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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESSE FREDERICK-CONAWAY, Appellant v. KEVIN M. BAIRD, COURT-APPOINTED EXECUTOR OF THE ESTATE OF EVERETT T. CONAWAY AND COURT-APPOINTED TRUSTEE OF THE EVERETT T. CONAWAY REVOCABLE TRUST, Appellee And JANICE M. RUSSELL-CONAWAY, Appellee	:	NO. 359, 2016 ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 8379-VCG

APPELLANT'S AMENDED OPENING BRIEF

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Dated: September 19, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS, CONT'.D

PAGE

TABLE OF CITATIONS

PAGE

CASES:

TABLE OF CITATIONS, CONT'D.

PAGE

STATUTES:

OTHER AUTHORITIES:

NATURE OF PROCEEDINGS

The questions before the Court arise from the interpretation and administration of the Last Will and Testament and the Amended and Restated Revocable Trust Agreement of Everett T. Conaway. The Supreme Court previously ruled on an aspect of his estate wherein it affirmed a decision of the Court of Chancery regarding the terms of a Limited Partnership Agreement and the effects of his attempts to bequeath a limited partnership interest contrary to the Agreement.

Subsequent to that decision, differing opinions among the then estate attorney, and the wife and son of Everett, and their respective counsel arose regarding the administration of his probate estate and separate non-probate trust. The estate counsel filed for the appointment of an independent successor estate administrator and successor trustee. Kevin M. Baird, Esq. was appointed for those purposes. Mr. Baird filed a Petition for Instructions. After evidentiary submissions and three hearings before the Court of Chancery where the issues were argued, bench rulings were made and the Court granted a Rule 54(b) Order on July 14, 2016. Jesse Frederick-Conaway, son of Everett T. Conaway, appealed the Order to this Honorable Court. Janice Russell-Conaway filed a cross-appeal. This is Appellant Jesse Frederick-Conaway's Opening Brief.

SUMMARY OF ARGUMENT

I. The Court of Chancery relied on the doctrine of incorporation by reference espoused In the Matter of Estate of Rocco Arcaro, 1977 WL 9539 (Del. Ch., October 12, 1977) to find the Last Will and Testament and Revocable Trust of Everett T. Conaway were unified for purposes of estate administration. In so doing the Court ignored revisions to 12 Del.C., §211 enacted since that decision and modern commentaries regarding the independent administration of a probate estate versus a non-probate estate. The result was the diversion of probate assets to a trust beneficiary, Janice Conaway, and use of non-probate assets to pay debts of the probate estate to the detriment of other trust beneficiaries. Janice Conaway should be required to return to the trust the probate assets she received, with legal interest.

II. The limited partnership interest in EJKC, LP owned by the Everett Conaway trust was improperly found to be available to pay trust beneficiaries and costs. This was an improper amendment to the law of the case and should be reversed. Under the law of the case, previously interpreting the rights of the parties to the limited partnership agreement, Jesse Conaway is the sole owner of the limited partnership interest that had been titled in Everett Conaway's trust and said limited partnership interest is not an asset from which bequests and costs can be paid.

STATEMENT OF FACTS

Everett T. Conaway (hereafter "Everett")[1] died testate on May 11, 2010 (A001). His Last Will and Testament ("LWT") dated September 21, 2009 (A002) was filed with the Sussex County Register of Wills and Letters Testamentary were granted to his third wife, Janice M. Russell Conaway ("Janice"), and Jesse Frederick-Conaway, his but not Janice's son ("Jesse"), as co-executors on May 26, 2010. On or about November 16, 2011, estate counsel jointly representing Janice and Jesse, Stephen P. Ellis ("Mr. Ellis"), filed the Inventory with the Register of Wills (A007). The First Account was filed on January 12, 2010 (A014). The estate administration filings have been in abeyance pending the outcome of this litigation.

Everett also executed an Amended and Restated Revocable Trust Agreement on September 21, 2009 ("Everett Trust") (A018). This amended and restated a revocable trust Everett initially executed on September 3, 1993. During his lifetime, Everett conveyed or assigned assets to his trust, but retained individual ownership, or joint ownership, of other assets. The Everett Trust sets forth gifts to be made from the trust assets after Everett's death.

Everett's LWT was a pour-over will that provided for certain payments and bequests with the residual directed to the Everett Trust. The LWT directed his co-

[1] Due to the similarity of the last names of Everett T. Conaway, Jesse Frederick-Conaway and Janice Russell-Conaway, first names shall be used to identify them. This is done for clarity of the respective parties and not out of disrespect to them.

executors to pay the expenses of his last illness, funeral and burial and provided for gifting under 12 Del.C., §212, though no written list was filed. It directed the residue of his probate estate to be "held, administered and distributed" in accordance with his trust (A002). The co-executors were specifically vested with the power to compromise or arbitrate any claims against the estate and to use estate funds to pay such claims (A004). The executor and trustee powers under the respective documents were identical with no provision for payment of debts and claims.

Previously, Janice and Jesse disputed the administrative treatment of a certain trust asset, to wit, the limited partnership interest ("LPI") of a Delaware limited partnership known as EJKC, LP ("EJKC"). [2] The issue was whether Everett could gift to Janice via the Everett Trust the trust's LPI in EJKC or whether he was precluded from doing so by the terms of the EJKC Limited Partnership Agreement ("LPA"). The Chancery Court ruled Everett was precluded from doing so. In re Estate of Everett T. Conaway, C.A. No. 6056-VCG, (Del. Ch., Letter Op. February 15, 2012), Brief Exhibit A.[3] Therein, the Vice Chancellor found Everett and Jesse had formed EJKC on August 9, 2002 and contemporaneously incorporated CONFAM, Inc. ("CONFAM"), a Delaware general corporation, to act as general

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[2] EJKC, LP was an acronym for Everett, Jesse, Kieran Conaway. Kieran is Jesse's son.

