

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE TRUST                    )  
UNDER THE WILL OF ELIZABETH                )  
WILLIAMS VALE FOR THE BENEFIT             )  
OF FREDERIC B. ASCHE, JR.                    )        C. A. No. 7662-ML

MASTER’S REPORT

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LEGROW, Master

## **INTRODUCTION**

In this petition, the sole remaining trustee of a trust seeks instructions from the Court about whether the assets held in trust should be distributed under a power of appointment purportedly exercised in the will of the beneficiary of the trust. The validity of that will, and by extension the power of appointment exercised therein, has been challenged in a proceeding pending in a Texas probate court. The parties who are contesting the will in Texas, and who are the default beneficiaries of the trust if the power of appointment was not properly exercised, contend that the trustee should continue to hold and manage the trust assets until the Texas court determines whether the will, and the power of appointment exercised therein, is valid. The party who will receive the trust assets if the will and power of appointment are upheld argues that the trustee should distribute the trust immediately under the terms of the disputed power of appointment, and that any other result would amount to a violation of principles of comity. For the reasons set forth below, I recommend that the Court enter an order directing the trustee to hold the trust assets until the Texas court resolves the dispute regarding the validity of the underlying will. This is my final report in this action.

## **BACKGROUND**

The critical facts underlying this case are not in dispute. Elizabeth Williams Vale (“Mrs. Vale”) died testate on August 28, 1961, a resident of the state of Delaware. In her will, Mrs. Vale established a trust for the benefit of her daughter, Grace Vale Ashe (“Mrs. Ashe”). Mrs. Vale’s will provided that, upon Mrs. Ashe’s death, the principal of the trust would be divided into equal shares, one for each of Mrs. Vale’s

grandchildren.<sup>1</sup> When Mrs. Asche died in 2001, the initial trust was divided into three equal shares. One such share was set aside for Frederic B. Asche, Jr. (“Tex”),<sup>2</sup> and is the subject of this action. References to “the Trust” in this report refer to the share set aside for Tex.

After Mrs. Asche’s death, PNC Bank, N.A. (“PNC”), then known as Bank of Delaware, and an individual named Vale Asche Russell were appointed as trustees of the Trust. Unlike several other trusts established by Mrs. Vale or members of her family, the Trust did not require that two individual co-trustees serve at all times. In June 2006, Vale Asche Russell petitioned this Court to resign as individual co-trustee and to modify the terms of the Trust agreement (*i.e.*, Mrs. Vale’s will) to require that two individual co-trustees serve with PNC at all times. All of the interested parties consented to the requested relief, and the Trust agreement was so modified. The modified Trust agreement provides that if one individual co-trustee resigns or is unable to serve, the other individual co-trustee shall appoint a successor co-trustee to fill the vacancy or, failing such appointment, a successor co-trustee may be appointed by this Court.<sup>3</sup> Tex’s wife, Sarah Patricia Asche (“Sallie”), and one of Tex’s children, Franz M. Asche (“Franz”), were appointed as the individual co-trustees of the Trust.

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<sup>1</sup> First Amended Verified Petition for Authorization (hereinafter “Pet.”), Ex. B, Article Third.

<sup>2</sup> Several of the relevant players share the same last name. I therefore use certain individuals’ first names where necessary for clarity. No disrespect is intended.

<sup>3</sup> Pet., Ex. C.

Mrs. Vale's will gave Tex a general power of appointment (the "Power of Appointment") over the Trust, providing:

Upon the death of any grandchild for whom a share shall then be held in trust hereunder, I direct my said Trustees to assign, transfer, convey and deliver forthwith such share, free from this trust, in such manner and amounts and for such interests or estates, whether in trust or otherwise and upon such terms and conditions as such grandchild shall have appointed effectively by his or her last will and testament; or in default of such appointment, or to the extent that any such appointment is not exercised or may not be effective, then in equal shares unto the issue of such grandchild per stirpes ... .<sup>4</sup>

In other words, Tex was empowered to direct, through his last will and testament, the distribution of the principal remaining in the Trust. To the extent he failed to exercise the power of appointment, Mrs. Vale's will directed that the Trust would be distributed to Tex's issue, per stirpes.

Tex had five children: Lisa Asche Mitnacht, Frederic B. Asche, III, E. Craig Asche, Franz, and E. Vale Asche Elkins (collectively, the "Default Beneficiaries"). At the time of his death on October 6, 2011, Tex was survived by his wife of 35 years, Sallie, and his five children. Tex left a last will and testament dated October 10, 2005, a first codicil dated June 5, 2007, and a second codicil dated September 9, 2011 (collectively, "Tex's Will").

Tex's Will purported to exercise his Power of Appointment in the Trust in favor of Sallie, providing, in relevant part:

I hereby exercise all general powers of appointment possessed by me at the time of my death, [including]:

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<sup>4</sup> Pet., Ex. B, Art. Third.

(a) The general power of appointment granted to me in Item THIRD of the Last Will and Testament of my deceased grandmother, ELIZABETH WILLIAMS VALE ...

