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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESSE FREDERICK-CONAWAY, Respondent Below, Appellant/Cross-Appellee, v. KEVIN M. BAIRD, COURT APPOINTED EXECUTOR OF THE ESTATE OF EVERETT T. CONAWAY AND COURTAPPOINTED TRUSTEE OF THE EVERETT T. CONAWAY REVOCABLE TRUST, Petitioner Below, Appellee, and JANICE M. RUSSELL CONAWAY, Respondent Below, Appellee/Cross-Appellant.	)	No. 359, 2016 On Appeal From the Court of Chancery of the State of Delaware, C.A. No. 8379-VCG

JANICE M. RUSSELL-CONAWAY'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE

This case involves a dispute between a specific beneficiary under an integrated testamentary plan, consisting of a pour-over will and trust, and the sole residuary beneficiary of that plan.

The appeal involves the trust residuary beneficiary's attempt to avoid the exposure of the residue to the typical payment of debts and expenses and to further avoid the application of Delaware's trust abatement statue. Ironically, the largest asset of the residue is a voided gift that fell into the residue despite the trustor's contrary intent. The residuary beneficiary's position is contrary to Delaware law and detrimental to the specific beneficiaries. Fortunately for the specific beneficiaries, the Court of Chancery properly applied the relevant statutory and case law to carry out the majority of the trustor's intent.

The cross-appeal involves the specific beneficiary's effort to protect her rights and to preserve the remainder of the trustor's intent. The specific beneficiary seeks to reverse the parts of the Court of Chancery's decision that order her to pay interest on advances she received on her specific beneficial interest because specific beneficiaries are not liable for interest in situations like those presented by this case. Additionally, the specific beneficiary seeks to reverse the Court of Chancery's decision that she must return some of the advances because the Court should have simply ordered a charge against her remaining beneficial interest.

NATURE OF PROCEEDINGS

The case below arises out of the Estate of Everett T. Conaway ("Estate"), who passed away on May 11, 2010. The decisions appealed to this Court can be best explained by beginning with the Petition for the Appointment of an Independent Executor and Successor Trustee and Rule to Show Cause ("Petition for Appointment"), filed March 4, 2013, by Stephen P. Ellis, Esquire ("Mr. Ellis").[1] Mr. Ellis was Everett T. Conaway's attorney during his lifetime and was the attorney for the Estate through November 14, 2012. The Estate documents include the Last Will and Testament of Everett T. Conaway, dated September 21, 2009 ("Will") and Amended and Restated Revocable Trust Agreement of Everett T. Conaway, also dated September 21, 2009 ("Trust"). Everett T. Conaway is hereafter referred to as "Everett."[2]

At the time of the Petition for Appointment, Jesse Frederick-Conaway ("Jesse") and Janice Russell-Conaway ("Janice") were Co-Executors of the Estate appointed under the Will, and the named Successor Co-Trustees of the Trust. Janice was Everett's wife and Jesse's stepmother. Jesse (but not Janice) had recently terminated Mr. Ellis' representation of the Estate and Trust, and Mr. Ellis sought instructions from the Court to determine if an independent party should be appointed to complete the administration of the Estate and Trust.

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[1] *See* D.I. 1 (Petition for Instructions).

[2] Because of the common last name of the decedent and the parties, first names are used.

The Court appointed Kevin M. Baird, Esquire as Successor Administrator of the Estate and Successor Trustee of the Trust by Order dated August 16, 2013.[3] The Order appointing Mr. Baird gave him all the duties of a typical trustee, specifying that he could file a Petition for Instructions on the distribution of assets, if necessary. On January 20, 2015, Mr. Baird filed a Petition for Instructions because there was no agreement on the administration of the Estate.

Following the responses of the parties and oral argument, the Court entered a bench decision on August 17, 2015 (the "Bench Decision").[4] Thereafter, at the request of Jesse's counsel, the Court issued a letter dated September 15, 2015 confirming that the Bench Decision would require an implementing order before becoming final.[5] Subsequently, Mr. Baird filed a Motion to Enter Final Judgment on Petition for Instructions,[6] and again, both Jesse and Janice filed responses.

On March 14, 2016, the Court again heard argument on the Motion.[7] The parties and Mr. Baird discussed the issues to be addressed in the final order. The Court requested an agreed-upon form of order or, if the parties could not reach an

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[3] A0100. Jesse's Appendix is cited as "A####" and Janice's Appendix is cited as "B####."

