EFiled: Jan 21 2016 12:06PM EST
Transaction ID 58459455
Case No. 10991-VCN

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OF THE
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January 21, 2016

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Re: *IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust*
U/A/D December 5, 2012
C.A. No. 10991-VCN
Date Submitted: September 23, 2015

Dear Counsel:

Trust Protector Kevin M. Kilcullen ("Kilcullen") has petitioned for instructions and declaratory relief regarding the Ronald J. Mount 2012 Irrevocable Dynasty Trust (the "Dynasty Trust"), which Ronald J. Mount (the "Settlor") established in 2012. This action is part of a larger dispute among Ian Mount ("Ian"), the Settlor's son, Heather Mount ("Heather"), the Settlor's daughter, and Rene Giacalone Mount ("Rene"), the Settlor's caregiver since 2007, whom he

purportedly married in 2014, less than a year before his death.[1] Actions are also pending in Florida and New Jersey.

* * *

The Settlor, a successful businessman, enjoyed an excellent relationship with Ian for many years. His relationship with Heather, however, was less than ideal. Indeed, in 2008, he substantially reduced what she could expect as an inheritance.

The Settlor was diagnosed with Parkinson's disease in 2003. By 2007, his condition had deteriorated and the hiring of a caretaker became necessary. Rene was hired. Ian contends that Rene exercised undue influence over his father in an effort to gain control of his substantial assets. Rene moved the Settlor from New Jersey to Florida and restricted Ian's ability to visit. Ian argues that Rene used his father's funds to buy herself a residence in Florida and pressed him to change his estate plans. Three modifications to the estate plans followed: a new will, a new revocable trust, and Ian's removal and replacement by Kilcullen, an alleged ally of Rene, as successor trustee of another trust. Rene also replaced Ian as the person with authority under the Settlor's healthcare directive.

[1] First names are used in an effort to avoid confusion; no disrespect is intended.

Heather and Rene would, it is alleged, eventually join together to take advantage of the Settlor and to deprive Ian of what his father intended that he inherit. Ian's core allegation is the assertion of undue influence.

In 2012, the Settlor established the Dynasty Trust, the validity of which Ian does not contest. The Settlor was the lifetime beneficiary, with Ian and Heather to benefit at his death. Kilcullen drafted the document, and he was designated to serve as the Trust Protector. At the same time, Rene and William Slattery, the Settlor's personal attorney of twenty-five years, were designated to comprise the distribution committee. Ian argues that Rene, as part of her exercise of improper "domination and control,"[2] influenced the Settlor to appoint Kilcullen to the position of Trust Protector (ensuring an additional "ally" in a position of influence over the trust assets) and, with Kilcullen's assistance, removed Slattery and replaced him with Heather so that the two "allies" controlled the Dynasty Trust's distributions.[3]

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[2] Tr. of Oral Arg. on Resp't's Mot. to Stay Proceedings 36.
[3] *Id.*; Ian Mount's Am. Verified Countercls. and Cross-cls. for (1) Removal of Certain Fiduciaries and (2) Declaratory and Other Equitable Relief 10-12.

In addition to challenging several questionable financial transactions, Ian accuses Rene of pressing his father to marry her in 2014. Other amendments to the Settlor's estate plan, unfavorable to Ian, followed.

After the marriage, the Settlor's health continued to fail to the extent that Rene sought to become his guardian. She was appointed guardian on an interim basis by the Florida court. Soon thereafter, Ian petitioned that court to remove Rene as guardian because of allegations of impropriety. The Florida court appointed a special monitor to investigate the Settlor's personal and financial status. As a result of that investigation, a professional guardian was appointed to replace Rene. The professional guardian raised questions about possible financial improprieties by Rene and her allies. She even sought authority to petition for annulment of the Settlor's marriage to Rene, but the Settlor died on April 23, 2015, before that could be pursued.

The Dynasty Trust is a Delaware trust governed by Delaware law, with a Delaware trustee, Wells Fargo Delaware Trust Company, N.A. ("Wells Fargo").

In this action, filed on May 5, 2015, the first one filed after the Settlor's death, Kilcullen, as Trust Protector, seeks a determination regarding the validity of the Dynasty Trust and instructions regarding its proper administration.[4] One question involves the effect of a confidentiality provision and whether records of the Dynasty Trust should be delivered to the guardian appointed by the Florida court. In addition, Kilcullen seeks a determination that this Court has primary jurisdiction over matters related to the administration and validity of the Dynasty Trust.

