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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY RAVET, Petitioner-Below, Appellant v. THE NORTHERN TRUST COMPANY OF DELAWARE and BARRY C. FITZPATRICK, in their capacity as co-trustees, Respondents-Below, Appellees 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, Court of Chancery of the State of Delaware, C.A. No.: 7743-VCG

APPELLEES' ANSWERING BRIEF ON APPEAL

Dated: September 26, 2014

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NATURE OF PROCEEDINGS

On August 2, 2012, after two rejected filing attempts, the Court of Chancery accepted Petitioner's Petition. Fifteen months later, on November 14, 2013, Petitioner filed a motion to deem the Petition filed as of July 26, 2012, the date of Petitioner's first attempt to file his Petition. On December 2, 2013, the trial court entered an order considering the Petition filed nunc pro tunc on July 26, 2012.

Petitioner didn't serve the Co-trustees (or anyone else) with his Petition until December 5, 2012. The settlor of the trust at issue had died on November 24, 2012, and Petitioner waited until December 3, 2012 to ask the trial court for a summons.

On December 21, 2012, the Co-trustees moved to dismiss the Petition because, even if deemed filed on July 26, 2012, the Petition was not filed within 120 days from when Petitioner received notice of the trust at issue and, thus, was time-barred by Delaware's Pre-mortem Validation Statute, 12 *Del. C.* § 3546.

On February 25, 2013, the Petitioner filed his response to the motion to dismiss and, on March 12, 2013, the Co-trustees filed their reply brief. On March 28, 2013, after the close of briefing on the motion to dismiss, Petitioner moved for leave to file a sur-reply opposing that motion.

The trial court, on April 12, 2013, denied Petitioner's motion to file a sur-reply but allowed the record to be supplemented to include a March 28, 2013

affidavit from Petitioner. In that affidavit, Petitioner claimed for the first time that he was not aware of any Federal Express package containing the Notice Letter[1] being delivered to his La Jolla, California home on or before March 27, 2012. (As described in more detail, *infra*, in addition to sending the Notice Letter by first class mail on February 23, 2012 to Petitioner's home and P.O. Box addresses, the Co-trustees also had it delivered via Federal Express to Petitioner's home address on March 27, 2012.)

On May 21, 2013, the trial court held a hearing on the Co-trustees' motion to dismiss. At the conclusion of that hearing, the trial court stated that it would allow the motion to dismiss to be converted to a motion for summary judgment and would schedule an evidentiary hearing on whether the Petition was time-barred. Also, at the May 21, 2013 hearing, Petitioner's counsel presented an additional affidavit from Petitioner which made specific factual claims that had not before been asserted in the briefing or in Petitioner's previous March 28, 2013 affidavit, namely that Petitioner claimed to have left his home in La Jolla for Vail, Colorado on March 24, 2012 and didn't return to La Jolla until March 28, 2012.

On May 30, 2013, the Co-trustees' counsel—by way of a letter to the trial court and counsel referencing the then-upcoming evidentiary hearing—made clear

[1] "Notice Letter" refers to the letter and attachments found at B-061-131. The Notice Letter is described in more detail, *infra*.

that as discovery would expand the record, "the Co-trustees may also rely on the several unreturned first class mailings sent to the Petitioner's addresses weeks before the Fed Ex package was delivered."[2]

During discovery, the Co-trustees learned more about Petitioner's whereabouts during the operative time period, including most significantly, that Petitioner was largely at home in La Jolla, CA between February 27 and March 24, 2012.

On January 29, 2014, the trial court conducted an evidentiary hearing on whether Petitioner had been given written notice of the trust by March 27, 2012, the last day on which such notice would effectively time-bar the Petition pursuant to Delaware's Pre-mortem Validation Statute.

At the conclusion of the January 29, 2014 hearing, the trial court ruled that as the Co-trustees had shown by "overwhelming" evidence that they had delivered notice of the trust at issue to the Petitioner's addresses well before 120 days prior to July 26, 2012, and as the only evidence that Petitioner presented to rebut the presumption of receipt was not credible, the Petition was time-barred by the Pre-mortem Validation Statute. The trial court then dismissed the Petition with prejudice.

[2] B-135.