[4] *In re Estate of Conaway & the Everett T. Conaway Revocable Trust*, C.A. No. 8378-VCG (Del. Ch. Aug. 17, 2015) (TRANSCRIPT). *See* Amended Opening Brief [hereinafter AOB], Ex. E.

[5] D.I. 38.

[6] D.I. 40. *See* B0120-0130.

[7] *See* AOB, Ex. F.

agreement, then counsel were directed to summarize their differences to assist the Court in generating a final order on the Petition for Instructions. The Court considered the further submissions of counsel for the Parties and Mr. Baird, and on July 14, 2016, entered its final Order (the "Order").[8]

On July 14, 2016, Jesse appealed to this Court, and on August 9, 2016, Janice filed a cross-appeal. Jesse's Opening Brief was filed on September 12, 2016 and amended on September 19, 2016. This is Janice's Answering Brief on appeal, and Opening Brief on cross-appeal.

[8] *In re Estate of Conaway & the Everett T. Conaway Revocable Trust*, C.A. No. 8378-VCG (Del. Ch. July 14, 2016) (Order). *See* AOB, Ex. G.

SUMMARY OF ARGUMENT ON APPEAL

1. **Denied**. Everett Conaway's Will and revocable Trust, prepared at his direction by his long-time attorney, are precisely the type of documents governed by 12 *Del. C.* § 211. The Will provided only for certain limited payments, several minor specific bequests and the pour over of the rest and residue to the Trustee of the Trust, but did not provide for payment of Estate debts and expenses. It was the Trust that contained Everett's clearly stated intent as to the distribution of both inter-vivos Trust funded assets and pour over assets. The Trust provides the Trustee the authority to pay debts and expenses, even if the law did not already so provide. Jesse tries to avoid the application of 12 *Del. C.* § 211, and supporting Delaware case law, *In re Estate of Rocco Arcaro*, both relied upon by the Court below. Contrary to Jesse's argument on appeal, amendments to 12 *Del. C.* § 211 subsequent to *Arcaro* do not limit *Arcaro*'s application to this case.

2. **Denied**. The Court of Chancery correctly concluded that the LPI must be returned to the Trust because the LPI is a residuary asset and is therefore subject to payment of Estate debts. In the 2012 Proceedings, Jesse argued, and the Court of Chancery held, that the LPI would pass to Jesse as part of the Trust's residuary assets. Jesse misrepresents the record and misleads the Court in suggesting otherwise now, and Jesse makes no cognizable argument that the LPI should not be used to satisfy Estate debts and expenses. The law of the case doctrine does not apply to this separate case, and even if the doctrine did apply, this case would be an exception to the doctrine.

STATEMENT OF FACTS

The parties in interest in this case are Everett's son Jesse, and his second wife, Janice. Janice and Everett were married March 7, 1997, and remained married and lived together in Everett's home in Seaford, Delaware until Everett's death on May 11, 2010. In 2012, Jesse and Janice were involved in prior litigation and an appeal (collectively, the "2012 Proceedings") regarding a different aspect of the Estate and Trust.[9]

Everett's relevant estate planning began in the early 1990s when Everett worked with Mr. Ellis and accomplished numerous, significant *inter vivos* transfers of a substantial portion of his wealth to Jesse. Mr. Ellis also represented both of the parties to this litigation through November 14, 2012 and the filing of the 2013 Petition for Instructions that followed this Court's decision in the 2012 Proceedings. Following Mr. Baird's appointment as Successor Trustee, Mr. Ellis submitted a letter report dated July 31, 2014, that contained a complete factual background to the issues (including the assets, gifting and distributions) addressed

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[9] *See In re Estate of Conaway*, 2012 WL 524190 (Del. Ch. Feb. 15, 2012) [hereinafter 2012 Decision], *reargument denied,* 2012 WL 839553 (Del. Ch. Mar. 13, 2012) [hereinafter 2012 Reargument Decision], *aff'd sub nom. Russel-Conaway v. Frederick-Conaway*, 54 A.3d 257 (Table), 2012 WL 4478655 (Del. 2012).

Because Jesse's Amended Opening Brief includes and cites the slip opinion/orders (rather than the reported or Westlaw versions) of the 2012 Proceedings, Janice cites to the slip versions as well.

in this case, along with extensive supporting documentation of those facts ("Ellis Report").[10]

As part of Everett's estate planning, he disclaimed his entire interest in the Estate of Eunice Tull (worth approximately $1,000,000.00), vesting the interest in Jesse.[11] Everett also transferred all of his substantial and valuable real estate abutting the Nanticoke River, including his homestead (reserving a life estate), to Jesse.[12]

On August 9, 2002, Everett formed the EJKC Partnership (the "Partnership").[13] He funded the Partnership with 79,533 shares of individually held Fulton Financial Corporation stock ("Fulton Stock"), then valued at $1,431,594.00, the only asset the Partnership ever owned.[14] The Partnership held a brokerage account for this single asset (with dividends and cash generated from the Fulton Stock) with Morgan Stanley, in the name of the Partnership, from the time the Partnership was formed through and after Everett's death ("Partnership Account").[15] Under the Limited Partnership Agreement ("LPA"), the general

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[10] *See* B0025-0105.