In exercising all of such general powers of appointment possessed by me, I hereby appoint and direct that all properties subject to my general powers of appointment as referenced above, together with any other property or properties with respect to which I have a general power of appointment, whether described above or not, be distributed (i) to my wife SALLIE, if she survives me, outright and free of trust or (ii) if my wife SALLIE does not survive me by thirty (30) days, to DEERFIELD ACADEMY (Deerfield, Massachusetts) ...<sup>5</sup>

Sallie filed an application to admit Tex's Will to probate on October 18, 2011.<sup>6</sup> No objections to the application were submitted, and Tex's Will was admitted to probate in Probate Court No. 2 of Dallas County, Texas (the "Texas Court") on November 7, 2011. Importantly for purposes of the arguments before this Court, the Texas Court's order (the "Probate Order") provides that Tex's Will was "executed with the formalities and solemnities and under the circumstances required by law to make such instrument[] a valid Will" and that Tex "was of sound mind" at the time the Will was executed.<sup>7</sup>

Because of the weight that is placed on this language by the Executrix, it is notable that the application to admit Tex's Will to probate did not contain any assertions that he was of sound mind, and there were no contested hearings regarding the admission of Tex's Will to probate.<sup>8</sup> It appears, based on counsel's representations to the Court, that

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<sup>5</sup> Pet., Ex. E, § 2.3.

<sup>6</sup> Default Beneficiaries' Response Brief dated Jan. 15, 2013 (hereinafter "Answering Br."), Ex. C.

<sup>7</sup> *Id.*

<sup>8</sup> Answering Br. at 1 and Ex. C.

the orders were entered following an uncontested, “quasi-administrative” hearing, and without the Default Beneficiaries receiving direct notice of the application.<sup>9</sup>

Sallie passed away on March 5, 2012.<sup>10</sup> Sallie’s testamentary documents included a last will and testament dated March 28, 2008 and a first codicil dated September 9, 2011 (“Sallie’s Will”). Sallie’s Will leaves the residue of her estate to a trust executed on the same day as her last will and testament.<sup>11</sup> If the Power of Appointment exercised in Tex’s Will is upheld, the assets in the Trust will be distributed to Sallie’s estate and, ultimately, to Baylor University Medical Center of Dallas (“Baylor”).<sup>12</sup>

On March 20, 2012, the Texas Court entered an order (the “Order of Appointment”) appointing Mary Susan Barnhill as the Independent Executrix of Sallie’s Estate (the “Executrix”). The Executrix serves without any bond. The Executrix contends that the Order of Appointment conclusively demonstrates that she is “duly qualified” and was appointed “with the duties to gather and administer the assets of the Estate.”<sup>13</sup>

Sallie’s death created a vacancy in the position of individual co-trustee of the Trust, a position that needed to be filled before the Trust could be distributed in accordance with the terms of Tex’s Will. Despite numerous requests, however, Franz

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<sup>9</sup> *In the Matter of the Trust under the Will of Elizabeth Williams Value for the Benefit of Frederic D. Asche, Jr.*, C.A. No. 7662-ML, at 38-39 (Jan. 29, 2013) (TRANSCRIPT) (hereinafter “Transc.”); *see also* Tex. Probate C. § 128 (providing for notice by “posting”).

<sup>10</sup> Upon Sallie’s death, Texas Capital Bank was appointed as successor Independent Executor of Tex’s Will. *See* Answering Br. Ex. C.

<sup>11</sup> Affidavit of Eric Gambrell, Esquire (hereinafter “Gambrell Aff.”), Ex. B.

<sup>12</sup> *See* Pet. ¶ 21; Transc. at 27.

<sup>13</sup> Executrix’s Reply to Petition for Authorization (hereinafter “Reply Br.”) at 3. The instruction to “gather and administer the assets of the Estate” does not, however, appear on the face of the Order of Appointment. Rather, the Executrix contends that the Texas Probate Code gives an independent administrator of an estate the exclusive authority to gather and administer the assets of the estate. *See* Executrix’s Brief in Support of Petition for Authorization (hereinafter “Opening Br.”) at 5 (citing Tex. Probate C. §§ 145(h), 145B).

refused to appoint a successor individual co-trustee to replace Sallie.<sup>14</sup> Instead, Franz resigned on May 30, 2012 as the sole remaining individual co-trustee of the Trust, stating “the questions that have been raised concerning the distribution and subsequent removal of this [Trust] from our family has [sic] put me in an awkward position and as a result, I resign.”<sup>15</sup>

A savvy reader will see the plot taking shape. The Executrix requested that PNC terminate the trust and distribute the Trust’s assets to Sallie’s estate. PNC could not take any action with respect to the Trust until the vacancies in the positions of the individual co-trustees were filled or until it obtained instructions from this Court.<sup>16</sup> PNC therefore filed a petition for authorization in this Court on June 28, 2012, seeking an order authorizing PNC to distribute the assets of the Trust to the Executrix. Several weeks after that original petition for authorization was filed, the Default Beneficiaries filed a petition in the Texas Court contesting Tex’s Will (the “Will Contest”). In the Will Contest, the Default Beneficiaries contend that Tex lacked the testamentary capacity to execute the Will and that the Will was the product of undue influence exerted upon him by others, namely Sallie.<sup>17</sup> There is no dispute that the Will Contest was timely filed, and it is scheduled to be tried in the Texas Court in September 2013.<sup>18</sup>

After the Will Contest was filed, PNC filed an amended petition for authorization (the “Amended Petition”), seeking a court order either (a) authorizing PNC to distribute

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<sup>14</sup> Pet. ¶ 22.