On February 7, 2014, Petitioner filed a Motion (1) to Open Judgment to Allow Ruling on Motion in Limine, and (2) to Alter or Amend Judgment, or in the Alternative, to Reconsider Judgment. After the Co-trustees responded to that motion but the before the trial court ruled on it, the Petitioner filed a second post-judgment motion on March 17, 2014.[3] The Co-trustees responded to that motion as well. On June 4, 2014, the trial court issued its letter opinion denying Petitioner's post-judgment motions.[4]

Petitioner appealed. On July 10, 2014, this Court issued a notice to show cause as to why the appeal was not untimely filed. After requesting and receiving submissions from the parties on that question, this Court discharged the notice to show cause on August 26, 2014.

On August 22, 2014, Petitioner filed his Opening Brief in this Court. This is the Co-trustees' Answering Brief.

[3] A-18.
[4] A-22.

SUMMARY OF ARGUMENT

1. DENIED. Delaware's Pre-mortem Validation Statute allows settlors the opportunity to defend trust challenges while they are still alive. Under that statute, interested parties must contest a trust within one hundred and twenty (120) days after receiving notice of the trust's existence.[5] If a notice recipient fails to contest the trust within that time-period, they are barred from ever contesting it.[6] The Pre-mortem Validation Statute further explains that "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*."[7]

The trial court found that notice was delivered to Petitioner's last known address more than 120 days before Petitioner first tried to file his Petition in the trial court. If the Pre-mortem Validation Statute is to be read such that "absent evidence to the contrary" modifies just the correctness of the address, then the analysis would end right there. The trial court, however, decided that even if the statute were read in the way most beneficial to the Petitioner—namely, that "evidence to the contrary" pertains to receipt—Petitioner still could not meet his burden to rebut the presumption of receipt as he offered no credible contradicting evidence.

[5] *See* 12 *Del. C.* § 3546(a).
[6] *Id.*
[7] *Id*. (emphasis added).

Petitioner contends that the presumption of receipt arises only if there is no evidence offered at all—including even non-credible evidence—to the contrary. That is a rather tortured reading of the statute and one that the trial court rightly rejected. Further, if Petitioner were correct, the presumption would be rendered meaningless as the "evidence to the contrary" could be comprised solely of evidence that the trier of fact found to be self-serving and not credible, as was the case here.

For these reasons, the trial court correctly applied the statute and dismissed Petitioner's Petition.

STATEMENT OF FACTS

1. Delaware's Pre-mortem Validation Statute

A settlor's absence can encourage frivolous contests because the challenger does not need to face the settlor.[8] To address that problem, Delaware enacted the Pre-mortem Validation Statute. That statute provides, in pertinent part:

> (a) A judicial proceeding to contest whether a trust, or any amendment thereto, 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.[9]

Regarding the phrase "absent evidence to the contrary," the trial court here explained that "[i]f the statutory language refers to mailing notice to the last known address, it is unquestionable that the [Co-trustees are] entitled to the statutory

[8] *See, e.g.*, Ralph Lehman et al., *Determining the Validity of Wills and Trusts – Before Death*, 21 No. 6 Ohio Prob. L.J. 7 (July/August 2011) (referring to executors and settlors).
[9] 12 *Del. C.* § 3546 (emphasis added).

presumption of receipt; if it refers to receipt itself, my decision must turn on a review of the 'evidence to the contrary' of receipt."[10]

2. The Trust

Shirley S. Ravet (the "Settlor") was the mother of Petitioner and of Respondents-below Patty Raphaelson, Lorey Baldwin, and Deborah Hill. The Settlor executed the Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust dated February 9, 2012 (the "Trust").[11] The Northern Trust Company of Delaware ("Northern Trust") and the Settlor initially served as co-trustees of the Trust. Upon the Settlor's resignation as co-trustee on October 12, 2012, Barry C. Fitzpatrick ("Mr. Fitzpatrick," and together with Northern Trust, the "Co-trustees") became a successor co-trustee of the Trust in place of the Settlor and he now serves in that role along with Northern Trust.[12]

3. The trial court found that there was "overwhelming" evidence that notice of the Trust was delivered to Petitioner more than 120 days before July 26, 2012

The trial court heard and credited unrebutted testimony from Delaware attorney Daniel F. Hayward, a director at the Wilmington law firm Gordon, Fournaris & Mammarella, P.A., stating that he, on behalf of Northern Trust and the

[10] June 4, 2014 Ltr. Op. at 3 (this letter opinion was attached to Petitioner's Notice of Appeal and his Opening Brief).
[11] *See* the Trust, filed herewith as B-01-60.
[12] *See* Mr. Fitzpatrick's acceptance to serve as successor trustee, filed herewith as B-134.