[3] Opening Brief Exhibit, hereafter OBE.

partner of EJKC. CONFAM was owned equally by the Everett Trust and the Jesse Frederick-Conaway Revocable Trust ("Jesse Trust"). CONFAM was a 1% owner of EJKC; the Everett Trust owned 89% of the LPI; and the Jesse Trust owned 10% of the LPI. The limited partnership was funded with 79,533 shares of stock of Fulton Financial Corporation ("Fulton"). When Everett died, the Everett Trust owned a 69% LPI and the Jesse Trust owned a 30% LPI due to *inter vivos* gifting. OBE A, pp. 2-3. In addition to the interest in EJKC, the Everett Trust owned 32,486 shares of Fulton stock. The Everett Trust gifted 1,000 shares of Fulton each to seven relatives, 200 shares to the Seaford Historical Society and 33,000 shares to Janice. In addition, the trust provided:

> D. Trustor's Morgan Stanley Active Assets Account 777 034773 029, (100) shares of Conaway Development Industries, Inc. stock, or in the event that said stock is sold during Trustor's lifetime, the proceeds of the sale of said stock including, without limitation, any note or other instrument of indebtedness representing a deferred purchase price, and the Trustor's partnership interest in EJKC Partnership, L.P. shall be distributed to Trustor's wife, JANICE M. RUSSELL-CONAWAY... (A021).
>
> The rest and residue of the trust assets were gifted to Jesse.

Jesse disputed the gift of the LPA to Janice as being in violation of the LPA which contained the following:

> II. Assignability of Partner's Interest. Any Partner may transfer or assign his or her partnership interest in the Partnership to another Partner or Partners. Except as set forth herein, the General Partner shall not sell, transfer or assign any part or all of the General Partner's interest in the Partnership without the written consent of the Limited

> Partner and the Limited Partner shall not sell, transfer or assign all or part of the Limited Partner's interest in the Partnership or substitute an assignee as Limited Partner without the written consent of the General Partner and non-transferring Limited Partner. (A039-040.)

Based on his analysis of the LPA language, the Vice Chancellor ruled: (1) Jesse was 100% owner of CONFAM; and (2) the attempted gift to Janice was void and that Jesse was the sole owner of all partnership interest in EJKC.

The Chancery Court ruled that the transfer restrictions invalidated Everett's attempt to transfer the EJKC interest to Janice, accepting Jesse's position that under the LPA, Jesse was the sole owner of EJKC.

Janice filed for reargument which the Court rejected holding:

> For the reasons stated in my Letter Opinion of February 15, 2012, I found that the ownership interest in EJKC...held by the Everett...Trust (the "ETC Trust") passed to Jesse..., or to [his] Trust, upon the death of Everett...Janice is not the equitable owner of the Partnership interest, or 50% of the Partnership Interest. Ownership of that interest is determined not by equity, but as a matter of contract law. (Emphasis added.)

In re Estate of Everett T. Conaway, C.A. No. 6056 (Del. Ch., Letter Op. March 13, 2012) (OBE B, pp. 1-2.)

The rulings were appealed to this Honorable Court resulting in an Order dated September 28, 2012 affirming the Chancery decisions. (OBE C.)

Based upon the affirmed Chancery rulings, Jesse believed he was the sole owner of both EJKC and CONFAM. On October 25, 2012, he instructed his stockbroker to transfer all assets in the EJKC account to his own personal account

intending to dissolve EJKC. However, Mr. Ellis, by letter dated October 23, 2012, interpreted the decision to be the 69% LPI titled in the Everett Trust passed to Jesse solely as a residual beneficiary "...subject to payment of Everett's debts and administrative expenses" (A046). Janice agreed with Mr. Ellis. Jesse, through litigation counsel, by letter dated November 14, 2012, strongly disagreed with that analysis stating, "A large part of our position is that we do not think we have a full understanding of the trust administration to date." Mr. Ellis was thereafter discharged as estate counsel by Jesse. (A047).

The confusion in the administration of the probate estate and its relation to the non-probate trust began almost immediately after Everett's death. Jesse emailed Mr. Ellis on June 16, 2010 pointing out he had again been contacted by a representative of Delaware National Bank ("DNB") seeking payment on an unsecured line of credit obtained by Everett (A049). This was triggered by Janice's position that after July, 2010, DNB could no longer withdraw interest on the line from the account Janice and Everett had jointly maintained at DNB. Jesse specifically asked Mr. Ellis, "How should I proceed?" (A049.)

The basis for the demand by DNB was an unsecured line of credit of $260,000.00 obtained by Everett on April 22, 2008 and signed solely by him (A050). The Credit Agreement specifically states, "This Credit Line Account is unsecured." It reserved to DNB a right of setoff against all of Everett's DNB accounts, exclusive

of IRA or Keogh accounts or "...any trust account for which setoff would be prohibited by law" (A051). An event of default under the Credit Agreement was Everett's death and in the event of default after demand, DNB had the right to call the loan (A051). No assets were pledged; $63,672.33 was deposited to a checking account and $196,302.67 paid to DNB, subject to a $25.00 finance charge (A054). Everett declined credit life insurance (A054). This was solely Everett's debt.

As a result of the bank's demand, the co-executors, under the guidance of Mr. Ellis, liquidated stock in Fulton, then the parent corporation of DNB (A056). At his death, Everett was the individual owner of 3,592 shares of Fulton. Everett's Trust owned 32,486 shares of Fulton. Jesse further inquired of Mr. Ellis how to proceed on addressing Everett's debts (A057) and arranged a meeting between Mr. Ellis and the stockbrokers in Mr. Ellis' office on June 10, 2010 (A058). At all times Jesse was seeking guidance from Mr. Ellis on how to address Everett's debts. This was all being done before all estate assets were marshaled or the expiration of the creditor's claim period. The payment to DNB was arranged without a formal claim on the estate. On July 9, 2010, the 32,486 trust-owned shares of Fulton stock were sold for $10.1184 per share for a total of $326,420.76. After payment to DNB, a net $52,536.91 was deposited into the *estate* account (A060). There was no note or other writing offered into evidence acknowledging a loan from the Everett Trust to the probate estate to pay Everett's personal debt.

