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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY RAVET, Petitioner Below-Appellant, In Re: Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated February 9, 2014.	No. 369, 2014 Court Below, Chancery Court of the State of Delaware, C.A. No: 7743-VCG

APPELLANT'S SECOND AMENDED OPENING BRIEF

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I. NATURE OF THE PROCEEDINGS

Plaintiff-Appellant Gary Ravet (the "Appellant" or "Petitioner"), by and through his undersigned counsel, hereby presents his Opening Brief in the above-captioned matter. This appeal is from a Chancery Court Decision of June 4, 2014 (the "Chancery Court Decision"), which denied the Appellant's Motion to Alter or Amend the Judgment, for Reconsideration of the Judgment, and for Relief from the Judgment.

On January 29, 2014, the Chancery Court held an evidentiary hearing concerning whether the underlying Petition was time-barred pursuant to Delaware's Pre-mortem Validation Statute, 12 DEL. C. §3546. On January 31, 2014, the lower court entered an order dismissing the Petition as time-barred.

On February 7, 2014, the Appellant filed a Motion (1) To Open Judgment To Allow Ruling On Motion *In Limine*, and (2) To Alter Or Amend Judgment, Or In The Alternatively, To Reconsider The Judgment. The parties filed briefs on the Motion(s). The lower court issued its ruling on the Motion(s) on June 4, 2014. This appeal follows.

II. SUMMARY OF ARGUMENT

1. This appeal is from a Chancery Court Decision of June 4, 2014, which denied the Appellant's Motion to Alter or Amend the Judgment, for Reconsideration of the Judgment, and for Relief from the Judgment. The Chancery Court Decision should be reversed.

2. The evidence presented at the lower court's hearing clearly showed that the Appellant had timely filed his Chancery Court Petition to set aside the Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trusty Dated February 9, 2012 (the "Trust") in that the evidence on the record below failed to establish that the Appellant received notice of the Trust prior to March 29, 2012.

3. Further, the lower court's order turned on an incorrect interpretation of 12 DEL. C. §3546.

III. STATEMENT OF FACTS

This appeal arises as a result of a Letter Opinion from the Chancery Court dated June 4, 2014 (the "June 4, 2014 Letter Opinion"), denying the Appellant's Motion to Alter or Amend the Judgment, for Reconsideration of the Judgment, and for Relief from the Judgment. This appeal involves a case of first impression for this Court to interpret a provision of Section 3546 of Title 12 of the Delaware Code.

By way of background, the Appellant in this action is the son of Shirley Ravet, settlor of the Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trusty Dated February 9, 2012 (the "Trust"). June 4, 2014 Letter Opinion at 1. The Appellant brought an action to contest the validity of the Trust on the basis that it was the product of his sisters' exercise of undue influence over their mother, the settlor. June 4, 2014 Letter Opinion at 1.

On February 23, 2012, the co-trustees allegedly attempted to provide notice of the Trust to Appellant by sending written notice by certified mail to Appellant's residence and to his post office box. Delivery of the certified mail addressed to Appellant's residence allegedly was attempted on February 27, 2012 and on March 3, 2012—both of which were unsuccessful. Delivery of the certified mail

addressed to Appellant's post office box allegedly was attempted on February 28, 2012 and on March 7, 2012—both of which were unsuccessful.

On March 27, 2012, co-trustees again attempted to provide notice of the Trust to Appellant by sending written notice to the Appellant's home address *via* Federal Express ("FedEx"). While FedEx provided a confirmation of delivery to Appellant's residence, Appellant at the time of delivery was in Vail, Colorado from March 24, 2012 to March 28, 2012, and did not return to his home in San Diego, California until early morning on March 29, 2012. On March 29, 2012, Appellant first received notice of the Trust when such notice was hand-delivered to him by an agent of the co-trustees. A-59, 60.