Settlor (who was then still a co-trustee), sent the Notice Letter on February 23, 2012 to Petitioner's home address at 1441 Cottontail Lane, La Jolla, California and also to Petitioner's P.O. Box in La Jolla by both first class and certified mail.[13] The Notice Letters that Mr. Hayward sent by first class mail on February 23, 2012 were never returned.[14]

It remains undisputed that the Notice Letter met the Pre-mortem Validation Statute's requirements as it was in writing and notified Petitioner of the Trust's existence, the trustees' names and addresses, that Petitioner was a beneficiary, and of the time allowed in which to initiate a judicial challenge.[15]

Mr. Hayward also testified that the certified mail package first arrived at Petitioner's home on February 27, 2012 and at Petitioner's P.O. Box on February 28, 2012.[16] And Mr. Hayward testified that two notices were left at each of Petitioner's addresses for each certified mailing sent on February 23, 2012.[17] Specifically, on February 27, 2012 and March 3, 2012, the U.S. Postal Service left certified mail notices at Petitioner's home address.[18] On February 28, 2012 and

[13] Trial Tr. at 11. (Citations to "Trial Tr." refer to the transcript of the January 29, 2014 evidentiary hearing, which is included in Appellees' Appendix as B-136-266).
[14] B-147 (Trial Tr. at 12:8-14).
[15] *See* 12 *Del. C.* § 3546(a).
[16] B-148 (Trial Tr. at 13:2-7).
[17] B-147-48 (Trial Tr. at 12-13).
[18] B-148 (Trial Tr. at 13:1-7); B-132 (envelope with USPS markings, which was part of trial exhibit JX-9B).

March 7, 2012, the U.S. Postal Service left certified mail notices at Petitioner's P.O. Box.[19]

Mr. Hayward also elected to use Federal Express to deliver the Notice Letter to Petitioner's home address in La Jolla, and Federal Express provided Mr. Hayward with a written confirmation of a March 27, 2012 delivery to that address.[20]

Petitioner admitted he was home on myriad days after the first class mail was sent on February 23, 2012 and before March 28, 2012.[21] Specifically, Petitioner testified that he was home at his La Jolla, California residence on all of the following relevant dates: February 27, 28, 29 and March 1, 2, 3, 4, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 2012.[22] And he testified that no one lived at that house but him.[23] Petitioner also admitted to checking his P.O. Box at least weekly and that he was the only person that had access to that P.O. Box.[24]

Petitioner nonetheless claimed that he never saw: (1) the unreturned first class mailing sent on February 23, 2012 to his home address (despite admittedly being home on February 27, 28, and 29, and myriad more days in the following

[19] B-148 (Trial Tr. at 13:1-12); B-133 (envelope with USPS markings, which was part of trial exhibit JX-9B).
[20] B-152-53 (Trial Tr. at 17-18).
[21] B-174 (Trial Tr. at 39:1-11).
[22] B-174 (Trial Tr. at 39:1-11).
[23] B-182 (Trial Tr. at 47:3-6).
[24] B-182, 217 (Trial Tr. at 47:7-15 and 82:21-24).

weeks);[25] *or* (2) the unreturned first class mailing sent on February 23, 2012 to his P.O. Box;[26] *or* (3) the four separate certified mail notices left at his home and P.O. Box;[27] *or* (4) the package that Federal Express reported delivered to his home on March 27, 2012.[28]

After weighing all the evidence, the trial court found that,

> the petitioner has argued that there is either an absence of proof of delivery or that he has presented evidence to the contrary because his testimony is that, despite being home at least periodically during the over a month between the mailing on the 23rd of February and the last day under which his action would be tolled, which is the 27th of March, he never received either of the first class letters. He's testified he's the only one who had access to mail at his home. He lived alone. And he testified he's the only one who had access to his post office box. He also testified that he did not receive either of two notices that the postal service left at his home address indicating that he had a certified mail delivery awaiting receipt, nor did he receive either of the two certified mail notices left at his post office box. So the question is, given the fact that there was first class mail that did not come back, sent to the correct address, and that there were more than 30 days for that to have been delivered sufficient to toll this suit, whether I should find that there has been delivery to the last known address under the statute. *It seems clear to me that the evidence is overwhelming here that there was delivery during that time, prior to March 28.*[29]