<sup>15</sup> Pet., Ex. F.

<sup>16</sup> Pet. ¶ 24.

<sup>17</sup> Pet., Ex. H.

<sup>18</sup> See Transc. at 12-13; Affidavit of James J. Hartnett, Jr. (hereinafter “Hartnett Aff.”), Ex. 1, ¶1.

the Trust to Sallie's estate; or (b) appointing PNC the sole trustee of the Trust until the resolution of the Will Contest, and directing PNC to hold and invest the Trust's assets until such resolution. Further complicating matters, at least from PNC's perspective, is the fact that the Trust is heavily invested in the stock of one particular publicly traded company, which investment accounts for over one-third of the value of the Trust.<sup>19</sup> The investments were made at the instructions of the individual co-trustees and, to the extent the Court directs PNC to continue to hold the Trust's assets while the Will Contest is pending, PNC seeks an order directing it to invest the assets of the Trust "in accordance with its investment policies for conservation and preservation of assets."<sup>20</sup>

The Executrix urges me to authorize PNC to release to Sallie's estate the assets held in the Trust. Unsurprisingly, the Default Beneficiaries take the opposite position, arguing that to order distribution now would limit or altogether eliminate their ability to recover the assets of the Trust in the event they prevail in the Will Contest, and that the Court should order PNC to hold the Trust assets until the resolution of the Will Contest.<sup>21</sup> The Executrix contends that this argument amounts to a collateral attack on both the Probate Order and the Order of Appointment, and that this Court must give the orders of the Texas Court full faith and credit. The Executrix denies that the Default Beneficiaries will be prejudiced by the distribution of the Trust's assets to the Executrix, although during argument counsel for the Executrix was unable to definitively answer the Court's

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<sup>19</sup> Pet. ¶¶ 31, 32.

<sup>20</sup> Pet. at 9, ¶ B.

<sup>21</sup> Now that the Executrix and the Default Beneficiaries each have taken a position in this case, PNC has largely stepped aside and has not taken a position in favor of one party. As long as the Court authorizes one of the two forms of relief sought in the petition for authorization, PNC appears indifferent to the Court's decision in this matter.



questions about what the Executrix intends to do with the Trust's assets while the Will Contest proceeds.<sup>22</sup> Finally, the Executrix contends that, even if the Default Beneficiaries prevail in the Will Contest, they will not be entitled to the assets held in the Trust because they have not challenged earlier wills that also exercised Tex's Power of Appointment in favor of Sallie.

The Default Beneficiaries, on the other hand, contend that they are not collaterally attacking the Probate Order or the Order of Appointment, but rather asking this Court to postpone the distribution of the Trust until the Will Contest – which is a direct attack on the Probate Order – is resolved. As to the Executrix's full faith and credit argument, the Default Beneficiaries respond that the Texas Court's orders are not final orders and therefore are not entitled to full faith and credit. To the contrary, the Default Beneficiaries contend that authorizing the release of the Trust's assets to the Executrix would undermine the Texas Court's ability to resolve the Will Contest. Finally, the Default Beneficiaries contend that the relief sought by the Executrix takes the form of a mandatory injunction, and that she has not satisfied the requirements to obtain that "extraordinary" remedy.

## **LEGAL ANALYSIS**

The procedural posture of this case is somewhat unusual. PNC seeks an order under 10 *Del. C.* § 6504(2), directing it to take or abstain from action in its capacity as trustee. After the Default Beneficiaries answered the Amended Petition, the parties agreed to a stipulated schedule allowing the Executrix and the Default Beneficiaries to

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<sup>22</sup> See *Transc.* at 19, 30-36.

file briefs in support of their position on the Amended Petition. Argument then was held. In a more typical matter, one would expect a motion for summary judgment or similar filing. Nonetheless, none of the parties contend that there are any material facts in dispute, or that this case is not ripe for decision at this time. I therefore will treat the case as one in which the parties have stipulated for a decision on the merits based on the record submitted to the Court.

**A. The Default Beneficiaries Are Not Collaterally Attacking The Texas Court's Orders**

The Executrix first argues that the Default Beneficiaries' opposition to the release of the Trust assets to Sallie's Estate amounts to a collateral attack on the orders issued by the Texas Court. The Executrix contends that by objecting to the release of the Trust assets, the Default Beneficiaries are "openly defying the Texas [Court's] [o]rders and intentionally interfering with the Texas Court-ordered administration of Sallie's [e]state."<sup>23</sup> The Default Beneficiaries respond that the Will Contest is a direct challenge to the Probate Order, and that their opposition to the release of the Trust assets is nothing more than an effort to preserve the Texas Court's ability to decide the Will Contest and the appropriate beneficiaries of Tex's Will (and, by extension, the Trust).