[11] Ellis Report, B0026.

[12] *Id.*

[13] 2012 Decision, AOB Ex. A, 2.

[14] *See* Ellis Report, B0027-0028.

[15] *Id. See* A0162-0165 (David Rutt, Esquire's April 30, 2015, letter to the Court of Chancery attaching Morgan Stanley statements).

partner of the Partnership is Confam, Inc. ("Confam"), a Delaware corporation, with two equal shareholders, Everett and Jesse.[16] The 1% Partnership interest it held was contributed to Confam by Everett.[17] The majority limited partner was and remains the Trust; the remaining, minority limited partner was the Jesse Frederick Conaway Declaration of Trust dated March 28, 1996 (the "JFC Trust") with Jesse, as Trustee.[18]

The objective of the Partnership was to provide a mechanism by which Everett could make voluntary gifts of appreciated Stock to Jesse (more precisely, from the Trust to the JFC Trust), through transfers of Partnership interests, thus avoiding Federal Estate and Gift taxes.[19] In 2002, the Trust gifted the JFC Trust a 10% limited partnership interest, contemporaneously with the formation of the Partnership.[20] Between August 2003 and January 2005, the Trust gave the JFC Trust two additional gifts of a 10% Partnership interest each.[21] The LPA was

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[16] 2012 Decision, AOB Ex. A, 2; LPA, A0032.

[17] *See* 2012 Decision, AOB Ex. A, 2.

[18] *Id. See* LPA, A0032.

[19] *See* 2012 Decision, AOB Ex. A, 2; Ellis Report, B0026-0028

[20] *See* 2012 Decision, AOB Ex. A, 2. At the time of funding, what became Fulton Financial Stock was then Delaware National Bank stock. Ellis Report, B0027.

[21] *See* 2012 Decision, AOB Ex. A, 3; Ellis Report, B0027.

amended with each gift; with the second and final gift, the Partnership interests were confirmed: Confam- 1%; Trust - 69%; and JFC Trust - 30%).[22]

Everett made no further gifts of Partnership Interests to Jesse for the next five years, through the date of his death, May 11, 2010[23]. From the creation of the Partnership to Everett's death, Jesse contributed no assets to the Partnership, and all limited Partnership interests were held in the two revocable trusts: the (Everett) Trust and the JFC Trust.[24]

Everett later amended his Trust to name Janice as a beneficiary of a percentage of the 69% limited Partnership interest held by the Trust (the "LPI").[25] The change recognized that Everett wanted to leave his interest in the Partnership to Janice because he felt he had given Jesse enough through *inter vivos* gifting.[26] In the final amendment to the Trust dated September 21, 2009, Everett named Janice the beneficiary of the "Trustor's partnership interest."[27]

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[22] *See* 2012 Decision, AOB Ex. A, 3.

[23] Bench Decision, AOB Ex. E, 3. *See* Ellis Report, B0027.

[24] *See* Ellis Report, B0027-0029.

[25] *See* 2012 Decision, AOB Ex. A, 4.

[26] *See id.*, 10; Ellis Report, B0027.

[27] Trust, §3-D, A0020. Because the Trust owned and held the 69% LPI, but did not hold the 50% stock interest in Confam (the *general* partnership interest) held by Everett individually, Janice made no claim that Everett's individual interest in Confam stock was part of the specific bequest of the "Trustor's partnership interest" to her.

The 2012 Proceedings involved Jesse's challenge to Everett's bequest of the LPI to Janice. Jesse argued that it violated a transfer restriction in the LPA, and as a result, that it should pass to him as part of the Trust's residue.[28] One of the primary issues on the current appeal to this Court involves Jesse's recent "interpretation" of the Court of Chancery's rulings in the 2012 Proceedings.