[25] B-173-75 (Trial Tr. at 38-40).
[26] B-173-75 (Trial Tr. at 38-40).
[27] B-173-75 (Trial Tr. at 38-40).
[28] B-177 (Trial Tr. at 42:5-19).
[29] June 4, 2014 Ltr. Op. at 3 (quoting and repeating verbatim from Trial Tr. at 124-25) (emphasis added). Thus, when Petitioner contends on page 11 of his opening brief that it was somehow "proven" that the mailings were not sent "until at least March 26, 2012," he is blatantly ignoring the trial court's actual findings of fact.

4. The trial court also found that Petitioner's testimony was not credible and, therefore, that Petitioner failed to rebut the presumption of receipt

Next, the trial court considered Petitioner's claims that he never received notice of the Trust until March 29, 2012. In so doing, the trial court examined Petitioner's credibility and found that,

> to believe [Petitioner], I would have to believe that the first class mail to his home went missing; the notice of certified mail to his home went missing; the first class mail sent to his post office box went missing; the notice of certified mail to his post office box went missing; two more notices of certified mail, one to his home and one to the post office box, went missing; all these things went missing. And yet the certified mail obviously went through because we have the returns. So it seems incredible to me that all of these things can have gone missing, at least three of them in a post office box to which no one but the petitioner had access, and that they simply disappeared. More than that, he testified that the Fed Ex, which we know was delivered to his house on the 27th, also went missing. I don't find that to be "evidence to the contrary of delivery," assuming that phrase modifies the delivery requirement, because it's simply not credible evidence. It's absolutely not credible to me. . . . But in any event, I find no credible evidence that the first class mail was not delivered to this residence, to the extent that modifier applied. 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.[30]

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[30] June 4, 2014 Ltr. Op. at 3-4 (quoting Trial Tr. at 126, 128).

The trial court reiterated its finding that Petitioner's testimony lacked credibility when it ruled on Petitioner's post-trial motions. Specifically, it stated that "[t]he substance of the Petitioner's testimony at trial was that he never received three mailings and four notices left at his home. That is the testimony I found not credible and I continue to find it not credible."[31]

The trial court also found that Petitioner may have tried to extend the deadline to the latest arguable date so "as to lessen the possibility that the settlor would be available to disagree with [Petitioner's] interpretation of the facts."[32] As mentioned above, the Petitioner waited until after the Settlor died on November 24, 2012 to seek a summons for his Petition. The trial court concluded that it was therefore *not* the case that "there could be no possible reasons for [Petitioner] to wish to avoid having the notice period apply to him and the statutory period beginning to run."[33]

The trial court concluded its bench ruling by summarizing its factual findings, stating, "I find that there was delivery by March 27th; that there is *no credible* evidence to the contrary; and that there is no credible evidence to the

[31] June 4, 2014 Ltr. Op. 9-10.
[32] B-262 (Trial Tr. at 127:22-24).
[33] B-263 (Trial Tr. at 128:1-4).

contrary that receipt did not occur within the statutory period which would prevent maintenance of this action."[34]

5. The trial court found that Petitioner's post-trial motions only further damaged his credibility

In support of his second post-judgment motion, Petitioner maintained—after the full evidentiary hearing conducted by the trial court in January 2014—that he discovered some "new evidence" warranting relief from the judgment. This "newly discovered" evidence consisted of two first class envelopes, postmarked March 26, 2012, which date falls about a month after February 23, 2012, the first date that the Co-trustees' counsel testified he sent the first set of Notice Letters to Petitioner.[35] Notably, Petitioner located the "newly discovered" March 26, 2012 envelopes in his *own* files.[36]

The trial court found that Petitioner's production of the March 26 envelopes provided an insufficient basis for relief from judgment for at least two reasons. First, the trial court found that, "with any minimal diligence the Petitioner would have discovered the March 26 mailings, which had been in his possession for almost two years prior to the January hearing."[37]

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[34] B-263-64 (Trial Tr. at 128-29) (emphasis added).
[35] June 4, 2014 Ltr. Op. at 11.
[36] June 4, 2014 Ltr. Op. at 11.
[37] *Id*. *See also* Chancery Rule 60(b) (requiring that in order to support relief from judgment the proffered newly discovered evidence must have been undiscoverable in the exercise of reasonable diligence before trial, among other requirements).