A collateral attack is an effort to "avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial."<sup>24</sup> The intent of the doctrine is to preclude litigants from collaterally attacking the judgments of other courts, because "it is for the

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<sup>23</sup> Opening Br. at 8.

<sup>24</sup> *Fransen v. Conoco, Inc.*, 64 F.3d 1481, 1487 (10<sup>th</sup> Cir. 1995).

court of the first instance to determine the question of validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.”<sup>25</sup>

In both this argument and in the argument relating to the Full Faith and Credit Clause, the Executrix relies heavily on the terms of the Texas Court’s orders. The Probate Order, as the Executrix correctly points out, indicates that Tex was of sound mind at the time he executed his Will, and that the Will is valid. As with Sallie’s estate, an independent executor, Texas Capital Bank, has been appointed to administer Tex’s estate. Under Texas law, those orders may be considered final and appealable under certain circumstances.<sup>26</sup> It is equally true, however, that the Will Contest is a direct attack on the Probate Order, and is considered a part of the probate proceedings.<sup>27</sup> The merits of that contest will be tried in Texas, and the Default Beneficiaries have not asked this Court to weigh in on that matter. The Default Beneficiaries are not using this proceeding to collaterally attack the Probate Order; they are attacking the “validity” and “sound mind” language in the Probate Order through the timely-filed Will Contest.

All the Default Beneficiaries seek to do in this case is to postpone the distribution of the Trust assets until the resolution of the Will Contest, at which point it will be clear where the assets should be distributed. The Executrix, however, contends that to do so would cause all estate administration to “grind to a halt” the moment a will contest is

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<sup>25</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (internal quotations omitted).

<sup>26</sup> See *In re Hudson*, 325 S.W.3d 811 (Tex. App. 2010); *In re Vance*, 2009 WL 4574896, at \*4 (Tex. App. Nov. 25, 2009); *Boone v. LeGalley*, 29 S.W.3d 614 (Tex. App. 2000); but see *In re McKissick*, 2003 WL 1847072 (Tex. App. 2003).

<sup>27</sup> *Stoll v. Henderson*, 285 S.W.3d 99, 105 (Tex. Ct. App. 2009).

filed. The Executrix's arguments in this regard foretell a nuclear effect were this Court to rule in the Default Beneficiaries' favor. This hyperbole fails to persuade.

With respect to Tex's estate,<sup>28</sup> nothing in this Court's order will impact the administration of Tex's estate during the pendency of the Will Contest. Indeed, nothing in this Court's ruling would prohibit Texas Capital Bank from gathering, or even distributing, the assets of Tex's estate, because the Trust is not an asset of Tex's estate. Even at a more theoretical level, which is where the Executrix's argument tends to stray,<sup>29</sup> nothing in this Court's ruling should give a hypothetical executor concern that he or she cannot gather estate assets or otherwise administer the estate. If an independent executor chooses to distribute the estate during the pendency of a will contest, and the contestants ultimately succeed in overturning the will, the contestants then will have a clear-cut claim against the executor. It is for that reason, I imagine, that most executors choose not to distribute assets to beneficiaries while a will contest is pending.<sup>30</sup> But nothing in this Court's order precludes distribution of estate assets, nor does it preclude an executor from gathering estate assets, paying creditors, or taking steps to preserve the estate. Much as the Executor argues otherwise, the issue in this case is simply whether an asset, that may or may not be an asset of Sallie's estate, should be distributed to the executor of Sallie's estate before final resolution of a separate, pending proceeding that will resolve the question of whether the asset belongs to the estate. As will be seen, the

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<sup>28</sup> As explained below, the relief sought by the Estate Beneficiaries also would not have a cataclysmic effect on the administration of Sallie's estate.

<sup>29</sup> See Transc. at 14-15, 21-23; Reply Br. at 6 ("If this Court finds for the [Default Beneficiaries] it is, beyond the collateral evisceration of the Texas [Court's] [o]rders, forging new and radical precedent that, at the moment a will contest is filed, an executor's powers are cut and orders granting executors powers are nullified. That would turn the probate of estates on its head.")

<sup>30</sup> See Transc. at 44.

answer must be no. Moreover, as I will explain below, nothing in this Court’s ruling should impact the administration of the remainder of Sallie’s estate.