The cover letter accompanying the notice materials provided to Appellant by the co-trustees (the "Cover Letter") provides in bold-face type, "If you do not challenge the validity of the Trust *within one hundred twenty days of your receipt of this notice*, your right to contest the validity of the Trust will be forever barred." (Emphasis added). The notice materials provided to the Appellant also included a statutory notice titled "Notice of Limitation on Action Contesting Validity of Trust" ("Notification of Limitation"). Similar to the Cover Letter, this Notification of Limitation provides, "You have *one hundred twenty days (120) from your receipt* of this Notification of Limitation on Action Contesting Validity of Trust *to initiate a judicial proceeding* to contest the validity of the Trust. After that date,

any judicial proceeding to contest the validity of the Trust will be barred." (Emphases added).

On July 9, 2012, Appellant emailed his sisters, Deborah Hill, Lorey Baldwin and Patty Raphaelson, beneficiaries of the Trust, in an attempt to resolve his potential challenges to the Trust and avoid a contest proceeding. On July 18, 2012, Appellant emailed counsel for the co-trustees, Kristen E. Caverly of Henderson, Caverly, Pum & Charney LLP, in an attempt to resolve his potential challenges to the Trust and to seek a tolling agreement while the parties explored settlement options.

On July 26, 2012, within one hundred twenty (120) days of March 28, 2012, counsel for Appellant filed the Petition with the Chancery Court ("Transaction ID # 45567111"). On July 27, 2012, under cover letter, counsel for Appellant mailed a courtesy copy of the Petition to beneficiaries of the Trust via certified mail.

On July 31, 2012, counsel for Appellant received a notice from LexisNexis File & Serve regarding Transaction ID # 45567111 indicating that the newly filed case had been rejected. The notice did not provide a basis for the rejection. On August 1, 2012, counsel for Appellant again attempted to file the Petition with the Chancery Court (Transaction ID # 45661446"). On that same date, counsel for Appellant received another notice from LexisNexis File & Serve regarding Transaction ID # 45661446 indicating that the new case had been rejected again.

Om August 2, 2012, counsel for Appellant attempted to file the Petition a third time with the Chancery Court ("Transaction ID # 45678793"). A-1. On that same day, counsel for Petitioner received notice from LexisNexis File & Serve regarding Transaction ID # 45678793 indicating that the new case was accepted and assigned a case number.

Subsequently, the Appellant filed a Motion to Deem the Petition filed as of July 26, 2012. A-13. On December 2, 2013, the lower court granted that motion and entered an order deeming the Petition filed *nunc pro tunc* to July 26, 2012. A-14. In light of this ruling, the principal issue, therefore, became *when* the Petitioner received notice of the Trust under Delaware's pre-mortem validation statute at 12 DEL. C. §3546. If the Appellant received notice of the Trust on or after March 28, 2012, the Petition would have been timely filed. If the Appellant received notice of the Trust on or before March 27, 2012, the Petition would be deemed time-barred.

Section 3546 of Title 12 provides in relevant part as follows:

> § 3546 Limitation on action contesting validity of trusts.
>
> (a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:
>
> (1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no

> trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, *notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person*.

12 DEL. C. §3546 (emphasis added).

During the hearing in the court below, the parties disputed the meaning of the italicized portion of the statute above. The Appellant argued that "absent evidence to the contrary" effectively is burden shifting in that if the Appellant was able to demonstrate through testimony or otherwise, he could overcome the presumption of delivery of the notice when he did not actually receive notice until March 29, 2012. *See* June 4, 2014 Letter Opinion at 2. Further, it would be the Appellees' burden to show *when* the Appellant received the notice of the Trust. The Appellees, on the other hand, argued that absent evidence demonstrating that written notice was not delivered to the Appellant's *last known address*, delivery of that notice was effective to trigger a presumption of receipt. June 4, 2014 Letter Opinion at 2.

In its June 4, 2014 Letter Opinion, the lower court reasoned, "If the statutory language refers to mailing notices to the last known address, it is unquestionable that the [Appellee] is entitled to the statutory presumption of receipt; if it refers to receipt itself, my decision must turn on a review of the "evidence to the contrary" of receipt." June 4, 2014 Letter Opinion at 2-3.