And perhaps more importantly, the trial court concluded that the "new" evidence would not have changed the result even if it were considered.[38] In fact, the trial court found that Petitioner's claim that he received that later set of mailings—but supposedly never opened them and forgot about them—only further diminished Petitioner's credibility.[39] The trial court added that "[t]hose mailings indicate that it was the *Petitioner's* testimony at trial—that he never received any mailings providing notice of the Trust—that was false."[40] And, the trial court also found that "the fact that the notice letters were notarized in February [2012] serves only to bolster the Trustee's testimony that notices were in fact first sent in February."[41]

[38] June 4, 2014 Ltr. Op. at 11.
[39] June 4, 2014 Ltr. Op. at 11-12.
[40] June 4, 2014 Ltr. Op. 12. (emphasis added).
[41] June 4, 2014 Ltr. Op. at 13, n.21.

ARGUMENT

I. The trial court did not abuse its discretion when it found that notice of the Trust was delivered more than 120 days before Petitioner first tried to file his Petition. And as the trial court found that Petitioner did not offer any credible evidence rebutting the Pre-mortem Validation Statute's presumption that delivery to the last known address equates to receipt, the trial court correctly dismissed the Petition as time-barred.

A. Question Presented

Was the trial court correct to find that Petitioner's Petition was time-barred by the Pre-mortem Validation Statute?

B. Scope of Review

Following an evidentiary hearing, the trial court made factual findings that notice of the Trust was delivered to Petitioner's address well before March 28, 2012 (the date 120 days before the trial court deemed the Petition filed nunc pro tunc). The trial court also found that the Petitioner's testimony denying receipt until March 29, 2012 was not credible. This Court reviews "questions of fact for abuse of discretion, and accept[s] a trial judge's findings unless they are clearly wrong."[42] A trial court has broad discretion in evaluating testimony, weighing credibility, and drawing appropriate inferences because it sits as a trier of fact.[43]

The only legal issue presented is whether 12 *Del. C.* § 3546 is to be read to instruct that the presentation of any evidence at all—even evidence that is not

[42] *Reserves Development, LLC v. Crystal Properties, LLC*, 986 A.2d 362, 367 (Del. 2009).
[43] *See Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002).

credible—is sufficient to rebut that statute's presumption of receipt. This Court will review de novo questions of law decided by the trial court.[44]

C. Merits of the Argument

(i) The trial court did not abuse its discretion when it found that the evidence was overwhelming that delivery occurred and that the evidence that Petitioner offered in an attempt to deny receipt before March 28, 2012 was not credible

At the January 2014 evidentiary hearing, as detailed above,[45] the trial court heard evidence showing myriad deliveries to Petitioner's home and P.O. Box addresses before March 28, 2012. In response, and as mentioned above, Petitioner claimed that he *never* saw: (1) the unreturned first class mailing sent on February 23, 2012 to his home address (despite admittedly being home on February 27, 28, and 29, and several more days in the following weeks);[46] *or* (2) the unreturned first class mailing sent on February 23, 2012 to his P.O. Box;[47] *or* (3) the four separate certified mail notices left at his home and P.O. Box;[48] *or* (4) the package that Federal Express reported delivered to his home on March 27, 2012.[49] But, as the trial court recognized, it is simply not plausible that Petitioner never received any

[44] *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 936 (Del. 1982).
[45] *See*, *supra*, Section 3 of Statement of Facts.
[46] B-173-75 (Trial Tr. at 38-40). But as explained by Mr. Hayward during his testimony, we know from the U.S. Postal Service's notations that the certified mailings, which were mailed contemporaneously with the unreturned first class mailings, first arrived at Petitioner's home February 27, 2012 and at his P.O. Box on February 28, 2012. B-148 (Trial Tr. at 13).
[47] B-173-75 (Trial Tr. at 38-40).
[48] B-173-75 (Trial Tr. at 38-40).
[49] B-177 (Trial Tr. at 42).