First, however, I must address two Delaware cases on which the Executrix relies in support of her position that the Default Beneficiaries are engaged in a collateral attack on either the Probate Order or the Order of Appointment. Neither case is particularly “on point” from a legal perspective, because the legal question presented by this case is rather unusual. The first case on which the Executrix relies, *In re Cochran’s Estate*, involved a petition to partition property filed by the devisees of a will.<sup>31</sup> The question before the Court in *Cochran* involved the proper interpretation of a clause in a will that devised the decedent’s property in a life estate to his wife, and “upon her death ... to such children as may survive me, and if any of my said children shall be dead, leaving a child or children, then to such child or children, he, she, or they taking the share their parent would have taken if living ... .”<sup>32</sup> At the time he executed the will, one of the decedent’s children had died, leaving his own children. The petition for partition was filed by the decedent’s living children, and a motion to intervene was filed by the children of the deceased child. The Court denied that motion to intervene, concluding that the movants lacked standing because the clause at issue in the will left the property to the five living children, and the movants therefore had no interest in the property.<sup>33</sup> The Court further denied the

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<sup>31</sup> 85 A. 1070 (Del. Ch. 1913).

<sup>32</sup> *Id.* at 1070.

<sup>33</sup> *Id.* at 1073.

movants' application to stay the partition proceeding "until the dispute as to the title [may] be adjudicated elsewhere."<sup>34</sup> The Court reasoned:

The suggestion that the proceeding for partition be stayed until the dispute as to the title be adjudicated elsewhere does not meet with approval. ***A legal question based on undisputed facts has been properly raised in a tribunal competent to decide it, and it is not ignoring or trespassing on the function and powers of other courts for this court to decide the question.***<sup>35</sup>

In relying on *Cochran*, the Executrix points out that the Court declined to stay resolution of the question of title to the property while the would-be intervenors filed a separate proceeding to resolve that question. Although the Executrix appears to assume that the separate proceeding would be a will contest filed in another state,<sup>36</sup> no such conclusion can be drawn from the Court's opinion. Even if the premise of a will contest were accepted, however, it is the Court's reasoning in declining to stay the proceeding that makes *Cochran* inapplicable to this case and unhelpful to the Executrix's argument. In *Cochran*, the Court was able to resolve the title to the property because the legal question, and the undisputed facts necessary to resolve it, were presented to the Court of Chancery, which was competent to resolve the dispute. Here, in contrast, it is undisputed that the legal question and the facts necessary to resolve the Will Contest – and therefore the issue of title to the Trust assets – are not before this Court, and this Court is not the forum in which those issues will be resolved. Accordingly, the decision of the Court in *Cochran* not to postpone resolving the question of title is not dispositive of the question raised in this case.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> See Opening Br. at 10.

Equally unavailing is the Executrix's reliance on this Court's more recent decision in *In re Jean I. Willey Trust*.<sup>37</sup> The *Willey Trust* case involved objections to a petition for approval of an accounting and termination of a testamentary trust. The objectors contended that the accounting should not be approved, and the trustee should not be released, because the executrix of the estate had not provided a full accounting of certain rents that allegedly were due to the estate and, if received, would be placed in the trust.<sup>38</sup> The Court declined to deny the discharge of the trustee on that basis, concluding that there was no allegation that the trustee was complicit in the alleged mishandling of the rental income or that he failed in his fiduciary obligations to the beneficiary of the trust. Because the discharge of the trustee would have no impact on the objectors' ability to recover the rental income from the executrix, the discharge was appropriate.<sup>39</sup>

The Executrix contends that the *Willey Trust* decision supports its argument that authorizing PNC to release the Trust assets and discharging PNC from liability as trustee of the Trust will have no impact on the Default Beneficiaries' ability to recover the Trust assets should they prevail in the Will Contest. The Court's decision in *Willey* supports no such conclusion. As I will further explain below, the release of the Trust to the Executrix creates the very real possibility that the Default Beneficiaries may never recover the Trust assets, even if they prevail in the Will Contest. Thus, the Executrix's reliance on *Willey* is misplaced.

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<sup>37</sup> 2011 WL 3444572 (Del. Ch. Aug. 4, 2011).

<sup>38</sup> *Id.* at \*5-6.

<sup>39</sup> *Id.* at \*6.

What remains unresolved by the analysis above is the second question of whether the Default Beneficiaries are using this action to collaterally attack the Order of Appointment, which designated Ms. Barnhill as “Independent Executor” of Sallie’s Estate. The concept of an independent<sup>40</sup> executor is not part of Delaware law, but appears to be an important component of Texas probate procedure. Section 145(h) of the Texas Probate Code provides:

When an independent administration has been created, and the order appointing an independent executor has been entered by the county court, and the inventory, appraisal, and list of aforesaid has been filed by the executor and approved by the county court, as long as the estate is represented by an independent executor, further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.

As the Supreme Court of Texas explained, the purpose of Section 145(h) was “to free an estate of the often onerous and expensive judicial supervision that had developed under the common law system, and in its place, to permit an executor, free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay.”<sup>41</sup>

The Texas courts repeatedly have reaffirmed the authority of an independent executor to operate without interference by the probate court.<sup>42</sup>

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<sup>40</sup> As will be seen, the word “independent” appears to refer to independence from judicial interference, rather than the absence of an interest in the estate.