In the 2012 Decision, the Court of Chancery found that Everett was precluded from gifting the Trust-held LPI to Janice, based upon the transfer restrictions in the LPA, because transfers required the consent of the remaining partners, which Jesse withheld. On page 5 of the 2012 Decision, the Vice Chancellor stated, "Everett's interest in EJKC passed to Jesse as residuary beneficiary of the Trust, a transfer that did not require the consent of the partners." The Court of Chancery's Reargument Decision did nothing to modify the prior ruling. The 2012 Reargument Decision began, "For the reasons stated in my [2012 Decision], I found that the [LPI], held by the [Trust] passed to Jesse Conaway or to the Jesse Frederick-Conaway Trust, upon the death of Everett Conaway."[29] This Court affirmed those decisions without separate opinion. As stated above, the

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[28] *Pet'r Mot. for Summ. J.* at ¶12 & 4, *In re Estate of Conaway*, C.A. No. 6056-VCG, 2012 WL 524190 (Del. Ch. Feb. 15, 2012) [hereinafter Jesse's Motion for Summary Judgment]. A copy of the motion is attached at B0163-B0169.

[29] Reargument Decision, AOB Ex. B, 1.

decisions of the Court below and on appeal hereunder arise out the administration of the Estate and Trust following the 2012 Proceedings.

Everett's Will and Trust, both executed September 21, 2009, were in effect when he passed away. Everett's Will provided only for payment of expenses related to last illness, funeral and burial; the disposition of items of tangible personal property pursuant to 12 *Del. C.* § 212; the disposition of other tangible personal property to Janice Conaway; and the pour-over of all of the rest, residue and remainder of assets to the Trust.[30] Notably, the Will did not include a traditional "payment of debts and expenses of administration" clause. Aside from funeral and burial expenses, the only debt of the Estate was the payoff of an unsecured loan to DNB, which as Mr. Ellis confirmed, was "incurred to pay off the costs of improvements on property gifted to Jesse."[31] As reported on the First Account, the DNB loan payoff was $261,396.17.[32]

The Trust provides Everett's specific direction as to the disposition of the majority of the Everett's assets, including (i) 30,200 shares of the Trust-held 32,486 shares of Fulton Stock (23,000 to Janice; 7,200 to eight other beneficiaries); (ii) Morgan Stanley Active Assets Account ($36,088.24) to Janice (Trust held account); (iii) 100 Shares of Conaway Development Industries Stock ("CDI

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[30] Will, A0002.

[31] Ellis Report, B0029.

[32] Petition for Instructions, A0106.

Stock") (or interests in the proceeds, if sold before his death); and (iv) the residual to Jesse.[33]

As to the CDI Stock, the Trust specifically states as follows:

> [I]n 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 .... shall be distributed to Trustor's wife, Janice M. Russell-Conaway, provided she survives the Trustor and, provided further, that she is married to the Trustor at the date of his death

Everett in fact sold the CDI stock in December 2009 to Harry Cook, LLC, pursuant to the terms of a Stock Purchase Agreement ("SPA").[34]

Under Section 2.2 of the SPA, two $75,000.00 payments came due following Everett's death.[35] Mr. Ellis requested Harry Cook, LLC to make distributions directly to Janice, with notice to Jesse. Mr. Ellis noted he "never received any objection to the payments from Mr. Cook, his attorney, Jesse or Mr. Rutt [Jesse's attorney]."[36]

Upon his death, Everett individually held 3,592 shares of Fulton Stock, other individually owned stocks, cash and tangible personal property, the total value of

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[33] *See id.*, A0104-0106; Trust, § 3-D, A0021.

[34] *See* SPA, A0062-0085.

[35] Section 2.2(1)(d) of the SPA describes a third, conditional payment that has not yet become due. SPA, A0067.

[36] Ellis Report, B0031.

which was $100,696.79.[37] Everett's individually-owned 50% interest in Confam was not reflected on the Inventory.[38]

The Petition for Instructions filed by Mr. Baird identified legal issues, the resolution of which he maintained was required to "allocate the assets between the Estate and the Trust" and "recoup any assets improperly distributing to Janice or Jesse, if necessary."[39]

Although the Petition for Instructions asserted that the amounts improperly distributed to Janice included the two $75,000 payments provided in the SPA, the Court below concluded that they were proper because Janice was gifted the right to the payments under the Trust.[40] The alleged improper distributions to Janice also included sums distributed to Janice during 2012 and 2013, totaling $77,986.22.[41] Janice believed, however, that the receipt or advance of these sums was appropriate based upon advice of Mr. Ellis, and would be treated as advances on Everett's specific bequest to her of 23,000 shares of Fulton stock, all of which was sold at the outset of the Estate administration to pay the DNB loan.[42]

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[37] Petition for Instructions, A0104.

