child support claims against it are resolved. Because the timeliness of Cummings's claims is a threshold issue, its resolution could be dispositive of Cummings's support claims, thereby allowing the Estate to be settled in a more timely manner.

Thus, I find that Requested Instruction One seeks guidance on a ripe dispute, and that there is no reason to delay resolution of that issue until after the merits of Cummings's support claims are decided.

2. The availability of recovery under Section 301 to a claimant who has already been awarded child support against an estate

In Requested Instructions Four, Five, and Six, Defendants ask this Court to determine whether, if Cummings prevails on one of her child support claims, she also can

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[72] *Adams v. Jankouskas*, 452 A.2d 148, 154 (Del. 1982).

recover under Section 301, and if so, whether any Section 301 award would offset, or be offset by, the amount of child support awarded. As a preliminary matter, I note that Cummings's child support claims, both in New Jersey and Delaware, are still pending.

The material facts relevant to Instructions Four, Five, and Six, unlike Instruction One, are not static. One fact material to Instructions Four, Five, and Six is whether Plaintiff has established her "entitlement to child support."[73] That question, however, has not been determined yet in either New Jersey or Delaware. If Cummings is denied child support, the issue of whether any Section 301 recovery offsets, or is offset by, her child support recovery will be moot. These Requested Instructions, therefore, seek the resolution of issues where a material fact, namely, the recovery of child support by Cummings, is yet to be determined.

Accordingly, I conclude that Requested Instructions Four, Five, and Six are not ripe for decision at this time.

3. The classification of any recovery

In Requested Instruction Seven, Defendants seek instruction as to whether Cummings's claims against the Estate for child support and under Section 301, if valid, should be classified as payments to a creditor or a beneficial interest. In fact, Cummings has not been awarded any recovery yet against the Estate. Although she probably would be entitled to some portion of the Estate under 12 *Del. C.* § 301, it is questionable whether she will be entitled to receive child support, and if so, how that would impact her

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[73] Defs.' Mot. to Amend Ex. 1 ¶ 20.

claim under Section 301. Furthermore, it appears that the amount of Cummings's child support claims, which may include the costs of private school and college, could exceed the maximum share of the Estate she might recover under Section 301.[74] Therefore, at least one material fact related to this Instruction, whether and how much Cummings might recover against the Estate on her support claims, is not static.

Thus, any ruling by this Court now classifying a future, uncertain recovery, at least arguably would involve an adjudication of an unripe issue.

D. Disposition of the Motion to Amend as to the Requested Instructions

In sum, I find that this Court lacks subject matter jurisdiction over Instructions Two and Three. An amendment allowing those Instructions would be futile, because they could not survive a Rule 12(b)(1) motion to dismiss. I therefore deny Defendants' Motion to Amend as to Instructions Two and Three.

I further find that this Court has jurisdiction over Instructions One and Eight, regarding the timeliness of the child support claims and the enforceability of the Severance Agreement, respectively. Both those Instructions also seek resolution of an issue that is ripe for adjudication.[75] Therefore, I grant the Motion to Amend as to Instructions One and Eight.

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74 Defs.' Reply 17.

75 Requested Instruction Eight asks for guidance as to whether the Severance Agreement is enforceable. In Count IV of her Complaint, Cummings claims that Defendants have breached the Agreement, and she seeks damages for that breach. Defendants contend that the Agreement is invalid, *i.e.*, unenforceable, because