<sup>41</sup> *Corpus Christi Bank and Trust v. Alice Nat’l Bank*, 444 S.W.2d 632, 634 (Tex. 1969).

<sup>42</sup> *See, e.g. Burke v. Satterfield*, 525 S.W.2d 950, 953 (Tex. 1975) (“the probate court’s control over independent administration of decedents’ estates is strictly limited to situations specifically and explicitly set out in the probate code”); *Smith v. Hodges*, 294 S.W.3d 774, 778 (Tex. App. 2009) (“[a]n independent executor may, without order of the probate court, do any act that an ordinary executor or administrator could do with or under an order of the probate court”); *Hutcherson v. Hutcherson*, 135 S.W.2d 757, 758 (Tex. Civ. App. 1940) (probate court lacked jurisdiction to resolve claim filed against an independent executor by devisees under a will, who were seeking the delivery of assets devised to them under the will and held by the independent executor).



Texas law gives an independent executor broad authority to administer an estate, including the power to gather and distribute assets of the estate.<sup>43</sup> The order appointing Ms. Barnhill as independent executor of Sallie’s estate was a final order when it was issued by the probate court, and an appeal of that appointment could have been filed at that time.<sup>44</sup> That does not mean, however, that the Default Beneficiaries’ position in this case is a collateral attack on the Order of Appointment. The Default Beneficiaries are not collaterally attacking the Executrix’s authority to gather assets of the estate. Instead, they are disputing whether the Trust can be considered an asset of Sallie’s estate before the resolution of the Will Contest. Asking this Court to enter an order that would preserve property while the question of title is resolved in another court does not amount to an attempt to “avoid, defeat, evade, or deny the force and effect of” the Order of Appointment.

The Executrix, however, contends that she must be permitted to gather all the assets she believes comprise Sallie’s estate, notwithstanding the pending legal dispute regarding one of those assets, and that anything short of this Court’s wholehearted endorsement of that view would be an affront to the Texas Court’s orders and a death blow to the ability of independent executors to administer estates. The Executrix’s arguments in this case, however, paint an independent executor as not unlike a modern-day Pancho Villa, seizing property free from oversight or interference. Taken to its logical conclusion, the Executrix’s argument would mean that if an independent executor

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<sup>43</sup> Tex. Prob. Code Ann. §§ 145(h), 145B.

<sup>44</sup> See *In re Vance*, 2009 WL 4574896, at \*4 (Tex. App.) (“[T]he 2007 order admitting the will to probate and appointing William as independent executor was an appealable order. Any direct attack on that order must have been brought within the time periods permitted.”) (internal citations omitted).

attempts to gather an asset, the ownership of which is disputed, no court in the land can enter an order respecting that asset, other than the court that appointed the executor. Putting aside the questionable legal basis for any such extension of the jurisdiction of the Texas courts, such a conclusion would be both absurd and inefficient.

Townes Van Zandt's iconic lyrics notwithstanding,<sup>45</sup> I do not expect this Court's decision in this case to play the "Lefty" to the Executrix's Pancho Villa. Authorizing PNC to retain the Trust assets until final resolution of the Will Contest will not impact the Executrix's ability to gather or distribute the other assets in Sallie's Estate. As explained above, I also do not expect it to effect the administration of other hypothetical Texas estates. This case arises under the very unusual circumstances in which an action contesting the probate of a will in one estate impacts whether a particular piece of property is the asset of a second estate. That this particular fact pattern is relatively uncommon is exhibited by the fact that no party could find a single case in Texas or Delaware with a similar factual background. For that reason, the Executrix's effort to broaden the perceived impact of this case takes on the appearance of tilting at windmills.<sup>46</sup>

**B. Affording Full Faith And Credit To The Texas Court's Orders Does Not Require Release Of The Trust To The Executrix**

The Executrix's arguments regarding the full faith and credit clause largely are repackaged versions of her argument regarding collateral attack. For reasons similar to those set forth above, although I agree with the Executrix that the Texas Court orders are

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<sup>45</sup> Merle Haggard and Willie Nelson, *Pancho and Lefty* (Epic 1983).

<sup>46</sup> See Miguel De Cervantes, *Don Quixote*, ch. 8, (Edith Grossman, trans., Harper Perennial reprint ed. 2005) (1605, 1615)

final under Texas law for purposes of appealing those orders, I disagree that ordering PNC to hold the Trust assets until resolution of the Will Contest violates the Full Faith and Credit Act.

Under Article IV, Section 1 of the United States Constitution (the “Full Faith and Credit Clause”) and the Full Faith and Credit Act (“FFCA”),<sup>47</sup> “all courts [must] treat a state court judgment with the same respect that it would receive in courts of the rendering state.”<sup>48</sup> The FFCA “has long been understood to encompass the doctrines of *res judicata*, or “claim preclusion” and collateral estoppel, or “issue preclusion,”<sup>49</sup> and the act implements the general rule that “parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction.”<sup>50</sup>

The Executrix argues, correctly, that the Probate Order and Order of Appointment are considered under Texas law as final, appealable orders, despite the fact that the administration of both Tex’s estate and Sallie’s estate is ongoing.<sup>51</sup> The Executrix therefore contends that if this Court does not order PNC to release the Trust assets, it will be acting in violation of the FFCA, because the Probate Order states that Tex is of “sound mind” and the Order of Appointment authorizes the Executrix to gather the assets of Sallie’s estate.

