

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

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VICE CHANCELLOR

New Castle County Courthouse  
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Re: *Cummings v. The Estate of Ronald E. Lewis, et al.*  
Civil Action No. 6948-VCP

Dear Counsel:

This matter is before the Court on Plaintiff Louise Cummings's Application for Certification of Interlocutory Appeal from this Court's June 17, 2013 Memorandum Opinion and Order (the "Opinion and Order") holding that Cummings's claim against the Estate<sup>1</sup> on behalf of her daughter, A.L., for child support is time-barred. The Estate

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<sup>1</sup> The same definitions and abbreviations used in the Opinion and Order are used in this Letter Opinion, as well.

opposes that application. For the reasons stated in this Letter Opinion, I agree to certify Cummings's proposed interlocutory appeal.

## **I. BACKGROUND**

### **A. Facts and Procedural History**

After Lewis's death on July 23, 2011, at age 65, Cummings filed this action in the Court of Chancery against his Estate on October 19, 2011, seeking to establish Lewis as the father of Cummings's child and to recover an intestate share of the Estate under 12 *Del. C.* §§ 301 and 310 (the "After-Born Statute"). The daughter of Lewis and Cummings, A.L., was born on April 15, 2012. On August 20, 2012, Cummings sought partial summary judgment on the issues of Lewis's parentage of A.L. and A.L.'s entitlement to an intestate share of the Estate. While her motion was pending, Cummings also filed on August 23 a "Statement of Claim" pursuant to 12 *Del. C.* § 2104 against the Estate with the Register of Wills for New Castle County seeking future child support. On August 29, 2012, Cummings filed a complaint for support on A.L.'s behalf in New Jersey. She later filed a petition for child support against the Estate in the Delaware Family Court on October 4, 2012.

On August 28, 2012, the Estate moved to amend its earlier counterclaim in this action (the "Motion to Amend") to seek instructions on seven questions regarding the relationship between Cummings's claim under the After-Born Statute and her claim for child support and an eighth question regarding the enforcement of a severance agreement Cummings had entered into with the Estate related to her former employment with Lewis's company, Butch Lewis Productions, Inc. ("BLP"). In the Motion to Amend Opinion dated March 14, 2013, I granted the Estate's Motion to Amend in part and

denied it in part.<sup>2</sup> I also stayed proceedings as to all of the Estate's requested instructions relating to Cummings's child support claim except for Requested Instruction One, regarding the alleged untimeliness of that claim under the Delaware Probate Code, 12 *Del. C.* § 2102(a). In addition, I allowed the Estate to proceed with a motion for partial summary judgment on Requested Instruction One. In my June 17, 2013 Opinion and Order, I held that the child support claim was untimely because it was a contingent claim under 12 *Del. C.* § 2102(a) for which notice of a claim must be filed against an estate within eight months of the decedent's death and the child support claim here was not filed until thirteen months after Lewis's death.<sup>3</sup> On June 27, 2013, Cummings applied for leave to file an interlocutory appeal from that Opinion and Order. In a response filed on July 8, 2013, the Estate opposed that application.

While Cummings's application for certification of an interlocutory appeal was pending, the parties consented to referral of this controversy to mediation and this Court ordered the case referred to mediation on July 11, 2013. Consistent with Cummings's conditional agreement to the referral, the order did not stay this or any related litigation. The same day, the Estate moved for expedited proceedings and for a preliminary injunction in aid of jurisdiction that would, if granted, preliminarily enjoin Cummings, individually and in her representative capacity for A.L., from prosecuting the child support claim in New Jersey. Cummings opposes those motions. The Court received Cummings's letter in opposition on July 15, 2013 and the Estate's response letter on July 16, 2013.

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<sup>2</sup> See *Cummings v. Estate of Lewis*, 2013 WL 979417 (Del. Ch. Mar. 14, 2013).

<sup>3</sup> See *Cummings v. Estate of Lewis*, 2013 WL 2987903 (Del. Ch. June 17, 2013).

## B. Parties' Contentions

Cummings contends that this Court should grant an interlocutory appeal for several reasons, including that: (1) the Order addresses novel questions of Delaware law; (2) the issues addressed by the Order implicate public policy and constitutional concerns; and (3) the Order affects at least two other courts, namely the New Jersey Superior Court, Chancery Division, Family Part (the "New Jersey Court") and the Delaware Family Court. The Estate primarily opposes the application for an interlocutory appeal on the ground that the Opinion and Order properly applied settled law to undisputed facts. The Estate maintains that Cummings's contentions to the contrary either are misplaced or should be disregarded because they were not raised in connection with the motion for partial summary judgment that resulted in the Opinion and Order.