In response, alleging conflicts of interest and self-dealing,[5] Ian has counterclaimed for the removal of Kilcullen, Heather, and Rene from fiduciary positions serving the Dynasty Trust; for the appointment of independent persons to serve as trust protector, as investment advisor, and on the distribution committee; and for, among yet other relief, an accounting.

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[4] Wells Fargo has separately petitioned for instructions regarding whether it should make certain distributions.

[5] Related to the undue influence contentions are various fiduciary duty breaches of which Rene, Heather, and Kilcullen are accused. Generally, they involve the diversion of the Settlor's assets and the assertion of control over his estate and his trusts. Ian also invokes notions of waste and self-dealing.

On May 12, 2015, Rene, Heather, and Kilcullen sought probate in Florida of the Settlor's will as amended by two codicils. On June 1, 2015, Ian challenged that will on grounds of undue influence and sought probate of an earlier will. He also petitioned for annulment of the Settlor's marriage to Rene, challenged an irrevocable trust on grounds of undue influence, and sought the removal of Rene, Heather, and Kilcullen as fiduciaries for the Settlor's estate and various trusts.[6]

In sum, there are six actions in three states, with the predominant factual question being whether Rene (along with Heather and Kilcullen) used undue influence to gain control over the Settlor's assets. The most comprehensive and wide-ranging litigation is in Florida, where substantial discovery has occurred and the proceedings appear to be progressing. The facts relevant to the Settlor's susceptibility to undue influence and whether he was the victim of undue influence largely, if not virtually exclusively, occurred in Florida.[7]

[6] Heather brought a proceeding in New Jersey in an effort to secure a receiver for the Settlor's limited partnership which owns a 200-acre farm.
[7] The key witnesses—Ian, Kilcullen, Rene, and Heather—are parties to this action.

* * *

Ian has moved to stay this first-filed action in favor of the Florida proceedings. He observes that a stay is "incident to the inherent power of a court to exercise its discretion to control the disposition of actions on its docket in order to promote economies of time and effort for the court, litigants, and counsel."[8]

While Ian contends that his motion for a stay is yet another matter committed to the exercise of the Court's discretion, Kilcullen argues that Ian must demonstrate that litigating in Delaware would cause "overwhelming hardship" in order to defeat his choice of Delaware as the forum to litigate issues involving the Dynasty Trust. The Court looks at the question of whether to grant a stay under both the approach sponsored by Ian and the approach sponsored by Kilcullen and concludes that a stay is not warranted.

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[8] *Brenner v. Albrecht*, 2012 WL 252286, at *4 (Del. Ch. Jan. 27, 2012) (internal quotation marks omitted); *see also Brudno v. Wise*, 2003 WL 1874750, at *4 (Del. Ch. Apr. 1, 2003) (A court "retains the inherent discretion to control its own docket, subject only to statutory and rule constraints and the requirement to exercise its discretion rationally.").

This action is the "first-filed." As noted, this action was filed on May 5, 2015, while Ian filed his claims in the courts of Florida on June 1, 2015. These initial filings are more than three weeks apart. Thus, this is not an instance where the "race to the courthouse" was won by a small margin, and, accordingly, treating the actions as contemporaneously filed is not warranted.[9]

"A court—in the absence of a prior-filed action elsewhere—should respect a plaintiff's choice of forum except in the 'rare case' where the defendant demonstrates 'with particularity that it will be subjected to overwhelming hardship and inconvenience if required to litigate in Delaware,' thereby warranting 'drastic relief.'"[10] Although first-filed status may not be outcome determinative under this line of authority, the burden facing the moving party is substantial.

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[9] *See, e.g.*, Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 5.01[a] (2015).

[10] *Pipal Tech Ventures Private Ltd. v. MoEngage, Inc.*, 2015 WL 9257869, at *5 (Del. Ch. Dec. 17, 2015) (footnotes omitted). Even though the "overwhelming hardship" standard is not preclusive, the defendant seeking relief under the doctrine of *forum non conveniens* must show that the plaintiff's choice is "overwhelmingly inappropriate and inconsistent with the administration of justice." *Id.* (citing *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1112 (Del. 2014)); *see also United Phosphorus, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 764 (Del. 2002); *Acierno v. New Castle County*, 679 A.2d 455, 458 (Del.