The fact that the Probate Order may be “final” for purposes of attacking that order in Texas through appeal or, as in this case, a Will Contest, does not mean that the order is

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<sup>47</sup> 28 U.S.C. § 1738.

<sup>48</sup> *In re National Auto Credit Inc. Shareholders Litig.*, 2004 WL 1859825, at \*2 (Del. Ch. Aug. 3, 2004) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996)).

<sup>49</sup> *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 336 (2005).

<sup>50</sup> *Id.*

<sup>51</sup> See *In re Hudson*, 325 S.W.3d 811 (Tex. App. 2010); *In re Vance*, 2009 WL 4574896, at \*4 (Tex. App. Nov. 25, 2009); *Boone v. LeGalley*, 29 S.W.3d 614 (Tex. App. 2000)).

final in the sense that the parties involved in the Will Contest are not permitted to relitigate the issue of Tex's testamentary capacity. In advancing a Full Faith and Credit argument regarding the Probate Order, the Executrix asks this Court to willfully bind itself to the pending Will Contest, which all of the parties concede is timely and will be adjudicated on its merits by the Texas court. Thus, the fact that the Probate Order references Tex's sound mind is not a final legal determination for purposes of *res judicata* or collateral estoppel. The Executrix does not argue otherwise, and such an argument would be difficult to advance in view of the fact that Texas law allows a will contest to be filed within two years of the date a will is admitted to probate. The Default Beneficiaries are not seeking to (re)litigate the capacity issue in this Court. They simply are asking this Court to order PNC to hold the Trust assets until the Texas Court determines whether Tex's will is valid and, by extension, whether the Power of Appointment was effectively exercised.

Entry of an order requiring PNC to hold the trust assets while the Will Contest is resolved also would not be a violation of the FFCA as it relates to the Order of Appointment. That order is a final order that directs the Executrix to gather and distribute the assets of Sallie's estate. As previously explained, however, until the Will Contest is resolved neither this Court nor the Texas Court can definitively identify whether the Trust is an asset of Sallie's estate. Because the Executrix's authority only extends to the administration of such assets, it is not a violation of the FFCA to prevent the Executrix from obtaining control over the Trust until the Will Contest is resolved. In

other words, there is nothing in the Order of Appointment that this Court is not respecting.<sup>52</sup>

### **C. The Default Beneficiaries Would Be Prejudiced By The Relief The Executrix Seeks**

The Executrix next contends that the Default Beneficiaries have no basis to challenge the distribution of the Trust to Sallie's estate because they would not be prejudiced by the Executrix "gathering and holding the Trust," and that there is no credible argument that the Executrix will "waste or abscond with the Trust" because she has been given the "stamp of approval" by the Texas Court.<sup>53</sup> The Default Beneficiaries, on the other hand, point out that the distribution of the Trust to Sallie's estate, and the approval of PNC's final accounting, will insulate PNC from any liability to the Default Beneficiaries. If the Executrix then distributes the Trust in accordance with Sallie's Will, and the Default Beneficiaries ultimately prevail in the Will Contest, the Default Beneficiaries contend that their ability to recover the Trust is, at best, uncertain and complex.

The Executrix concedes that an independent executor may distribute the assets of an estate at any time, even when a will contest is pending.<sup>54</sup> The Executrix has not represented to the Default Beneficiaries or the Court that she will not distribute the trust

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<sup>52</sup> The Executrix relies heavily on this Court's decision in *In re Trusts Created by Farrell*, 2008 WL 5459270 (Del. Ch. Dec. 18, 2008). That case, however, involved a request for an injunction permitting a trustee to disregard orders of a Pennsylvania court requiring the placement of certain trust assets in escrow. The *Farrell* Court considered whether it should enter an injunction under the Delaware Uniform Enforcement of Foreign Judgments Act. The Court ultimately declined to enter an injunction because the trustee could not meet the standard for injunctive relief. The Court's analysis did not depend upon the FFCA, and the *Farrell* case therefore does not add much to the analysis of the issues herein presented.

<sup>53</sup> Opening Br. at 15.