At the conclusion of the January 29, 2014 hearing in the court below, the court issued a bench ruling concluding in part:

> I find no credible evidence that the first class mail was not delivered to this residence, to the extent that modifier applies. To the extent, the modifier doesn't apply, I simply make a positive finding that given the two first class mailings and the two contemporaneous certified mailings, which we clearly know reached his two addresses, that it is extremely likely that delivery was made before the 27th of March.

June 4, 2014 Letter Opinion at 4.

On February 7, 2014, the Appellant filed a Motion to Open Judgment to Allow Ruling on a Motion *in Limine* and to Alter or Amend Judgment or, in the Alternative, to Reconsider the Judgment. A-16. On March 17, the Appellant amended his pending Motion on the following basis:

> While preparing a letter to the trustees of the various trusts involved in this action and actions pending in California, on March 3, 2014, [Appellant] discovered first class mail envelopes from counsel for the Co-trustees—one envelope addressed to his residence and one envelope addressed to his P.O. Box. The postage stamp on each envelope indicates that it was mailed on March 26, 2012—more than a month after counsel for the Co-trustees, Mr. Hayward, testified that he had sent such first class mailings. Upon opening the envelopes . . . an original cover letter signed and dated February 15, 2012 (with original signatures in blue ink) . . . .

June 4, 2014 Letter Opinion at 4.

On May 8, 2014, the lower court held a hearing on the Appellant's Motion to Open Judgment. At the conclusion of that hearing, the court issued a bench ruling denying the Appellant's Motion. June 4, 2014 Letter Opinion at 5. Despite this uncontroverted new evidence, the lower court reiterated its prior ruling and

ruled that the Appellant had not raised any credible evidence to rebut the statutory presumption of mailing to the last known address was sufficient to establish *when* the Appellant received the notice of Trust. Further, the lower court did not, and indeed could not, give a date through any evidence as to when the Appellant received notice of the Trust.

IV. ARGUMENT

(1)A. QUESTION PRESENTED

WHETHER THE APPELLANT TIMELY FILED HIS COMPLAINT IN CHANCERY COURT UNDER 12 DEL. C. §3546. *See* A-25 to A-54.

(2)A. SCOPE OF REVIEW

This Court reviews the Court of Chancery's conclusions of law *de novo*, *see DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012) (citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court's factual findings "unless they are clearly wrong and the doing of justice requires their overturn." *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This Appeal involves mixed questions of law and fact and presents a case of first impression regarding the interpretation of 12 DEL. C. §3546. Since the lower court's decision on the Appellant's underlying Motion was based on the interpretation of this statute, this Court's review is *de novo*.

(3)A. MERITS OF ARGUMENT

This appeal involves a relatively discreet but important case of first impression; namely an interpretation of 12 DEL. C. §3546. Contrary to the lower court's opinion, the evidence was overwhelming that the Appellant timely filed his Chancery Court Complaint. It is undisputed that if the Appellant did not receive notice of the Trust until after March 27, 2012, then his Complaint would have been timely filed. In the lower court's June 4, 2014 Letter Opinion, the court appears to have gone to great lengths to justify and affirm its prior ruling which clearly was based on an assumption of receipt of mailings that were proven not to have been mailed until at least March 26, 2012. The Court simply casually dismissed this new evidence and issued a speculative ruling that the Appellant must have received notice of the Trust prior to March 28 since there was testimony from one of the co-trustees that he had mailed a notice to the Appellant "in February 2012." *See* June 4, 2014 Letter Opinion at 13.

However, the February mailings were proven to have been forwarded in a subsequent mailing dated March 26, 2012. It was not disputed that the dates on the recently discovered mailings were correct. Further, the Appellant himself testified under oath that the first time he knew of the notice of the Trust was on March 29, 2012 when it was hand-delivered to him by opposing counsel at another hearing in California. The lower court did not address why the counsel for the co-trustees

found it necessary to hand-deliver the notice of the trust to the Appellant at that hearing if they had already provided notice of the trust in prior mailings.