[38] *See id.*

[39] *Id.*, A0103.

[40] *See* Order, AOB Ex. G, 1 (sub-paragraph (b)).

[41] *See* B0107 (Mr. Baird's July 24, 2014 letter itemizing all distributions made to Janice).

[42] *See* Janice's Response to Petition for Instructions, B0110-114; Ellis Report, B0027-0028.

ANSWERING ARGUMENT

I. THE COURT OF CHANCERY PROPERLY APPLIED 12 *DEL. C.* § 211 IN INTEGRATING EVERETT'S WILL AND TRUST.

A. Question Presented

Did the Court below properly apply 12 *Del. C.* §211 to determine payment of debts and distribution of assets under Everett's Will and Trust?

B. Standard and Scope of Review

This Court reviews the Court of Chancery's legal conclusions, including its interpretation of written agreements, *de novo*.[43] Review of the Court of Chancery's exercise of its equitable powers is for abuse of discretion.[44]

C. Merits of Argument

1. As allowed under 12 *Del. C.* §211, Everett's Will validly bequeathed the residue of his Estate to the Trust, thus integrating Everett's Will and Trust.

The Court of Chancery correctly determined that the Will and Trust reflect, and must be treated as, an integrated testamentary plan. The Court reached this conclusion by relying upon 12 *Del. C.* § 211 ("Section 211") and by applying *In re Estate of Rocco Arcaro*.[45] Because Delaware case law supports this view, this Court should affirm the Court of Chancery.

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[43] *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999).

[44] *In re Peierls Family Testamentary Trusts*, 77 A.3d 223, 226 (Del. 2013).

[45] 1977 WL 9539 (Del. Ch. Oct. 12, 1977) [hereinafter *Arcaro I*].

Section 211 represents Delaware's adoption of the Revised Uniform Testamentary Additions to Trusts Act ("Revised UTATA").[46] Delaware adopted the Revised UTATA in 1997, thereby replacing the previous Section 211.[47] Section 211 reads, with emphasis added, as follows:

> "a) A will may validly devise or bequeath property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person or by some other person including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument other than a will executed before, concurrently with or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size or character of the corpus of the trust. The devise or bequest is not invalid because the trust is amendable or revocable or because the trust was amended after the execution of the will or the testator's death.
>
> (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*

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[46] *Unif. Testamentary Additions to Trusts Act* (Unif. Law Comm'n 1992 & rev'd 2014) [hereinafter Revised UTATA].The Revised UTATA, promulgated in 1991, amended the original UTATA, promulgated in 1960. A copy of the revised UTATA (with comments) is attached at B0211-B0219.

[47] 71 Del. Laws ch. 76, § 1 (1997).

> *setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.*

In the Court below, Janice supported the application of Section 211, citing *Arcaro*. In *Arcaro*, the decedent's will, like Everett's Will, provided only for the disposition of tangible personal property and the disposition of the residue of the Estate as provided in a separate revocable trust. The court in *Arcaro* applied the earlier version of Section 211, holding,

> [T]he strict requirements for incorporating a separate document into a will are that such document is in fact in existence at the time of the execution of the will, and that the will refer to the document so as reasonably to identify it, thus indicating the testator's intent to incorporate it into and make it a part of his will.[48]

The *Arcaro* court continued,

> In the case at bar the trust was in existence at the time the will was executed and was referred to specifically and unambiguously in the will, indicating that the testator intended that it be made a part of his will. Incorporation by reference of the deed of trust is not destroyed by the fact that the settlor has reserved the right to revoke or amend. 12 *Del. C.* Sec. 211. *I conclude that the inter vivos trust of Rocco Arcaro has been incorporated by reference into his will and that the residue of the estate, i.e., those assets not distributed under his will and not previously delivered to the trustee, constitute trust assets.*[49]

On reargument, the court confirmed, "Here, the will and deed of trust together constitute *a single testamentary scheme* the interlocking nature of which is

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[48] *Arcaro I*, 1977 WL 9539, at *2 (citing sources).

[49] *Id.* (emphasis added).

evidenced by the incorporation of the trust into the will."[50]

Looking to this case, the Will and the Trust must be integrated for purposes of estate administration. Everett's Will and Trust, both executed September 21, 2009, were in effect when he passed away on May 1, 2010. Both documents were contemporaneously prepared and executed on September 21, 2009. It is the Trust that provides Everett's specific direction as to the disposition of the majority of the Everett's assets, some of which were previously titled in the Trust (*i.e.*, some of the Fulton Stock). The balance of the assets poured over to the Trust through the Will.