Certain probate estate assets not identified on the Inventory, and which are a key part of the current controversy, were payments due to Everett from the sale of stock in a corporation named Conaway Development Industries, Inc. ("CDI"). In the Everett Trust, Everett directed that "...one hundred (100) shares of Conaway Development Industries, Inc. stock, or in the event that said stock is sold during [my] lifetime, the proceeds of the sale of said stock, including without limitation, any note or other instrument of indebtedness, representing a deferred purchase price" was to be distributed to Janice (A021). There is no evidence of record that Everett assigned the CDI stock to his trust. On December 22, 2009, Everett entered into a Stock Purchase Agreement ("SPA") selling his 100 shares of CDI to Harry Cook, LLC, a Pennsylvania limited liability company("Cook") (A062). Everett was named as one of the Sellers, individually, and not as trustee of his trust. The SPA specifically states, "Conaway owns one hundred (100) shares..." and that he desired to sell his shares (A062). Further, Paragraph 2.2(1) of the SPA states:

> (1) Conaway: Purchaser shall pay Conaway the following:
>
> (a) Seventy Five Thousand Dollars ($75,000.00)...at Closing;
> (b) Seventy Five Thousand Dollars ($75,000.00)...on the first (1st) anniversary of the Closing Date;
> (c) Seventy Five Thousand Dollars ($75,000.00)...on the second (2nd) anniversary of the Closing Date; and
> (d) Ten Percent (10%) of the amount distributed to the Purchaser on account of its ownership of Corporation, or on account of the sale of its Common Stock, up to a maximum of...$775,000.00. (A066)(emphasis added).)

Everett executed the SPA in his individual name. It is undisputed he did not assign his personal right to be paid to his Revocable Trust. The SPA granted to Everett a security interest in the stock shares until paid in full (Paragraph 2.2(3)). In the Seller Representations and Warranties, Article 5. 5.1(1), Everett represented that he was the "legal, beneficial and record owner of the Shares" (A071). It was agreed the stock certificates would be held by Seller's attorney (in Everett's case, Mr. Ellis) until the full purchase price was paid (A079). The parties also agreed:

> 9.10 Successors and Assigns. This Agreement shall enure to the benefit of, and be binding on, the Parties and their respective successors (including successors by merger), heirs, beneficiaries, donees, legatees and permitted assigns. Neither party may assign or transfer, whether absolutely, by way of security or otherwise, all or any part of its respective rights or obligations under this Agreement without the prior written consent of the other party. (A081.)

No written consent by the purchasers to assign Everett's rights is of record.

Despite the SPA directing payment to Everett individually and no assignment, Mr. Ellis directed Cook to make the 2010 payment due to Everett directly to Janice, in his care (A086). It was confirmed with Cook that he also was directed by Mr. Ellis to make the 2011 payment in the same fashion (A087). It is undisputed that Janice received both payments, for a total of $150,000.00. These personal payments were not reported as probate assets on the Inventory filed with the Register of Wills (A007). Had they been, the total probate assets would have been $250,696.79. As it was, the Inventory reported probate assets totaling $100,696.79 and jointly owned

property valued at $405,222.25 (A013). The debt to DNB in the amount of $261,396.17 was reported on the First Account (A015). The total estate indebtedness plus administrative costs was $290,866.16 with a reported overpayment of $190,169.77 (A015). If the $150,000.00 was added as a probate asset, the overpayment would have been $40,169.37. Instead, to pay the unsecured claim of DNB under Mr. Ellis' guidance, the shares of Fulton titled in the name of Everett's Trust were sold. After payment to DNB, payment of the funeral bill and reimbursements to Janice, $52,536.91 was deposited into an estate account and $15,845.99 was held in a brokerage account. Mr. Ellis reported on October 31, 2011:

> There should be more than sufficient cash assets in the estate account to pay any potential claims. It would be my suggestion that the tangible personal property set forth in the bills of sale prepared by Rob and delivered to Jesse on May 13th be signed and returned and the note related to the purchase of the decedent's interest in Conaway Development Industries, Inc. (a $75,000.00 principal payment is due in December of this year) and the Morgan Stanley Smith Barney active assets account (a date of death balance of $39,902.31) be distributed to Janice. (A060.)

He reiterated there were sufficient estate assets to pay all claims on May 7, 2012 as follows: "As I have stated, the estate/trust retains sufficient assets to pay any claims, including disputed claims" (A088).

Mr. Ellis wore many hats vis-à-vis Everett, Janice and Jesse both during Everett's lifetime and after his death. He prepared Everett's Will and Amended Trust. He formed EJKC and incorporated CONFAM. The LPA was prepared by

him and he was the initial estate counsel. Mr. Ellis also represented Jesse in his personal estate planning. He was the escrow agent for the CDI stock after it was sold, and after Jesse discharged him as his estate counsel, he continued to represent Janice. This led to conflicts on how the probate estate versus non-probate trust assets were addressed in this matter.

On October 25, 2010, Jesse told Mr. Ellis that on advice of litigation counsel no more funds should be paid to Janice from the estate or trust pending expiration of the claim period (A089). But, the personal payment to Everett from Cook was directed to Janice in both December, 2010 and December, 2011. In addition, and after the claim period expired but while litigation was pending, on August 4, 2011 Mr. Ellis asked Jesse to approve payment to Janice of $20,000.00 (A090). Jesse's litigation counsel responded on August 10, 2011, "Due to the nature of this litigation, Jesse is not willing to agree to any further distributions of assets until the Court of Chancery has ruled" (A 091). It was further stated to Mr. Ellis:

> [Jesse] is not even sure exactly how much cash is or will be left in the estate, how the other beneficiaries will be dealt with in any proportionate distributions, and he does not know how his claim will be responded to. Therefore, he does not agree to this or any further distributions of assets until after the litigation is complete and all assets, liabilities and claims may be properly addressed. (A091.)