Further, the lower court simply ruled that the Appellant's "evidence to the contrary" was not credible without going into any new or colorable explanation as to why it was not credible. The lower court appears simply to have assumed that one or more of the prior alleged mailings (which were apparently re-mailed on March 26, 2012) must have been delivered to the Appellant at some point without making a plausible determination as to when or how such notice was actually received. Although the lower court neatly dodged the ruling as to whether the Appellant's interpretation of the statute was correct or whether the Appellee's interpretation was correct, the lower court ruled that under either interpretation, the Appellant had not provided credible evidence to rebut a presumption of receipt based on mailings that were shown to have been made later on March 26, 2012.

The Court must give effect to the statute's specific use of the word "received." A-40. In analyzing the clause in the statute that provides "notice shall be given when *received* by the person to whom the notice was given," it is clear that the General Assembly intended to trigger the commencement of the 120-day challenge period (the "Challenge Period") upon *receipt* of notice. *See* 12 DEL. C. §3546(a)(1)(emphasis added). As the lower court noted when questioning whether cases in which there is a requirement for service of process are directly applicable,

"Here, the statute specifically says, 'received.'" A-40. Indeed, both the Cover Letter and Notification of Limitation provided to Appellant by the co-trustees state that the Challenge Period is triggered by his *receipt* of the notice of the Trust.

The Court must give effect to the statute's use of the word "received" and require actual notice of the Trust. *See Nelson v. Frank E. Best, Inc.*, 768 A.2d 473, 478 (Del. Ch. 2000)("It is well-established that this court must give effect to a statute's plain meaning in order to implement the General Assembly's intent."). Here, the evidence presented in the lower court below reveals that the Appellant did not receive the notice of the Trust until March 29, 2012.

The next clause in the statute that must be analyzed provides, "*[A]bsent evidence to the contrary*, it shall be presumed that *delivery* to the last known address of such person *constitutes receipt* by such person." *See* 12 DEL. C. §3546(a)(1)(emphasis added). The plain meaning of the statute is that the presumption of receipt arises only in the absence of evidence to the contrary, which was not substantiated by the record below. Nonetheless, the Appellant put forth evidence contrary to the presumption of receipt in the form of sworn affidavits, airline ticketing information proving he was not home until the morning of March 29, 2012, bank statements, Facebook posts, as well as his own sworn testimony of when he did receive notice of the Trust—March 29, 2012. A-59-71.

Moreover, in the absence of evidence to the contrary, this presumption of receipt is only triggered where there is delivery to the person's last known address, not merely upon mailing to the person's last known address. Here, the Appellees were only able to show delivery of the notice to the Appellant's residence on March 27, 2012 through a FedEx receipt that was not signed by the Appellant or any other recipient. To the extent the lower court based its ruling on the presumption of receipt in connection with this March 27, 2012 FedEx delivery receipt, the Appellant produced ample evidence sufficient to rebut that presumption of receipt in the form of sworn affidavits, airline ticketing information proving he was not home until the morning of March 29, 2012, bank statements, Facebook posts, as well as his own sworn testimony. The fact that the Appellant was not home on March 27, and therefore could not have *received* the notice of the Trust for another two days, was not disputed below.

The statute does not contain a presumption that mailing in and of itself constitutes *receipt* of notice. The lower court also appears to have at least in part based its ruling that the statute gives the Appellees a presumption that mailing (not delivery) constitutes receipt of notice. The presumption in the statute is that notice is received when *delivered*, not when *sent*. To the extent the lower court interpreted the statute as reversing this presumption, the lower court's ruling must be reversed.

The lower court failed to cite to any evidence or proof that notice of the Trust was ever delivered prior to July 27, 2012. Indeed, no such evidence exists on the record. The Appellees asserted below that the notice of Trust was *sent* twice more than 120 days prior to when he first tried to file the Petition below. *See* Co-trustee's Opening Brief below at 15. Furthermore, the co-trustee testified, "we presume [the notices] got there, but we are not trying to go off of those dates. We do know that the certified attempts came back. So we wanted to make sure that we got something back that *showed delivery*." (emphasis added). A-34. The only document the co-trustees have that shows delivery of any kind was the FedEx receipt dated March 27, 2012, and which shows that a signature was not required. A-33. Further, the Appellant showed clear evidence that he was not at home from March 24, 2012 to March 28, 2012, so he could not possibly have received notice of the Trust prior to March 29, 2012, which testimony and position has been consistent throughout all related proceedings. A-59-71.