Lastly, I find that this Court has jurisdiction over Requested Instructions Four through Seven, but that all four of them at least arguably seek advisory opinions. Generally, a motion for leave to amend would be denied as futile when the proposed amendments seek advisory opinions and, therefore, probably would not survive a motion to dismiss.[76] Defendants argue, however, that failure by this Court to address the issues raised by the Requested Instructions could result in a double recovery for Cummings. This is because 12 *Del. C.* § 301 only applies when the parent "made no provision, vested or contingent, specifically or as a member of a class, by will or otherwise" for a child born after the parent made its last will and testament. According to Defendants, if a claim for child support is a "provision" under Section 301, an after-born child who has been awarded child support against an estate would not be entitled to a statutory share. In that sense, Defendants assert that a denial of their Motion to Amend as to Instructions Four through Seven might prevent the Estate from advancing a potentially meritorious defense. In addition, they warn that a windfall could result if this Court awarded Cummings, on behalf of A.L., a statutory share and the New Jersey Court or the Family Court later determined that Cummings is entitled to child support.[77]

Cummings misrepresented certain things in the negotiations leading up to the Agreement. Whether the Agreement is enforceable, then, is a ripe dispute.

[76] *See Adoption Agency v. Smith*, 628 A.2d 82, 1993 WL 228086, at *1 (Del. 1993) (ORDER) ("The proceedings, therefore, should be dismissed, since their continuance would result in the issuance of an improper advisory opinion.").

[77] Section 301 states, in relevant part, that an after-born child "for which [the] parent has made no provision . . . by will or otherwise, shall take the same portion of its

Defendants also urge this Court to address these Requested Instructions now because, *inter alia*, a ruling on the Instructions could serve as a catalyst for dispute resolution and lead to a more prompt and efficient administration of the Estate. In particular, they assert that a ruling on these issues would "avoid the burden and expense of litigating multiple claims (in multiple *fora*) only to find that one is ultimately barred under the Delaware Probate Code."[78] With the exception of Instruction One regarding the timeliness of Cummings's support claims under 12 *Del. C.* § 2102, however, I conclude that the benefit to the efficient administration of the Estate is not so great in this case that the Court should rule immediately on the Requested Instructions that remain. The primary reason is that the issues these Instructions present, in fact, may be avoidable. For example, if Cummings is unsuccessful on her claims for child support, many of the issues will be moot.

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parent's estate, both real and personal, that the child would have been entitled to if such parent had died intestate." Section 301 is "predicated upon the likelihood that the testator would have provided for the child in his will if he had anticipated its future existence." *Woolford v. Woolford*, 76 A.2d 5, 7 (Del. Orph. 1950). Defendants contend that child support might be a "provision" within the meaning of Section 301. If child support is not a "provision" under Section 301, the Estate argues, an after-born could recover twice the amount the after-born would otherwise be entitled to: once under Section 301 and once for child support. Where there is no evidence that the testator intended the after-born to recover a disproportionately greater amount than those provided for in the will, the Estate continues, the after-born should not be entitled to recover twice the amount of an intestate share. Defs.' Reply 17–18.

78 Defs.' Reply 15.

The Court of Chancery possesses the inherent power to manage its docket, including the discretion to stay a case pending the resolution of another case on the basis of "comity, efficiency, or common sense."[79] The Court may exercise its discretion to stay a case where "a controversy has not yet matured to a point where judicial action is appropriate."[80] Ultimately, the Court must make a practical judgment as to whether a stay is warranted under the circumstances of each case,[81] and it may stay actions *sua sponte*.[82] Moreover, under Rule 42(b), the "Court in furtherance of convenience . . . or when separate trials will be conducive to expedition and economy, may order a separate trial of . . . any issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues."[83]

Based on the circumstances of this case, I have decided to grant Defendants' Motion to Amend as to Instructions Four through Seven, but to stay further proceedings on those Instructions pending resolution of Cummings's child support claims. If I allow

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79 *See, e.g.*, *SRG Global, Inc. v. Robert Family Hldgs., Inc.*, 2010 WL 4880654, at *10 (Del. Ch. Nov. 30, 2010); *Nutzz.com, LLC v. Vertrue, Inc.*, 2006 WL 2220971, at *11 (Del. Ch. July 25, 2006); *Salzman v. Canaan Capital P'rs L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996).