Mr. Ellis restated his position on estate administration on October 27, 2011:

> My suggestion regarding the administration of the estate is set forth in my May 13, 2011 letter addressed to your client, Mrs. Conway, you and Mr. Gibbs. You have stated to me that your client opposes any

> distribution from the trust until resolution of the litigation related to the limited partnership interest. Mr. Gibbs has stated that his client contends that the trust assets, excluding the limited partnership interest, should be distributed to her.... I am not in a position to resolve the dispute. However, my suggestion as to the administration of the estate has not changed. (A093.)

He followed this with his email dated October 31, 2011 stating there were sufficient assets to pay any claims (A060).

Mr. Ellis' letter of May 13, 2011 states his roadmap toward resolution of the estate administration (A094). This was before the finality of the original litigation and at a time he was representing there were sufficient estate assets to settle claims. Despite this, Janice unilaterally, with the acquiescence of Mr. Ellis, continued to withdraw funds from the estate account until it was virtually depleted. See Jesse emails dated October 8, 2012, October 22, 2012 and March 26, 2013 (A097-099).

The way in which the estate and trust administration was being addressed reached the critical stage after the court decisions on the prior litigation when Mr. Ellis took the position the EJKC LPI in Everett's Trust had to be used to fund the specific bequests in Everett's Trust. Jesse objected to use of the trust residual on the basis of the court rulings and the failure to include the CDI payments as an estate asset to be used to pay estate debt rather than depletion of the Fulton stock titled in the name of the Everett Trust which would have virtually satisfied the specific bequests. Ultimately, Mr. Baird was appointed successor executor and successor

trustee with removal of Janice and Jesse. He was ordered to take all action necessary including filing a Petition for Instructions on the distribution of assets (A100).

Mr. Baird filed the Petition for Instructions on January 20, 2015 (A101). He summarized the matter as follows:

a. Was the sale of Fulton Financial stock from the trust to pay the debts of the estate a proper action by the trustees?
b. Was the payment of $150,000 of proceeds from the sale of the decedent's company directly to Janice Conaway proper, or should the payments have been made to the estate and used to pay estate debts?
c. Was Jesse's removal and liquidation of the trust's interests in EKJC Limited Partnership and Confam, Inc. proper or should those assets be available to satisfy bequests?
d. Were $77,986.82 in payments from the estate account to, or for the benefit of, Janice proper? (A102-103.)

He gave no opinion regarding the sale of the trust assets to pay estate debt. However, he did state the $150,000 was an estate asset and should have been available to pay estate debts (A110). He opined the 69% LPI titled in the name of the Everett Trust should be returned to the trust (A111). And, Mr. Baird stated the $77,986.82 in estate assets removed by Janice was improper (A114).

The parties through counsel responded to the Petition for Instructions. The exhibits attached to this Opening Brief were presented to the Court.

Jesse answered the four (4) legal issues as follows:

> 5. (a) The sale of the Fulton stock from the Trust to pay the estate debt was done on the advice of the estate counsel. The sale should not have occurred until or unless it was determined there were sufficient assets in the estate to pay the debts. If there was a deficiency,

then payments should have been paid based on the priority set forth in 12 Del.C., §2105.

(b) The $150,000 paid to Janice was improper. This was an estate asset that should have been used to pay estate debt.

(c) The Court held all interest in EJKC, LP vested in Jesse at Everett's death and is not an asset of the estate or trust available to pay debts or to satisfy bequests. Note, EJKC is an acronym for Everett, Jesse and Kieran Conaway, evidencing the family heir structure as the genesis of the Limited Partnership.

(d) Payments to Janice from estate assets prior to payment of estate debts and other bequests were improper. (A123-124.)

Janice took an opposing view. In summary, she responded the sale of trust-owned stock to pay probate debts was proper; the payment of $150,000.00 from Cook to Janice was authorized by the trust language; Jesse improperly retitled the limited partnership assets to his own name; and Janice was entitled to a portion but not all of the probate funds she withdrew (A140).

After the answers were filed, the Chancery Court held three (3) non-evidentiary hearings and invited submissions from counsel of their positions on the ultimate Order. At the April 20, 2015 hearing, Stephen Smith, Esq., on behalf of Mr. Baird, sought guidance from the Court on how to address the issues in the (OBE D, p. 4). The Court initially considered mediation, but after being advised of the futility of that, the Court determined it needed to address the issues. (OBE D, p. 25.) It was conceded by Janice's counsel that she had received probate funds. Mr. Baird sought to have those funds credited to any disbursement due to Janice. It was ultimately agreed the two primary issues were: First, whether the LWT and Everett's

Trust should be considered separately or unified for purposes of administration. That is, should all probate assets have been marshalled, all estate debts paid from those assets according to Delaware Code Title 12 with any residual paid to Everett's Trust, or contrary to existing law and practice, should the LWT and Trust be administered as one procedure with non-probate trust assets subject to use for probate estate debts? Second, was Jesse acting properly when he retitled the assets owned by the limited partnership into his own name?

On April 20, 2015, the issue of Jesse's retitling of the EJKC assets was discussed. The Court was told that the stock account was merely retitled at Morgan Stanley to Jesse based upon the prior court rulings. (OBE D, p. 14.) In supplement to that report, Jesse through counsel submitted to the Court statements of the account (A160). Jesse had permitted EJKC to lapse on the belief it was solely his. It was reported to the Court on March 14, 2016, EJKC had been renewed by the payment of back taxes and fees. (OBE F, pp. 8-9.)