The plain language of the statute and the only sensible reading of the statute is that the presumption of receipt can be rebutted by demonstrating that while delivery occurred, it was never received. Any suggestion that the General Assembly intended anything different must fail.

Unlike many statutory provisions regarding notice that provide that notice is complete upon mailing (e.g., Rule 5(b) of the Rules of the Court of Chancery and

Rule 5(b) of the Civil Rules of the Superior Court), 12 DEL. C. §3546(a)(1) provides that "[f]or purposes of this paragraph, *notice shall be given when received* by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person." (emphasis added). Thus, actual notice of a trust is required under the statute to start the one hundred twenty (120) day notice period. *See also State ex rel. Hall v. Camper*, 347, 138-139 (Del. Super. 1975)("Generally speaking, the law requires that notice be actually received in order to be effective for all purposes. The mere deposit in the mail of notice, under the general law is not sufficient to bind a person who never receives it. If the mailed notice is in fact not received, the notification is without any legal effect."). Both the Cover Letter and the Notification of Limitation provided to Appellant clearly indicate that the one hundred twenty (120) days to initiate any proceeding to contest the validity of the Trust runs from his *receipt* of the notice of the Trust.

The lower court appears to have misunderstood this subtle but important distinction under the statute. While the Appellees were able to show that the notice was *delivered* to Appellant's residence on March 27, 2012 by FedEx, A-31, there is no evidence in the record that the Appellant *received* the notice on that date. There is clear evidence to the contrary.

As a practical matter, the requirement of actual notice makes good sense, as a recipient of a notice has no way of knowing when the party attempting to effectuate notice first tried to effect such notice. For example, in this case, while the co-trustee's Cover Letter was dated February 15, 2012, counsel for the co-trustees, Mr. Hayward, testified that he did not attempt to mail it until February 23, 2012. The actual notice requirement is also consistent with Delaware "time of discovery" rule. Where the rule is applicable, the statute of limitations will not begin to run on a plaintiff's claim until "discovery of facts 'constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence in inquiry which, if pursued, would lead to the discovery' of facts." *See, e.g., Shea v. Delcollo & Werb, P.A.*, 977 A.2d 899, 2009 Del. LEXIS 2424 *6 (Del. Aug. 13, 2009). It is also consistent with Delaware's strong public policy of deciding cases on their merits. *See, e.g., McMartin v. Quinn*, 2004 Del. Super. LEXIS 28 *16 (Del. Super. Feb. 4, 2004).

In Delaware, there is a common law presumption that mail matter, correctly addressed, stamped and mailed, was received by the party to whom it was addressed. *See State ex rel. Hall v. Camper*, 347, 139 (Del. Super. 1975)("This presumption is rebuttable and may be overcome by evidence that the notice was in fact never received." *Id.* "This presumption may be strengthened, weakened or

overcome by proof of attendant pertinent circumstances." *Windom v. Ungerer*, 903 A.2d 276, 282 (Del. 2006).

By enacting 12 DEL. C. §3546(a)(1) the General Assembly demonstrated its intent to restrict the common law presumption regarding delivery in the context of pre-mortem validation contests. In effect, the language of 12 DEL. C. §3546(a)(1) codifies the common law rule and then restricts its application. *See Dunn v. St. Francis Hosp. Inc.*, 401 A.2d 77, 79 (Del. 1979)(finding that 18 DEL. C. §6856(1) codified the "inherently unknowable injury" rule of common law and then restricted it to three years in the context of medical malpractice claims).

Quite simply, no evidence exists on the record that the Appellant received notice of the Trust until March 29, 2012, in which case his Petition below was timely filed and should not have been dismissed.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant/Petitioner-Below respectfully requests that this Court REVERSE the Chancery Court's June 4, 2014 decision denying the Appellant's Motion to Alter or Amend the Judgment, for Reconsideration of the Judgment, and for Relief from the Judgment, and grant such other relief as this Court deems just under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused true and correct copies of the foregoing documents to be served via File & ServeXpress delivery upon the following:

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