of those deliveries. Specifically, the trial court found that "[i]t just seems absolutely unbelievable to me that seven separate mailings can have gone awry: four notices, two first class mailings, and a Fed Ex; that all of those simply disappeared based simply on the interested testimony of the petitioner here."[50]

The trial court also stated that "[e]ven if a showing of clear and convincing evidence is required by the statute, . . ., my finding that it was 'extremely likely' that delivery was made satisfies such a standard,"[51] and that "there is no evidence, credible evidence, to the contrary with respect to actual receipt because, as I've said, the scenario that has been testified here today by the petitioner is simply not believable by me. It is simply not credible. One mailing can go awry. One notice can go awry. Three mailings and four notices simply don't disappear. I don't believe it. I don't think there is any credible testimony to it."[52] Further, when later dealing with Petitioner's post-judgment motions, the trial court reasonably found "that the facts that the Petitioner actually received the [March 26] mailings and *never opened them*, but instead filed them away with other trust-related documents, and that he claims to have had no memory of those mailings until their re-

[50] B-262 (Trial Tr. 127:3-7).
[51] June 4, 2014 Ltr. Op. at 9, n.16.
[52] B-263 (Trial Tr. 128:14-22).

discovery nearly two years after receipt, serve to further discredit the Petitioner's testimony that he never received any February 23, 2012 mailings."[53]

As the just-quoted rulings show, the trial court detailed why it found the Petitioner's testimony not credible. Thus, Petitioner's contention that the trial court never explained why it found the Petitioner not credible lacks merit.

Petitioner also contends that there is some significance in the fact that the Co-trustees also utilized a process server to hand-deliver the Notice Letter. But, as Mr. Hayward testified, that was done in the unlikely event that the Co-trustees had incorrect addresses for Petitioner.[54] At trial, however, it was confirmed that the addresses to which the Notice Letter was delivered before March 28, 2012 were indeed Petitioner's correct addresses, including the home address at which Petitioner spent most of his time during late February and March 2012.[55] As the Co-trustees had the correct addresses, the trial court was reasonable to conclude that the additional personal service—done out of an abundance of caution—had no import.

Further, on page 15 of his brief, Petitioner seemingly suggests that the "Co-trustees" were not relying on the first class mailings in the trial court. But that, of course, is wholly inaccurate. First, the quotation used on that page was from the

[53] June 4, 2012 Ltr. Op. at 12 (emphasis in original).
[54] B-151-52 (Trial Tr. at 16-17).
[55] B-174, B-181-82 (Trial Tr. at 39, 46-47).

May 21, 2013 oral argument on the motion to dismiss, not the later January 29, 2014 evidentiary hearing. (It is telling that Petitioner does not cite once to the transcript of the controlling evidentiary hearing in his entire brief.) Further, the cited statement came from the Co-Trustees' counsel at argument, and was not "testimony" of the Co-Trustees themselves as Petitioner incorrectly asserts in his brief. More importantly, while the Co-trustees were not expressly relying on the first class mailing *for the purposes of their motion to dismiss*, the Co-trustees made abundantly clear on the record that once discovery was expanded for the summary judgment motion, they would indeed rely on the first class mailings to show notice on the Petitioner.[56] And, the Petitioner's counsel acknowledged at the January 29, 2014 evidentiary hearing that he had fair notice from the briefing and otherwise that the Co-trustees would rely on the first class mailings at the January 29, 2014 evidentiary hearing to show notice.[57]

In sum, as the unreturned Notice Letters almost certainly arrived at Petitioner's home address *and* at his P.O. Box on or about February 27, 2012 (and if not on that date, surely no more than a day or two later), the trial court did not abuse its discretion in concluding that Petitioner had notice of the trust under the

[56] B-135 (W. Kelleher's May 30, 2013 Ltr. to the trial court) (stating "[t]he Co-trustees also wish to make clear that as the record on the notice issue will now be expanded they may also rely on the several unreturned first class mailings sent to the Petitioner's addresses . . . .").
[57] B-241-47 (Trial Tr. 106-112).

Pre-mortem Validation Statute well more than 120 days before he filed his Petition.