Notably, the Will did not include a traditional "payment of debts and expenses of administration" clause. Rather, Everett's Will provided only for payment of expenses related to last illness, funeral and burial.[51]

The Trust, on the other hand, did provide for payments of debts. In addition to other powers, the Trust provided the Trustee the power "to prepay or accept prepayment of any debt; to enforce, abstain from enforcing, release or modify, with or without consideration, any right, obligation or claim. . .[.]"[52] Thus, it is only by viewing the Will and the Trust together as a single testamentary scheme that the Estate can be administered properly.

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[50] *In re Estate of Rocco Arcaro*, 1977 WL 4530 (Del. Ch. Jan. 10, 1978) (hereinafter *Arcaro II*) (emphasis added).

[51] Will, A0002.

[52] Trust, §7-D, A0027.

Jesse incorrectly asserts that the amendment of Section 211, subsequent to *Arcaro*, alters this conclusion. While Jesse is correct that Section 211 was amended after the *Arcaro* decisions,[53] the amendments do not diminish the relevance of the *Arcaro* decision to this case. The amendments merely expanded the acceptable types of *inter vivos* trust instruments. In addition to a written instrument executed before or concurrently with the execution of the testator's will, Section 211 now allows additional types of "receptacle trusts," including those created after the execution of a will.[54] This does not negate the acceptance of "interlocking" estate

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[53] Footnote 1 to *Arcaro I* sets forth the full text of Section 211 as it then read:

> "Whenever a testator bequeaths or devises property to the trustee of in *inter vivos* trust which is evidenced by a written instrument in existence prior to the making of the will and identified in the will, and which may be subject to amendment, modification or revocation, the property so bequeathed or devised, unless the will provides otherwise, shall be governed by the provisions, effective at the testator's death, of the instrument creating such trust as the same may have been amended, even though any such amendment may have been made subsequent to the making of the will."

[54] *See* Revised UTATA, Prefatory Note at 1, B0215:

> These revisions increase the intent-effectuating characteristics of the original Act . . . [T]hey make it clear that the receptacle "trust" need not have been established (funded with a trust res) during the testator's lifetime, but can be established (funded with a res) by the devise itself; allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust amended as well as before the testator's death, unless the testator's will provides otherwise; and allow the testator's will

plans recognized in *Arcaro*. To the contrary, the changes to Section 211 allow more estate plans to be administered in a unified manner.

Here, Everett's Trust was executed contemporaneously with his Will, and was a valid "receptacle trust" under Section 211 as it existed when *Arcaro* was decided, and it remains valid under Section 211 as amended. Jesse contends that the 2009 Trust amendment merely modified the existing 1993 version of the Trust, and that the 2009 Will added to the Trust but did not create it. These two contentions are true, but neither one negates the clear language of Section 211 and its application to Everett's Will and Trust. Moreover, there is no argument that the Trust would be invalid under either version of Section 211.

Jesse also misreads §3.8 of the *Restatement (Third) of Property*. Jesse argues, in essence, that the common law doctrine of incorporation by reference is a disfavored method of validating a trust. Again, Jesse misses the point. Comment (b) of §3.8 puts this issue into perspective: "A pour-over devise may be validated *by statute*, incorporation by reference, or independent significance" (emphasis added). What Jesse misses is that the various common law theories for validation of a pour-over devise between a will and a trust are illustrative to show the different bases for common law decisions that applied them *where no statute had been adopted*. Given that Delaware adopted the Revised UTATA as Section 211, Jesse's argument is misplaced.

> to provide that the devise is not to lapse even if the trust is revoked or terminated before the testator's death.

The failure of Jesse's argument is clearer against the comments from the drafters of the on the Revised UTATA. After discussing all of the validation theories applied by common law, the drafters state that: "By this time [1960], however, it had come to be generally thought that the cleanest and most reliable way of dealing with the pour-over problem was through enabling legislation—hence the promulgation of UTATA in 1960, and its widespread enactment throughout the country."[55] Against this clear statement, Jesse's summarization of Section 211 (*i.e.*, that "wills and trusts are now interpreted independently") is nonsensical.

Given all of this, the Court of Chancery correctly determined that the Will and Trust were to be administered as a single testamentary scheme pursuant to Section 211 and *Arcaro*.

2. The Court of Chancery correctly provided for the distribution of the Trust assets, subject to the payment of debts and expenses of administration of the Estate.

Because the Trust and Will are parts of an integrated testamentary plan, Trust distributions are subject to the payment of debts and expenses of the Estate. As explained above, the Will failed to provide expressly for the payments of these debts and expenses; payment is addressed only in the Trust.