<sup>54</sup> Opening Br. at 10.

assets while the Will Contest is pending, and because the Will Contest does not directly involve Sallie's estate, it is plausible that the Executrix may distribute the Trust assets in accordance with Sallie's Will. Indeed, if she fails to distribute the Trust assets after obtaining control over them, the Executrix may face a claim from the beneficiaries of Sallie's Will.<sup>55</sup>

If such a distribution is made, and the Default Beneficiaries prevail in the Will Contest, their avenue to recover the Trust assets will be murky. PNC will be exculpated from liability by this Court's order. The Default Beneficiaries are not beneficiaries of Sallie's estate, and therefore the Executrix owes no duties to them. It would appear, then, that the Default Beneficiaries would have to initiate a claim directly against the beneficiaries of Sallie's estate. Indeed, neither counsel could identify the precise manner in which the Default Beneficiaries would be able to recover the Trust assets if they were distributed through Sallie's estate.<sup>56</sup> That type of legal uncertainty cannot be said to present no prejudice to the Default Beneficiaries. In contrast, it is difficult to conjure the prejudice that Sallie's Estate will suffer. As counsel to the Executrix conceded, the estate has other assets from which the estate's expenses can be paid.<sup>57</sup> On the other hand, if the Trust were the sole asset of Sallie's estate, there would be few if any administrative expenses that would be incurred while the Will Contest in Tex's estate was pending. The prejudice the Executrix may suffer if this Court orders PNC to continue to hold the Trust is, at most, theoretical.

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<sup>55</sup> *Cf* Transc. at 19 (noting that Ms. Barnhill would take whatever action was necessary in light of her fiduciary duties).

<sup>56</sup> *See* Transc. at 27-33, 44-46.

<sup>57</sup> *See* Opening Br.at 15.

**D. The Executrix Has Not Demonstrated That The Default Beneficiaries Will Not Prevail Under Any Set of Circumstances**

The Executrix also asserts an alternative argument that, in essence, challenges the Default Beneficiaries' standing to object to a distribution of the Trust. As the argument goes, even if the Default Beneficiaries prevail in overturning Tex's Will, they will not be entitled to the Trust because an earlier will and related codicils executed by Tex also exercised the Power of Appointment in favor of Sallie, and the Default Beneficiaries have not challenged those earlier testamentary documents.

The Default Beneficiaries, however, argue that they have uncovered two earlier wills in which Tex exercised the Power of Appointment in favor of Tex's estate, directed that Sallie would receive a life estate in Tex's estate, and instructed that upon Sallie's death Tex's estate would be divided into sub-trusts for each of Tex's children. Those wills were included in an amended petition in the Will Contest and the Default Beneficiaries are seeking to admit one of those wills to probate. In order to be entitled to the Trust assets, however, the Default Beneficiaries do not need to prove that those earlier wills are valid. They only need to establish that later wills, which executed the Power of Appointment in favor of Sallie, are not valid. If the Power of Appointment never was validly exercised, the Default Beneficiaries will receive the Trust assets under the terms of the trust agreement. Although the Executrix argues that the Default Beneficiaries have not yet challenged a will from 1998 that exercised the Power of Appointment in favor of Sallie, the Executrix does not dispute that the scheduling order issued by the Texas Court

in the Will Contest permits amendments to the pleadings until the end of August 2013.<sup>58</sup>

As the Executrix repeatedly has argued, this Court may not resolve the merits of the Will Contest. It is sufficient for purposes of the Petition for Authorization that there is a set of circumstances under which the Trust may not become an asset of Sallie's estate.

#### **E. The Executrix Is Not Seeking A Mandatory Injunction**

The Default Beneficiaries make the alternative argument that this Court should refuse to allow PNC to distribute the Trust to the Executrix because such relief amounts to a mandatory injunction and the Executrix has not met the burden of demonstrating that she is entitled to that extraordinary form of relief. Because I am not awarding that relief, this argument technically is moot. I address it briefly, however, for the sake of judicial review.

As counsel to the Default Beneficiaries conceded at trial, there is no precedent supporting the argument that a Petition for Authorization to allow a trustee to distribute assets from a trust amounts to a request for a mandatory injunction. Delaware law specifically authorizes this Court to enter an order directing "trustees to do or abstain from doing any particular act in their fiduciary capacity."<sup>59</sup> Nothing in that statute or this Court's precedents suggests that such relief amounts to a request for a mandatory injunction, or indicates that the party seeking relief under the statute must meet the heightened burden necessary for a mandatory injunction. The Default Beneficiaries' argument on this point therefore lacks merit.

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<sup>58</sup> Hartnett Aff., Ex. 1, ¶ 9.

<sup>59</sup> 12 *Del. C.* § 6504(2).



## CONCLUSION<sup>60</sup>

For the foregoing reasons, I recommend that the Court enter an order authorizing PNC to continue to hold the Trust assets while the Will Contest is pending and to invest the assets of the Trust in accordance with PNC's investment policies for conservation and preservation of assets. This is my final report in this action. Exceptions may be taken in accordance with Rule 144. If the parties do not take exceptions to the final report, or if the final report ultimately is adopted by this Court, the parties then should confer regarding a proposed final order, including appropriate language defining the point at which the Will Contest will be final for purposes of *res judicata* or collateral estoppel, such that PNC may release the Trust assets.

Respectfully submitted,

/s/ *Abigail M. LeGrow*

Master in Chancery

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<sup>60</sup> “The desert’s quiet, Cleveland’s cold[,] and so the story ends, we’re told.” Merle Haggard and Willie Nelson, Pancho and Lefty (Epic 1983).