## II. ANALYSIS

The standard for certification of an interlocutory appeal to the Supreme Court is set forth in Supreme Court Rule 42(b). No interlocutory appeal will be certified by the trial court or accepted by the Supreme Court unless the order of the trial court determines a substantial issue, establishes a legal right, and meets one of five additional criteria enumerated in Rule 42.<sup>4</sup> The Supreme Court only will accept an application for interlocutory appeal in extraordinary or exceptional circumstances.<sup>5</sup> To obtain leave to pursue an interlocutory appeal, a party must apply in the first instance to the trial court

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<sup>4</sup> Supr. Ct. R. 42(b)(i)–(v).

<sup>5</sup> See *Wilm. Sav. Fund Soc'y, FSB v. Covell*, 577 A.2d 756, 1990 WL 84687, at \*1 (Del. May 16, 1990) (TABLE); see also Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04, at 14-5 to -6 (2012).

and must subsequently apply to the Supreme Court.<sup>6</sup> The Supreme Court will decide to accept or deny the application in its sole discretion but may consider as one factor in exercising this discretion the trial court's decision on whether to certify the appeal.<sup>7</sup> When considering whether to certify an interlocutory appeal, the trial court must balance the interests of advancing potentially case-dispositive issues against the additional burden of fragmentation and delay that interlocutory review can create.<sup>8</sup>

#### **A. Substantial Issue**

An order of the trial court determines a “substantial issue” when it addresses the merits of the case.<sup>9</sup> As the Supreme Court has explained:

Generally speaking, the substantive element of the appealability of an interlocutory order must relate to the merits of the case . . . . This is essential to the limitation of appeals and the avoidance of fragmentation of cases necessary to the efficient operation of our system.<sup>10</sup>

Whether 12 *Del. C.* § 2102 bars Cummings's child support claim goes to the merits of this case. If, as this Court held, the statute bars Cummings's claim, the Estate would not be obligated to recognize this claim against the Estate. Alternatively, if Cummings's child support claim is not time-barred, this Court, the New Jersey Court, and, perhaps, the Delaware Family Court, as well, will need to address a number of other issues relating to

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<sup>6</sup> Supr. Ct. R. 42(c), (d).

<sup>7</sup> Supr. Ct. R. 42(d)(v).

<sup>8</sup> *See Castaldo v. Pittsburgh-DesMoines Steel Co.*, 301 A.2d 87, 87 (Del. 1973); *see also In re Pure Res., Inc.*, 2002 WL 31357847, at \*1 (Del. Ch. Oct. 9, 2002).

<sup>9</sup> *Castaldo*, 301 A.2d at 87.

<sup>10</sup> *Id.*

Cummings's claim for child support and the settlement of the Estate. Resolution of this issue, therefore, would aid in the prompt settlement of the Estate.

An immediate appeal to the Supreme Court would provide certainty to Cummings, the Estate, and the other courts as to whether the Estate may recognize the child support claim. In these circumstances, I conclude that this Court's Opinion and Order determined a substantial issue under Supreme Court Rule 42.

### **B. Legal Right**

An order of the trial court establishes a legal right if it relates to the merits of the action or creates or diminishes the parties' rights with respect to the underlying substantive issues.<sup>11</sup> This Court held that Cummings's child support claim is barred because it was not timely filed under 12 *Del. C.* § 2102(a). If, as Cummings argues, her claim was not a contingent claim under Section 2102(a) but a claim that arose after the death of the decedent under Section 2102(b), then that statute would have permitted Cummings to file her claim within six months after it arose rather than within eight months of the decedent's death. In these circumstances, and if the child support claim arose when A.L. was born on April 11, 2012, Cummings's August 2012 statement of claim against the Estate would have been timely. The Opinion and Order, therefore, limited Cummings's right to bring her child support claim against the Estate. Absent an interlocutory appeal, there does not appear to be any possibility that Cummings could

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<sup>11</sup> *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 215621, at \*1 (Del. Ch. Sept. 25, 1991).

prevail on this point at a later stage in this litigation, *i.e.*, at trial.<sup>12</sup> Thus, I find that the Opinion and Order also established a legal right under Rule 42.