In its Bench Decision and Order, the Court of Chancery properly applied *Arcaro* and Section 211. The Court held that, "The Trust was to be distributed

[55] Revised UTATA, Prefatory Note at 1, B0215.

under the testator's intent. The Trust was adopted into the will."[56] The Court held in its Bench Decision that Everett's 69% LPI "had to be available in the residuary clause to satisfy specific bequests, estate expenses, creditors, *et cetera*, and then passed . . . to Jesse."[57] The Court also decided that requiring Janice to return of the payments she received under the SPA Agreement (specifically bequeathed to her under the Trust) to pay debts "would frustrate even further the intent of Ev. Conaway."[58] Instead, the proceeds "must be paid to Janice" under the "unified estate plan."[59] Likewise, the Order provides distributions under the same unified estate plan.

Jesse misleadingly argues that this part of the Court's holding would obligate him to pay all of the administrative costs (including attorneys' fees) as well as the specific gifts to Janice and other specific beneficiaries.[60] In reality, Jesse merely describes the normal operation of Delaware's trust abatement statute. The abatement statute confirms that expenses are paid and if necessary, the residue is abated, before any specific bequests are abated.[61] Jesse is the residuary

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[56] Bench Decision, AOB Ex. E, 4.

[57] *Id.*, 6.

[58] *Id.*

[59] *Id.*

[60] AOB, 17. Jesse also misstates the number of Fulton Stock shares owed to Janice. The correct amount is 23,000, not 33,000 shares.

[61] *See* 12 *Del. C.* § 3595.

beneficiary, and as a result, he is entitled only to the balance of the funds in the Trust, after all such payments and distributions.

Jesse's misleading analysis again reflects a segregation of Estate assets and expenses from Trust assets and expenses in his attempt to raise the priority of his residuary interest. Jesse's improper approach has the effect of changing the Everett's intent and avoiding the operation of 12 *Del. C.* §3595. In contrast to Jesse's argument, Jesse is not obligated to pay anything under Everett's Estate and Trust. The Estate's expenses, and Everett's specific Estate bequests (under the Will and the Trust), simply have higher funding priority, whether funded by assets in the Trust prior to Everett's death or assets distributed to the Trust through the Will.

Since the pour over of assets leaves debts of the Estate unpaid (notably the DNB loan liability), the trust abatement statute applies. It is undisputed that the Trust held 32,486 shares of Fulton Stock (30,200 of which were specifically bequeathed to individuals, including Janice) and another 3,592 shares of Fulton Stock were distributed to the Trust by the Will. The Trust is entitled to the return of the Partnership-held Fulton Stock, accrued dividends and cash, equivalent to 69% of the Partnership Account, as set forth below. All of these assets should be available to fund specific bequests and administrative costs, including attorneys' fees and expenses – before payment of any residuary interest to Jesse. Thus, the procedure chosen by the Court of Chancery is the only method by which the Estate can preserve the Everett's intent and properly apply the abatement statute.

In sum, as to Jesse, the Court of Chancery's Bench Decision and Order reflect the intent of Everett's Will and Trust and they properly apply Section 211 and established Delaware law.

II. THE COURT OF CHANCERY CORRECTLY ORDERED JESSE TO RETURN THE 69% LPI, A RESIDUARY ASSET, TO THE TRUST.

A. Question Presented

Was the 69% LPI a residuary asset of the Trust, subject to payment of specific bequests, and debts and expenses of administration?

B. Standard and Scope of Review

This Court reviews the Court of Chancery's legal conclusions, including its interpretation of written agreements, *de novo*.[62] Review of the Court of Chancery's exercise of its equitable powers is for abuse of discretion.[63]

C. Merits of Argument

1. The LPI is part of the Trust's residue because the LPA does not address its disposition upon the owner's death and because the 2012 Proceedings determined that Everett's gift of the LPI to Janice was void and became part of the Trust residue.

As recognized by the Court of Chancery in the 2012 Proceedings, ownership of the LPI involves the interpretation and interplay of the LPA and the Trust. Under settled Delaware law, a limited partnership agreement is a contract, and the plain meaning of the agreement's terms control.[64] A trust, on the other hand,

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[62] *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999).

[63] *In re Peierls Family Testamentary Trusts*, 77 A.3d 223, 226 (Del. 2013).