80 *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989); *see also LightLab Imaging, Inc. v. Axsun Techs., Inc.*, 2012 WL 1764225, at *1 (Del. Ch. May 10, 2012).

81 *K&K Screw Prods., L.L.C. v. Emerick Capital Invs., Inc.*, 2011 WL 3505354, at *11 (Del. Ch. Aug. 9, 2011).

82 *See Kingsland Hldgs. Inc. v. Fulvio Bracco*, 1996 WL 422340, at *2 (Del. Ch. July 22, 1996) (staying an action *sua sponte*).

83 Ct. Ch. R. 42(b).

this case to proceed on those Instructions, I would need to confront several underlying issues that are not ripe. Moreover, if I rule before Cummings child support claims are decided, I risk awarding a windfall to Cummings should either the New Jersey court or the Family Court allow recovery of child support. On the other hand, staying this case pending resolution of the child support claims will allow the unripe issues raised by Defendants to either ripen or be mooted. If Cummings's claim for child support is granted, the issues then will be ripe; if denied, the issues will be moot.

I conclude that the most prudent exercise of my discretion here is to grant the Motion to Amend as to Instructions Four through Seven and to stay further proceedings on them pending the final adjudication of Cummings's child support claims or further order of this Court.

E. The Affirmative Defense

In addition to the Requested Instructions, Defendants seek to amend their Answer to include an Affirmative Defense that Cummings's claim for damages for breach of the Severance Agreement is time-barred under 12 *Del. C.* § 2102(b). Cummings contends that Defendants offered no reason for including this Affirmative Defense late, and, therefore, have failed to meet their pleading burden. Motions for leave to amend, however, are liberally granted, and "[i]n the absence of undue prejudice, undue delay, bad faith, dilatory motive or futility of amendment, leave to amend should be granted."[84]

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[84] *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970); *In re TGM Enters., L.L.C.*, 2008 WL 4261035, at *2 (Del. Ch. Sept. 12, 2008).

Thus, contrary to Cummings's assertion, there is no heavy "pleading burden" the moving party must satisfy.[85] Furthermore, Defendants have not delayed unreasonably in seeking to amend their Answer with this affirmative defense. Plaintiff added Count IV, regarding breach of the Severance Agreement, when she filed her amended Complaint on May 8, 2012. Defendants filed their Answer on July 3, 2012, and moved to amend that Answer on August 28, 2012, less than two months later. Nor has Cummings pointed to any possible prejudice she would suffer if Defendants are allowed to add the Affirmative Defense. The Affirmative Defense relates to the Agreement that Cummings seeks to enforce and is based on representations that Cummings herself made. Accordingly, there is no reason to believe that the Affirmative Defense will require burdensome discovery or will increase noticeably the complexity of this case.

I therefore grant Defendants' Motion to Amend to add the Affirmative Defense.

III. CONCLUSION

For the foregoing reasons, I grant Defendants' Motion to Amend the Answer as to Requested Instructions One, Four, Five, Six, Seven, and Eight, as well as the Estate's Affirmative Defense under 12 *Del. C.* § 2102(b). I deny the Motion as to Requested Instructions Two and Three. Defendants promptly shall file and serve an amended answer consistent with these rulings. Furthermore, because Instructions Four, Five, Six, and Seven currently seek advisory opinions, I order that proceedings as to those

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[85] Pl.'s Opp'n 14.

Instructions be stayed pending the resolution of Cummings's child support claims or further order of this Court.

Requested Instruction One regarding the timeliness of Cummings's child support claim under 12 *Del. C.* § 2102 is one of the subjects addressed in Defendants' pending Motion for Summary Judgment. Briefing on that Motion was completed on February 4, 2013. The parties shall advise the Court on or before March 21, 2013, whether they request oral argument on the Motion for Summary Judgment as it relates to Instruction One. In all respects other than Requested Instruction One, the Motion for Summary Judgment is stayed.

IT IS SO ORDERED.