Because of the Settlor's estate and other trusts, related litigation will necessarily go forward in Florida, and that litigation will involve the allegations of undue influence which are substantially the same in both venues. One question is whether it would be appropriate to stay this action in favor of the Florida action as the more efficient forum for developing the undue influence (and perhaps breach of fiduciary duty) claims. Questions regarding the Dynasty Trust, with the benefit of the discovery in Florida, could then be resolved in Delaware. A stay of this nature would, however, run contrary to Kilcullen's expectations resulting from having filed first. This sort of coordination in case management more readily falls within the Court's broad discretion in controlling its docket effectively and is not necessarily driven by the strong deference accorded first-filed actions in the *forum non conveniens* analytical context.

1996) ("[W]here the Delaware action is the first filed, a motion to stay or dismiss should be granted only in a rare case, after defendant has established that litigating in Delaware will cause undue hardship and inconvenience.").

* * *

When a Delaware court is confronted with the question of whether to stay an action in favor of another action, it considers the following factors:[11]

1. Relative Ease of Access to Proof:

Development of the facts will be easier in Florida because that is where the events leading to this multi-fora litigation largely occurred. That includes Ian's claim of undue influence and the work of the monitor and the guardian appointed by the Florida court to inquire into the Settlor's status and to protect him. Also, the medical care providers who treated the Settlor as his health deteriorated are in Florida.

Kilcullen's evidentiary needs for his direct case are modest. His arguments are primarily legal in nature, but the burden for factual development arises in the context of Ian's efforts to demonstrate undue influence. That effort will be pursued in any event in the Florida action.

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[11] *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964); *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *2 (Del. Ch. May 20, 1993). These factors provide the basis for a *forum non conveniens* analysis. Ian does not seek dismissal of this action, but the Court's discretion in assessing a stay is guided by these practical considerations.

Coordination of the discovery in both the Delaware action and the Florida action should minimize any disadvantages and inefficiencies caused by a need to develop facts in Florida for the Delaware action.[12] The amount of duplication and the amount of unnecessary costs should be minimal.

2. Availability of Compulsory Process for Witnesses:

Many of the necessary witnesses are parties to this proceeding. Some likely witnesses (such as medical care providers and those individuals who otherwise dealt with the Settlor) would not be subject to the process of this Court. Testimony of that nature can be reasonably developed by deposition, and will most likely be developed in the course of the Florida proceeding.

3. View of the Premises:

It is unlikely that this will be a significant consideration.

[12] Coordination 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.

4. Whether the Controversy Involves Application of Delaware Law Which the Courts of This State Should More Properly Decide:

Delaware law controls the Dynasty Trust, with its Delaware trustee. Although the Florida court is capable of resolving questions of Delaware law, it would be preferable (assuming that it is not essential) for a Delaware court to apply Delaware law in this context.[13]

When Kilcullen filed his Petition for Instructions here, the Court was authorized (but not required) to exercise primary jurisdiction over the administration of the Dynasty Trust.[14] "The discretionary exercise of jurisdiction requires a balancing of competing jurisdictional interests."[15]

The Florida action does not directly involve administration of the Dynasty Trust, and, thus, there is no significant risk of jurisdictional conflict (at least beyond resolving questions of fact or mixed questions of law and fact regarding the undue influence and breach of fiduciary duty claims). With the Court's

[13] The trustee, the situs of the Trust, and the law governing the Dynasty Trust presumably could have been changed (or could be changed).
[14] *See In re Peierls Family Testamentary Trust*, 77 A.3d 223, 228 (Del. 2013).
[15] *IMO Daniel Kloiber Dynasty Trust U/A/D Dec. 20, 2002*, 98 A.3d 924, 946 (Del. Ch. 2014).

opportunity to assert primary jurisdiction over the Dynasty Trust,[16] the Dynasty Trust's Delaware trustee and its Delaware situs (at least for now), and there being no significant risk of jurisdictional conflict, the questions raised by Kilcullen regarding administration of the Dynasty Trust would seem likely to be resolved better in Delaware by a Delaware court as a matter of Delaware law.