(ii) For a recipient to rebut the presumption of receipt found at 12 Del. C. § 3546, he must, at a minimum, present some credible evidence of non-receipt

The trial court found, after considering all the evidence, that the Co-trustees delivered the Notice Letter to both Petitioner's home address and his P.O. Box well before 120 days prior to his first attempt to file his Petition. Thus, the burden shifted to Petitioner to somehow rebut the presumption that he received notice of the Trust more than one and hundred and twenty (120) days prior to filing his Petition.[58] The trial court correctly determined that Petitioner failed to meet his burden.

Petitioner now argues to this Court that the trial court erred by shifting the burden to Petitioner after it found that several deliveries had occurred well before March 28, 2012. Petitioner had taken a markedly different position regarding the

[58] 12 *Del. C.* § 3546 (a)(1). Moreover, the trial court rightly found that the Pre-mortem Validation Statute is a statute of repose, meaning its deadline is hard and fast. B-262 (Trial Tr. at 127). In fact, even Petitioner's counsel agreed below that the General Assembly intended a statute of repose. B-241 (Trial Tr. at 106). The Pre-Mortem Validation Statute's 120-day period to file after receiving notice is similar to the requirement in 12 Del. C. § 1309 ("Will Contest Statute") that will contests be filed within "6 months after the entry of the order of probate." 12 Del. C. § 1309(a). And regarding will contests, "Delaware courts strictly construe the requirement that a petition for review of a will be filed in a timely manner under Section 1309(a), because it reflects a special public policy in favor of prompt settlement of decedents' estates." *In re Estate of Turner*, 2004 WL 74473, at *6 (Del. Ch. Jan. 9, 2004). *See also Disabatino v. Diferdinando*, 2001 WL 812014, at *2 (Del. Ch. July 9, 2001) (holding that Section 1309's six-month statute of limitations also applies to trusts that are incorporated by reference into a will). The Pre-mortem Validation statute similarly reflects a special public policy in favor of prompt settlement of trust contests before the settlor dies, an undeniable benefit to all involved.

statute's operation at the May 2013 oral argument. At that argument, Petitioner's counsel conceded that the burden shifts to Petitioner upon delivery of the notice, arguing only about the extent of the burden.[59] In contrast, Petitioner's more recent interpretation would render the statute's burden shifting provision without meaning. The trial court was correct to reject Petitioner's self-serving and illogical reading.

The trial court found that the Co-trustees delivered the Notice Letter by first class mail on or about February 27, 2012 to both Petitioner's home and to Petitioner's P.O. Box and, later, by Federal Express on March 27, 2012 to Petitioner's home.[60] Petitioner could have tried to show that those addresses were wrong, or perhaps—depending on how the statute is read—to show that he did not receive the notice despite the presumption. Either way, the trial court was correct to shift the burden to Petitioner.

Under D.R.E. 301, the burden shifts to the party against whom the presumption is directed. The trial court found that the Co-trustees delivered the Notice Letter to Petitioner's residence and to his P.O. Box by first class mail well before March 27, 2012,[61] and again to his residence on March 27, 2012 by Federal

[59] A-43-44 (May 21, 2013 Oral Argument Tr. at 21-22) (Petitioner's counsel arguing that the standard of evidence required to rebut the presumption is a "preponderance" standard).
[60] B-259-63 (Trial Tr. at 124-28).
[61] B-259 (Trial Tr. at 124:6-18).

Express.[62] Consequently, the trial court properly shifted the burden to the Petitioner. And as section 3546 doesn't set a standard of proof to rebut the presumption of receipt, the default standard under D.R.E 301 should apply.[63] D.R.E. 301 requires that the party against whom the presumption is directed prove that the nonexistence of the presumed fact is more probable than its existence.[64] Stated differently, D.R.E. 301 dictates that the trial court apply a preponderance of the evidence standard to determine whether Petitioner has met his burden. The trial court found that Petitioner fell well short of meeting that burden. In fact, the trial court didn't have to expressly rely on D.R.E. 301 as it found that Petitioner presented no credible evidence whatsoever.