### **C. Five Additional Criteria**

In addition to determining a substantial issue and establishing a legal right, Rule 42(b) requires that the Court's Opinion and Order meet one or more of the following criteria:

(i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) Controverted Jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) Prior Judgment Opened. The interlocutory order has vacated or opened a judgment of the trial court; or

(v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.<sup>13</sup>

The reasons the Court might accept certification under Rule 41 include if: (i) the issue presents an original question of law; (ii) there are conflicting trial court decisions on a question of law; and (iii) the issue presents an unsettled question of law where the

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<sup>12</sup> Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04[b], at 14-9 (2013) (recognizing that a legal right generally is not established where either party may yet prevail at trial).

<sup>13</sup> Supr. Ct. R. 42(b).

“question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Supreme] Court.”<sup>14</sup>

Without considering Cummings’s arguments that were not raised in connection with the motion for partial summary judgment, and without considering whether it would be appropriate for this Court or the Supreme Court to consider those arguments, I conclude that the June 17, 2013 Opinion and Order meets at least the first additional criteria in Rule 42(b), *i.e.*, Rule 42(b)(i). As far as this Court is aware, neither this Court nor the Supreme Court has addressed whether a child-support claim is a claim “against a decedent’s estate which arose before the death of the decedent” under 12 *Del. C.* § 2102(a), or a claim “against a decedent’s estate which ar[o]se at or after the death of the decedent” under 12 *Del. C.* § 2102(b). Moreover, this question relates to the construction of a Delaware statute which has not been settled by the Supreme Court. Arguably, this question should be settled by the Supreme Court to provide clarity to future claimants for child support against an estate and to the estate receiving such a claim.

The Court’s Opinion and Order also possibly meets the fifth criteria. Although the issue addressed in the Opinion and Order is not a case dispositive issue, its resolution may otherwise serve considerations of justice. Due to the additional claims in Cummings’s complaint, review of the interlocutory order will not terminate further litigation. In addition to the child support claim, Cummings asserts claims related to, for example, (1) A.L.’s entitlement to an intestate share under 12 *Del. C.* § 301, (2) a severance agreement entered into between the Estate and Cummings, (3) an alleged fraudulent transfer of BLP’s assets to the Estate, and (4) A.L.’s asserted entitlement to an

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<sup>14</sup> Supr. Ct. R. 41(b).



intestate share of certain tangible personal property that Lewis's will devised to his adult children.

Although resolution of this issue will not terminate this litigation, it will clarify the issues this Court must consider. Such clarification would benefit this Court and the other courts involved in this matter. As to the issues remaining before this Court, if the child support claim is timely and child support is awarded by the New Jersey Court or the Delaware Family Court, this Court must consider whether the child support claim precludes, offsets, or is offset by A.L.'s Section 301 "intestate share" and whether the child support claim is entitled to priority over other claims against the Estate. If this Court proceeds under the Opinion and Order's holding that the child support claim is untimely, the parties and the Court will *not* consider these child support-related issues at this time. If the Supreme Court were to conclude, after a later appeal by Cummings, that the child support claim is not time-barred, the parties and the Court would be required to revisit findings related to A.L.'s intestate share and reconsider A.L.'s entitlement to an intestate share in light of any child support award. This would delay both A.L.'s receipt of a share of the Estate and the settlement of the Estate. A definitive resolution of this issue by the Supreme Court would avoid this delay. Indeed, the Estate concedes that a definitive decision on the Court's Opinion and Order would provide finality to at least this aspect of the case.

An immediate appeal of the Opinion and Order admittedly would create delay with regard to the other issues in this case. The timeliness *vel non* of the child support claim, however, affects how the parties and this Court will proceed related to those other issues. In these circumstances, I am persuaded that resolution now of the issues

presented by Cummings's contemplated appeal of the Opinion and Order would serve considerations of justice.

### **III. CONCLUSION**

For the foregoing reasons, I find that the requirements for certification of an interlocutory appeal to the Supreme Court are present in this case and support an immediate appeal from this Court's June 17, 2013 Opinion and Order. Accordingly, I grant Cummings's application for certification of interlocutory appeal.

**IT IS SO ORDERED.**

Sincerely,

*/s/ Donald F. Parsons, Jr.*

Donald F. Parsons, Jr.  
Vice Chancellor