5. Pendency of Similar Actions in Another Jurisdiction:

The fundamental question of undue influence has also been framed in the later-filed Florida action. The administration of the Dynasty Trust, however, is not before the courts of Florida. There is some limited risk that this Court and the courts of Florida could reach different answers regarding undue influence.[17]

[16] Regardless of how this Court eventually balances the factors informing its discretion to exercise primary jurisdiction over trust administration, Kilcullen's argument further informs such discretion. Primary jurisdiction may not be a mandatory conclusion, but in a general way, its consideration reinforces an understanding of why this action should remain active on the Court's docket.

[17] It is, of course, possible that issues involving the doctrine of collateral estoppel may arise. Also, the Court need not resolve now the question of whether, for example, fiduciary breaches in Florida regarding another trust or estate administration would inform the Court's decision regarding whether those fiduciaries should be removed as fiduciaries of the Dynasty Trust.

6. Other Practical Considerations Which Would Serve to Make the Trial Easy, Expeditious, and Inexpensive:

It is likely that the costs of litigation will be borne by the various trusts established by the Settlor. Unnecessarily depleting financial resources should be avoided, and litigating in more than one court will inevitably increase costs to some extent. Because Ian's undue influence and fiduciary duty counterclaims, raised both in Florida and in Delaware, depend primarily upon the same set of operative facts, the inefficiencies and expenses can be minimized. In sum, the additional cost of litigating in both Florida and Delaware (if discovery is effectively coordinated), as contrasted with litigating solely in Florida, is likely to be relatively small.

Because the Florida proceeding has the larger range of issues and because Florida is generally convenient to potential witnesses, litigating the dispute among the parties to the fullest extent possible in Florida would be more efficient.

* * *

Ian also cites to this Court's decision in *Fischberg Family Trust*.[18] There, the Court deferred to criminal, not civil, proceedings in New Jersey and deferred deciding questions of Delaware law involving a Delaware trust with a Delaware trustee pending the New Jersey proceedings. Notions of comity persuaded the Court that New Jersey, whose citizens had allegedly been the victims of fraud by a medical care provider in New Jersey that cost the State of New Jersey significant sums, provided the appropriate forum. The circumstances of *Fischberg Family Trust* were unusual, and those unusual circumstances persuaded the Court that it should not interfere with an ongoing criminal prosecution. In short, *Fischberg Family Trust* does not support Ian's efforts to obtain a stay.

* * *

In sum, a plaintiff's choice of forum—in the absence of an earlier action elsewhere involving similar issues and parties—is entitled to favorable consideration. The issues raised by Kilcullen in his first-filed action—

[18] *In re the Juan Carlos Fischberg Family Trust*, C.A. No. 2527-VCN (Del. Ch. Feb. 22, 2007) (TRANSCRIPT).

administration of a Delaware trust—are clearly appropriate for decision by a Delaware court. Ian's objections, focused on factual overlaps between the Florida and Delaware proceedings, are essentially that he will have to litigate in different courts and that Florida is more convenient for collecting the evidence primarily to support his counterclaims. The objections are reasonable, but they do not outweigh a plaintiff's choice of venue. As a question committed to the Court's discretion to manage its docket, the marginal efficiencies that a stay might provide do not warrant depriving Kilcullen of his reasonable expectations, protected to a significant extent by his first filing here, of having a Delaware court resolve questions of Delaware law regarding a Delaware trust. Moreover, Ian's concerns certainly do not amount to hardship. They do not support a finding that "litigation in Delaware would represent a manifest hardship to [Ian]."[19] Whether one applies a "stringent standard" or perhaps a more flexible standard, the conclusion is the same: a stay of the first-filed Delaware action is not appropriate.

[19] *Wilm. Sav. Fund Soc'y, FSB v. Caesars Entm't Corp.*, 2015 WL 1306754, at *8 (Del. Ch. Mar. 18, 2015) (citing *Martinez*, 86 A.3d at 1105).

* * *

For the foregoing reasons, Ian's Motion to Stay Proceedings is denied.[20]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[20] With this conclusion, the Trust Protector's Motion to Strike as Untimely Arguments Advanced for the First Time in Ian Mount's Reply Brief in Support of his Motion to Stay this Action is denied as moot.