The Court reconvened on August 17, 2015, at which time a bench decision was rendered. On the issue of whether the EKJC LPI in the Everett Trust vested in Jesse outright or passed through the residual estate, the Court ruled, "...the shares fell under the residuary clause." (OBE E p. 4). He further stated:

> When I started, and I'll be quite candid with you, I think my opinion was somewhat sloppy because I indicated that the share in the partnership had already passed under the residuary clause, but it was

> subject, obviously, to the demands of creditors, the estate expense and the specific bequests therein.
>
> So while I am sure it was in absolute good faith, and I can't think to say anything else because of the sloppy way that this was decided, it's clear to me that that interest had to be available in the residuary clause to satisfy specific bequests, estate expenses, creditors, et cetera, and then passed, despite the specific bequest which fails, to Jesse. (OBE E, pp. 4-5.)

This would obligate Jesse to pay all administrative costs including attorneys' fees, 7,200 shares of Fulton stock gifted to eight beneficiaries besides Janice, and 33,000 shares of Fulton stock gifted to Janice, less what she had already received by improper transfers to her of estate assets. (OBE E, p. 5.)

The Court also ruled the estate administration and trust administration should be unified into one procedure rejecting the usual distinction between probate and non-probate assets and that the probate estate must be administered separately and the residual, if any, paid to the non-probate trust. In so doing, he found the $150,000 payment to Janice from Cook for the CDI stock was a trust asset rather than a probate estate asset despite being payable to Everett individually (OBE E, p. 6) and was a specific bequest not subject to any offset for debt. (OBE E, p. 9.)

Counsel for Jesse raised the ancillary issue of a specific bequest to Janice under the LWT. Janice was gifted Everett's personal property and a probate asset valued on the Inventory at $25,000.00. It was argued that should act as an offset of any funds due to Janice. (OBE E, pp. 9-10.) In addition, she received a pickup truck

($6,000.00) and a travel trailer, plus proceeds from liquidated Dole and Heinz stock. The Court denied the offset of the $25,000.00 again ruling it was a specific bequest and not subject to liquidation to pay debt. To conclude that he again combined the estate and trust administration into one. (OBE E, p. 17.) The Court also ruled that any residual payments due from Cook for the CDI stock passed to Janice again as a specific bequest. (OBE E, p. 24.) Specific exception to the Court's ruling on the unified administration of the probate estate and non-probate trust as contrary to existing law and practice was noted on the record. (OBE E, p. 26.)

Despite attempts to reach an agreed upon Order, Mr. Baird and the parties were unable to do so. This prompted another hearing where again the proposed Order was discussed, with little resolution. No agreement was reached except each party would submit a proposed Order to the Court for consideration. This was done simultaneously on April 29, 2016. The Court issued its Rule 54(b) Order on July 14, 2016. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY RELIED ON THE DOCTRINE OF INCORPORATION BY REFERENCE IN RULING NON-PROBATE ASSETS COULD BE USED TO PAY PROBATE DEBTS.

A. QUESTION PRESENTED.

Did the Chancery Court correctly hold that the Last Will and Testament of Everett T. Conaway and the Amended and Restated Revocable Trust of Everett T. Conaway were merged into one estate administration? This was reserved for appeal at the August 17, 2015 hearing (OBE E, p. 26).

ANSWER: No.

B. STANDARD OF REVIEW

In an appeal from the Court of Chancery's interpretation of written agreements, the Supreme Court will review conclusions of law *de novo*. Schock v. Nash, 732 A.2d 217, 224 (Del. 1999).

C. MERITS OF ARGUMENT

The Court of Chancery was asked to interpret Everett's LWT and the Everett Trust and their interrelationship. Jesse argued they needed to be interpreted and administered independently. Janice argued Everett's Trust, which was mentioned in his Will, was incorporated by reference requiring the Will and Trust be intermingled and administered as one estate. In advancing that argument, Janice relied on In the

Matter of Estate of Rocco Arcaro, 1977 WL 9539 (Del. Ch., October 12, 1977). The Court accepted the argument it was a unified plan, relying on Arcaro. (OBE E, pp. 6, 16-17.)

The Arcaro decision was narrowly based, decided under old statutory law that has been amended and modernized, and very infrequently cited. Janice argued that Arcaro stood for the proposition that all assets in an estate not specifically devised vested in a trust named as the beneficiary. The argument was that the will incorporated the trust by reference and they were to be administered together.

A preliminary issue in Arcaro was the timing of the document execution. The trustor executed his will and revocable trust concurrently. The will referenced the trust as the estate residual beneficiary. The Court had to determine based on the timing of execution whether the will properly incorporated the trust so there was an integrated estate plan. Chancellor Marvel, applying Delaware law at the time, stated, "The strict requirements for incorporating a separate document into a will are that such document is in fact in existence at the time of execution of the will..." (emphasis added). Arcaro, at page 2.

In 1997, Delaware adopted the revised Uniform Testamentary Additions to Trust Act ("UTATA") in 12 Del.C., §211. It states in relevant part:

> (a) A will may validly devise or bequeath property to a trustee of a trust established or to be established... 12 Del.C., §211(a) (emphasis added).

(b) Unless the testator's will provides otherwise, property devised or bequeathed to a trust described in subsection (a) of this section is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised or bequeathed and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death. 12 Del.C., §211(b) (emphasis added).

The 1997 amendments to the Delaware Code supersede Arcaro as to the necessity of a trust existing when a pour-over will is executed. Thus, the holding cited for Janice has no legal importance in the pending action.

This modern view of the relationship between a will and trust relegates "incorporation by reference" to the least favored validation of pour-over devises. *Restatement Third Property:* Wills and Other Donative Transfers, §3.8 reads:

(a) A "pour-over" devise is a provision in a will that (1) adds property to an *inter vivos* trust, or (ii) funds a trust that was not funded during the testator's lifetime but whose terms are in a trust instrument that was executed during the testator's lifetime.
(b) A pour-over devise may be validated by statute, incorporation by reference, or by independent significance.