Even a case cited by the Petitioner implicitly demonstrates why Petitioner's argument is wrong. In his appeal brief, Petitioner notes that packages correctly addressed, stamped, and mailed are presumed received by the addressee.[65] Specifically, he cites to *State ex. rel. Hall v. Camper* for its statement, "[t]his presumption is rebuttable and may be overcome by evidence that the notice was in

[62] B-259 (Trial Tr. at 124:1-2).
[63] D.R.E. 301(a) states, "[i]n all civil actions and proceedings not otherwise provided for by statute or by these Rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."
[64] *Oberly v. Howard Hughes Medical Inst.*, 472 A.2d 366, 388 (Del. Ch. 1984) ("[D.R.E. 301] is unlike its counterpart in the Federal Rules of Evidence in that it accords substantially more weight to a presumption than does the Federal rule.") (distinguished on other grounds by *Staats by Staats v. Lawrence*, 576 A.2d 663, 667 (Del. Super. 1990)). *See also* Comment to D.R.E. 301 (stating, "[t]he Committee rejected F.R.E. 301. . . . The Federal Rule as adopted by Congress embraces the 'bursting bubble' rule.").
[65] Petitioner's Opening Br. at 16.

fact never received."[66] But of course such rebutting evidence would have to be, at a minimum, credible. Allowing the rebuttal of presumptions via non-credible evidence, as Petitioner now advocates, would destroy the purpose of the presumption.[67]

Importantly, the trial court addressed the parties' interpretations of the statutory presumption in the alternative. The trial court correctly found that no matter what standard applied, "evidence must be credible, and that such evidence is lacking here."[68]

(iii) The General Assembly could have required personal service if it truly wanted to do so

The General Assembly knows how to require notice by personal service when it truly wants to do so.[69] And, in numerous other statutes, the General Assembly has expressly required notice by certified mail.[70] But with the Pre-mortem Validation Statute, it did not require either. The operative language of the

[66] 347 A.2d 137, 139 (Del. Super. 1975)
[67] In fact, at the oral argument on the motion to dismiss, Petitioner's counsel more than acknowledged that non-credible evidence wouldn't rebut the presumption found in the Pre-Mortem Validation Statute. He said, "by simply stating 'absent evidence to the contrary', they [the General Assembly] are looking for some evidence that the court can say more likely than not. That's a preponderance standard."A-43 (May 21, 2013 Motion to Dismiss Tr. at 21).
[68] June 4, 2014 Ltr. Op. at 7.
[69] *See, e.g.,* 19 Del. C. § 2393 (allowing only personal delivery or certified mail to give notice to insurance carrier).
[70] *See, e.g.*, 29 Del. C. § 5258 (disability insurance program); 25 Del. C. § 3907 (priority of lien); 21 Del. C. § 8411 (mediation for recreational vehicle dispute); 21 Del. C. § 6902 (notification to owner of removal of vehicle); Rules of the Board of Bar Examiners, Rule 35 (notice of hearing).

Pre-mortem Validation Statute doesn't mention personal service or certified delivery anywhere.

Petitioner continues to maintain that mere denial of receipt by the intended recipient is all that is needed to defeat the notice. However, as the trial court determined at the evidentiary hearing, it is extremely easy for a recipient to claim that he never saw a first class mailing or a Federal Express package or to avoid picking it up from his driveway or retrieving it from inside his mailbox.[71] If the trial court had accepted Petitioner's arguments, it would have effectively rewritten the statute to require personal hand-delivery (perhaps even video-taped) as that would then be the only way to prevent an uncorroborated denial of receipt from defeating the notice. But if the General Assembly had intended for that to be the case, it would have required personal service when it drafted the statute. And, as "[i]t is well established that 'a court may not engraft upon a statute language which has clearly been excluded therefrom,'"[72] the trial court was correct to interpret the statute as it did and to reject Petitioner's argument. By crafting a statute of repose, the General Assembly sought to avoid the exact kind of uncertainty that Petitioner is trying to read into the statute.

[71] B-239-40 (Trial Tr. at 104-05).
[72] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (quoting *In Re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993)).

CONCLUSION

The trial court found that the Petitioner didn't offer any credible evidence to rebut the statutory presumption of delivery. And as a matter of law, the trial court found that any rebutting evidence, to be effective, must at a minimum be credible.[73] That legal ruling is perhaps self-evident because if non-credible evidence were sufficient to rebut the presumption the Pre-mortem Validation Statute would be gutted and rendered meaningless.

For those reasons and the other reasons described above, this Court should affirm the Court of Chancery's decision to dismiss the Petition.

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Wilmington, DE

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[73] June 4, 2014 Ltr. Op. 7.