Comment c. discusses how incorporation by reference is to be considered only if no other means of funding a trust exists. It states in part:

Of the common-law bases for validating pour-over devises, the doctrine of incorporation by reference is less satisfactory than independent significance. Incorporation by reference should be utilized only if no other theory is available. Prior to the widespread enactment of statutes validating pour-over devises, the doctrine of incorporation by reference was initially the only theory for validating such devises...

Thus, wills and trusts are now interpreted independently. Had the General Assembly not wished to bifurcate the two, it would not have amended 12 Del.C., §211. If it was to remain solely an incorporation by reference jurisdiction, the Code would not have clarified devised assets to a trust were not to testamentary trusts. 12 Del.C., §211(b). The Court herein failed to follow the current Code recognizing two separate instruments finding instead the Everett Will and Everett Trust were one. The American Law Institute in its publication of the *Restatement of the Law Third Trusts,* §19, "Pour-Over" Dispositions by Will, discusses additions to trusts by will. Comment a(4), *Special pour-over statutes* states, "Legislation has been enacted in most...jurisdictions authorizing pour-overs to trusts in existence at the testator's death or to trustees named *in independent instruments of trust"* (emphasis added). Due to the existence of the statutes, the balance of the commentary was devoted to an analysis of law where such statutes do not exist. The Everett Trust existed since 1993. The version at bar was an amendment to the previously funded original trust. What the residual clause did in this case was to add to the trust, not create it.

The unusual ruling by the Court below had the effect of permitting $150,000 of Everett's personal assets in the form of the payment due from Cook to be paid directly to Janice rather than be used to pay his personal debts. To pay the debt to DNB, the trust stock was liquidated, DNB was paid and over $52,000 was deposited into an *estate account and not a trust account* which was ultimately extracted by

Janice for her own use. It is recognized the sale of the stock was under the "direction and authority" of Janice and Jesse as co-executors and co-trustees, but both were relying on the guidance and advice of Mr. Ellis who had been the longtime family attorney and an experienced estate counsel. It was not a situation of the parties' counsel shopping for the answer they sought. It was a good faith and prudent step upon advice of counsel that resulted in the improper administration of the estate.

The money to be paid to Everett from Cook was not assigned to the Everett Trust or to a given beneficiary, but was titled just in Everett's name. It should have been paid to the estate increasing the probate estate by $150,000, which when added to the amount reported on the Inventory, would have increased the gross probate estate to $250,696.79. Comment e of *Restatement of the Law Third Property,* Wills and Other Donative Transfers, Sec. 1.1 points out, "The probate estate is liable for the payment of claims allowed against the estate....The net probate estate is the probate estate reduced by these claims, taxes and allowances." Comment f states "As defined in UPC Sec. 1-201(6) the terms "claims" in respect to estates of decedents, includes liabilities of the decedent, whether arising in contract, tort or otherwise..." In this instance the debt owed to DNB was clearly a liability to be paid from Everett's probate estate before any distribution.

The lower Court ruling permitted it to bypass the estate by determining the $150,000 was payable to Janice directly as a gift under the trust and not part of the

gross probate estate for payment of claims. Janice also accepted ownership of the other tangible personal property not deemed to be assets subject to the payment of claims, but under the trust were specific bequests not subject to abatement until all other assets were used.

The Court in In Re Spicer's Estate, 120 A. 90 at page 91 (Del. Orph. Ct., 1923) addressed the common law duties of a personal representative. It stated:

> "The rule seems to be now well established (except where changed by statute) that upon the death of a person his personal property vests in the executor or administrator, who, for the time being, succeeds to all rights and responsibilities of the decedent in reference thereto. He takes such personal property, however, in trust for the payment of the debts of the deceased, and the distribution of the remainder to his heirs."

This was cited by Master Ayvazian in the Master's Report In the Matter of the Estate of Jones, 2008 WL 731666, at page 2 (Del. Ch., 2008), where she expounded on it by stating, the administrator "...failed...to collect and preserve the personal effects of the estate, itemize the debts, and provide a true accounting of the estate administration to the heirs." Regardless of the asset's location, "There is no statutory provision nor any testamentary provision relieving the executrix of the duty to conduct a complete inventory and appraisal.....(The executrix) was, therefore, under a duty to convert all personal property into cash and to first pay decedent's debts and to then pay those entitled to cash bequest. " In The Matter of the Estate of McDowell, 1983 WL 103268, at page 2 (Del. Ch., 1983).

In a recent case, the Court of Chancery was called upon to review the obligation of an executor to pay claims. The case of In Re Estate of Farren v. Farren, 131 A.3d 817, 840 (Del. Ch., 2016) held:

> When evaluating claims and paying them in the order of preference established by statute, an executor operates under a "mandatory duty of paying demands against the deceased in a certain prescribed order."...Based on the statutory scheme, "it is plain that (executors) owe a duty to pay the claims of creditors of the decedent." In terms of the priority of claims against the estate, creditors take precedence over beneficiaries, who only are entitled to their bequests after the claims of creditors have been paid. See 12 Del.C. §2312(b). Because of this structure, the executor of an insolvent estate may sue a beneficiary who received a preferential transfer from the decedent to recover the proceeds for the benefit of the estate's creditors. Delaware's statutory scheme comports with common law, which recognizes that "(rights) of creditors are paramount to those of devisees and legatees" and that "(a) testator has no power to dispose of its property by will as to interfere with the rights and claims of his creditors. "It is said that the rights of creditors of the testator vest at his death, and regardless of whether the will so directs, every bequest or devise is subject to be divested in part or in whole if required to satisfy testator's debts. (Citations omitted.)

Under the theory of the case advocated by Janice and accepted by the Court, the debts were properly paid. They *were* paid, but the source of the payment is contrary to the law. Jesse seeks to have the funds paid from the trust to pay personal debts treated as a loan from the trust to the estate, and for Janice who received substantial estate assets to repay them to the trust to be used to pay the other trust beneficiaries. Janice argued below that incorporation by reference permits the use of the trust assets to pay the debts. However, that is contrary to the weight of

precedent and cited legal commentaries on the relation between probate estates and trusts.

Though not adopted in Delaware, the *Uniform Trust Code* ("*UTC*") is instructive on the issue of how estate assets versus trust assets are to be treated for payment of creditor claims. Section 505(a)(3) of the *UTC* states:

> **Section 505. Creditor's Claims Against Settlor.**
>
> (a)(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances]. (Emphasis added.)

The Comment explains this provision as follows:

> **Comment:** Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. (Emphasis added.)

Thus, it is clear that by common law, by statutory law and by modern Uniform Codes, the assets of the probate estate are the first source for payment of creditor claims and must be exhausted before any trust assets are used for that purpose.

Accord, 76 Am Jur 2d Trusts, §253 states in part,

(A) Decedent who has reserved a right to alter, amend, or revoke in whole or in part a living trust to which the entire estate was bequeathed, remained the absolute owner of specific property that the trust instrument stated would be given as gifts to certain persons ... and thus that property would not be beyond the reach of creditors of the decedent's estate if the estate was found to be insolvent. Citing In re Estate of Martin, 686 N.Y.S. 2d 195 (3d Dep't 1999). (Emphasis added.)

The Massachusetts Court of Appeals had occasion to rule on the issue of whether a trust was obligated to pay the debts of an estate. In State Street Bank and Trust Co. v. Reiser, 389 N.E. 2d 768, 771 (Mass. App. Ct. 1979), the Court ruled:

> Where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit. (Emphasis added).

Therefore, the Court should overturn the ruling of the Court of Chancery that the Everett Will and the Everett Trust were one unified document for purposes of the administration of Everett's estate. Janice should be ordered to disgorge the assets she received from the estate to the trust in repayment of the trust assets used to pay the estate debt. The Court should find that the Everett Will and Everett Trust are separate and distinct estate planning instruments to be administered separately according to the law or the terms of the document.

II. JESSE FREDERICK-CONAWAY IS THE SOLE OWNER OF EJKC, LP AND NOT LIABLE FOR PAYMENT OF BEQUESTS AND COSTS OF THE ESTATE AND TRUST

A. QUESTION PRESENTED:

Was the limited partnership interest titled in the name of the Everett T. Conaway Revocable Trust that passed to Jesse Frederick-Conaway an asset that could be used to satisfy specific bequeaths in Everett's Revocable Trust? This issue was reserved for appeal by Appellant at the hearing of March 14, 2016. (OBE. F, pp. 8-11.)

ANSWER: No.

B. STANDARD OF REVIEW

In an appeal from the Court of Chancery's interpretation of written agreements, the Supreme Court will review conclusions of law *de novo*. Schock v. Nash, 732 A.2d 217, 224 (Del. 1999). At further issue is the Court's application of the doctrine of the "law of the case" that is subject to *de novo* review as a question of law. Cede & Co. v. Technicolor, Inc., 884 A.2d 26, 36 (DE 2005).

C. MERITS OF ARGUMENT

The prior rulings of the Court of Chancery, as affirmed by this Honorable Court, were substantially altered by the Court below in the pending matter. Previously, the Court of Chancery reviewed the formation, organization and purpose

of EJKC and in particular its LPA. It found there was a corporate general partner (CONFAM) owned equally by the Everett Trust and the Jesse Trust, and two limited partners, being the same trusts. The LPA had a restraint on alienation that limited transfers of interest to the existing partners unless there was written consent otherwise. The Court in its February 15, 2012 Letter Opinion (OBE A, p. 3) found:

> The purpose of the LPA was to provide a mechanism by which Everett could make transfers of appreciated stock to Jesse through the transfer of limited partnership interests in EJKC, thus limiting tax exposure.

Chancery also noted the LPA contained a withdrawal penalty of 50% of the withdrawing partner's equity. The Court then found:

> In agreeing to this withdrawal restriction and the aforementioned restriction on alienation, it is clear that the parties intended to obstruct the acquisition of EJKC interest by third parties and to preserve the original purpose of the partnership barring the consent of all the partners. (OBE A, pp. 3-4.)

The argument previously advanced by Janice below was that the gift to her of the Everett Trust LPI superseded the LPA restrictions. Jesse took the opposite position. This was resolved by the Chancery Court as follows:

> I find that the LPA's language is clear and unambiguous in its restriction on the transfer of partnership interests. The LPA quite plainly prohibits the sale, transfer, or assignment of any partnership interest absent the consent of the non-transferring partners. The LPA does not suggest that a transfer through a will or pour-over trust should be treated differently than any other transfer... (OBE A., p.6.)
>
> [By] "...entering into the LPA, each party ceded his right to transfer his interest at will and without interference from the other party. This alienation restriction was clearly limited to preserve the purpose of

EJKC which was to provide a mechanism for Everett to make transfers to Jesse with limited tax exposure." (OBE A, p. 8.)

At issue in the prior case was the question of Everett's intent. The Court ruled:

> Delaware law requires courts to honor the contractual intent of the parties. When the contractual language is unambiguous, the clear meaning of that language determines the parties' intent. In this case, Everett and Jesse clearly intended to limit membership in the partnership to themselves, absent the consent of every partner.
>
> * * * * * *
>
> The testator's intent controls construction of his will; it cannot change preexisting contractual obligations. Everett's intent changed after he entered the LPA: by the time of his death he wished to transfer his interest to Janice. This change of heart does not invalidate Everett's contractual obligation to Jesse to obtain consent before transferring his partnership interest. (OBE A, p. 10.)

In a March 13, 2012 Letter Opinion on reargument, Chancery held:

> For the reasons stated in my Letter Opinion of February 15, 2012, I found that the ownership interest in EJKC...held by the Everett...Trust passed to Jesse..., or to the Jesse...Trust, upon the death of Everett. I found that Everett's attempt to transfer that interest to a non-partner, his widow, Janice...was invalid under the terms of...(the "LPA").... Janice is not the equitable owner of the Partnership interest, or 50% of the Partnership Interest. Ownership of that interest is determined not by equity, but as a matter of contract law. (OBE B., pp. 2-3.)

Thus, the Court below unequivocally clarified that Jesse was the owner of EJKC due to the contract that existed with Everett.

The matter was appealed to this Court. An Order was issued on September 28, 2012 affirming both decisions of the Court of Chancery. (OBE C.)

When this returned to the Court on the Petition for Instructions, the Vice Chancellor changed his ruling finding the LPI was now to be considered part of the

residual in Everett's Trust subject to divestment to pay beneficiaries and costs that would have been available from trust assets if they had not been wrongfully liquidated to pay estate debts. The only way the Court could reach its conclusion was by adopting the Arcaro argument directing the $150,000 and other personal assets to Janice while ignoring the established probate process. Otherwise, it would not have needed to rule that the LPI was to be raided. Had the estate been properly administered with marshaling of assets, payment of administrative expenses and payment of valid claims in due course under the order of preference in 12 Del.C., §2105, the LPI would not be an issue.

Much was made below by Janice that the LPI fell to Jesse through the residual clause of the trust and thus is subject to payment of claims under 12 Del.C., §3595, "Abatement of gifts in trust." Granted, the Court's analysis was the gift to Janice of the LPI lapsed due to the prior contractual restrictions and thus fell to the residual. However, that does not alter the nature and terms of the LPA any more than Everett's attempt to gift ownership of the LPI is defined by the LPA as found previously by the Court of Chancery and affirmed by this Court.

By changing his ruling, the Vice Chancellor violated the "law of the case" doctrine which "...encompasses...principles arising from the 'mandate rule.' The doctrine stands for the proposition that 'findings of fact and conclusions of law' by an appellate court are generally binding in all subsequent proceedings in the same

case in the trial court or in a later appeal." Insurance Corp. of America v. Barker, 628 A.2d 38, 40 (DE 1993). "This is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of any litigation." Gannett Co., Inc. v. Kanaga, 750 A.2d 1174, 1181 (DE, 2000). In the case at bar, the facts have not changed. The issues are unchanged except the prior litigation removed the LPI from the equation for payment of bequests or debts. Now that has been reversed by the trial court. Jesse recognizes there are exceptions including where the prior decision was clearly wrong, an injustice is produced or there are changed circumstances. Id. p. 1181. None of these exceptions apply in this case. The prior decision was based on established principles of law. No injustice will occur except to Jesse if the change by the Vice Chancellor is upheld. And, the circumstances and facts are unchanged. For these reasons alone, the LPI now vested in Jesse should not be available for use to pay other beneficiaries or claims. Rather, the wrongful payments to Janice should be returned and used for such purposes, and, if insufficient, the other gifts not subject to contractual restrictions should abate proportionately.

This is supported by Myers v. Myers, 408 A.2d 279 (DE 1979). Mr. Myers as part of a separation agreement purchased a life insurance policy naming his separated wife as an irrevocable beneficiary. The ex-wife died after which Mr. Myers changed the beneficiary to his current wife. Then he died. His son brought

an action for payment of the life insurance proceeds as the first wife's heir claiming there was a breach of contract by his father and that the separation agreement and insurance created a vested interest in the first wife. Chancery rejected the son's argument by finding the separation agreement created an intent to name the first wife as beneficiary only during her lifetime. This Court reversed, holding:

> [An] unconditional contract between an insured and a named beneficiary that the designation shall be irrevocable grants the beneficiary a vested interest in the insurance proceeds...And...an "irrevocable" grant by contract of beneficial rights in an insurance policy removes the insured's power to change the beneficiary, the power to make such change reserved in the policy itself notwithstanding; the power is generally deemed waived by the contract. We conclude as a matter of law that Anne's interest vested by virtue of the clear and unambiguous use of the term "irrevocably" in...of the separation agreement here under consideration. In the absence of ambiguity, there is no room for interpretation or a search for the intent of the parties. Accordingly, we must hold that the Court of Chancery erred in interpreting paragraph 11 in the light of its version of what the parties intended. Id., pp. 280-281.

It is the law in this case that the ownership interest in EJKC was irrevocable by either Jesse or Everett without their mutual consent. Due to Everett's death, the interest is solely Jesse's. Just as it was ruled Janice could not reach the LPI, it follows no other person or creditor can reach it. Everett's death did not amend the LPA. Rather, it guaranteed it could not be amended.

Further, the Court's bench ruling portends that the LPI ordered to be "returned to the trustee" will be reduced to cash or shares of stock to satisfy gifts to other beneficiaries or creditors. (OBE E., p. 4 and OBE G.) To do that would be contrary

to 6 Del.C., §16-701 which states: "A partnership interest is personal property. A partner has no interest in specific limited partnership property." What Everett's Trust and now Jesse's Trust owns is an interest in EJKC, not its individual assets. Thus, the EJKC LPI must stay intact. And, in keeping with the terms of the LPA and Everett's intent, that LPI vests solely with Jesse. Delaware, as a progressive business jurisdiction, has taken and should continue to take the lead in upholding its entity contracts.

CONCLUSION

For the reasons cited herein, Jesse respectfully prays this Honorable Court will reverse the ruling of the Court below.

Respectfully submitted,

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By: */s/ David N. Rutt*

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