[64] *Norton v. K-Sea TransPartners L.*, 67 A.3d 354, 360 (Del. 2013).

follows the trustor's intent as judged not only by the plain language of the trust but also the context of the trust's creation.[65]

The LPA is silent regarding distribution or assignment of a limited partner's interest upon death, and thus provides no right of the JFC Trust (hereafter, simply "Jesse") to the Trust held LPI, as a matter of contract. None of the LPA provisions that Jesse quotes in his Opening Brief addresses what was to happen to the LPI upon Everett's death. And Jesse can point to no other LPA term that so provides. The LPA's silence as to such event is not surprising, given that both limited partners are trusts, not individuals. Moreover, Jesse offered no argument below (or in the Opening Brief) that the parties meant to include additional terms into the LPA.

In his Opening Brief, Jesse's mischaracterizes his arguments from the 2012 Proceedings because he never argued he was entitled to the LPI based upon contractual rights under the LPA. The 2012 Proceedings addressed (1) whether the Everett's gift of the LPI to Janice should be voided and (2) if the gift were void, what happened to the LPI. In his Motion for Summary Judgment in the 2012 Proceedings, Jesse argued "because the limited partnership units could not be transferred. . . those limited partnership units formed a portion of the residual distribution of [Everett]'s trust corpus[.]"[66] Jesse's prayer for relief in that same motion dovetailed with his assertions, expressly requesting the Court to void

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[65] *In re Peierls Family Inter Vivos Trusts*, 77 A.3d at 263.

[66] Jesse's Motion for Summary Judgment, ¶12, B0166.

Everett's gift of the LPI to Janice and to find that "the partnership units titled in the name of Mr. Conaway's Revocable Trust *passed by way of the residuary clause* to Jesse Frederick Conaway."[67]

Jesse also mischaracterizes Janice's argument from the 2012 Proceedings – and in doing so, notably omits any citation to Janice's argument.[68] Unlike Jesse's characterization, Janice merely acknowledged that the only manner in which Jesse might get the LPI was as a residuary beneficiary. Janice's primary argument was that if the gift of the LPI was voided, the LPI would simply remain a Trust asset, subject to further rights of an independent successor trustee, and would not automatically become a residuary asset.[69]

The Court of Chancery agreed with Jesse. The 2012 Decision summarized Jesse's "contention," stating "Everett's [LPI] passed to Jesse as residuary beneficiary of the Trust, a transfer that did not require the consent of the partners."[70] The Court adopted his position in its initial order and in its order on reargument, concluding:

> For the reasons stated in my Letter Opinion of February 15, 2012, I found that the [LPI], held by the [Trust] passed to Jesse

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[67] *Id.* at 4, B0167.

[68] See AOB, 29, 31.

[69] *See Appellant's Opening Br.* at Argument § II-IV, *Russel-Conaway v. Frederick-Conaway*, No. 194, 2012, 2012 WL 4478655 (Del. 2012). A copy of the brief is included at B0171-B0210.

[70] 2012 Decision, AOB Ex. A, 5.

> Conaway or to the Jesse Frederick-Conaway Trust, upon the death of Everett Conaway.[71]

In the proceedings on this appeal, the Court of Chancery recognized that its 2012 Orders used the improper verb tense (*passed*), and the Court has since clarified that Everett's LPI *passes* to Jesse as residual beneficiary, subject to normal administration of the Trust.[72] Finding the gift to Janice void left the Trust as if no gift of the LPI had ever been made. As a result, the 69% LPI became part of the Trust's residue. This Court affirmed that finding.

In his Opening Brief, Jesse provides a succinct summary of the basis of the Court's ruling in the 2012 Proceedings: "[T]he Court's analysis was the gift to Janice of the LPI lapsed[73] due to the prior contractual restrictions and thus fell to the residual."[74] Yet, despite this acknowledgment, Jesse continues his attempt to demonstrate a contractual path to his separate ownership of the LPI through the LPA.[75] He selects individual sentences of the 2012 decisions, expounds general

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[71] 2012 Reargument Decision, AOB Ex. B, 1.

[72] Beench Decision, 4.

[73] The gift did not lapse; it was declared void.

[74] AOB, 31.

[75] Jesse also ignores his own actions in violation of the terms of the LPA and the Trust. Even though the Trust owned and held a 69% LPI and a 50% GPI, Jesse has admitted that he canceled the Partnership with the Delaware Secretary of State, closed the Partnership account, and transferred the Partnership assets (Fulton Financial Stock and cash held in the Morgan Stanley Partnership investment account) to his individual account. *See* AOB, Ex. F, 8, 10. This constituted a *de facto* termination of the Partnership and a distribution of its assets.

principles of contractual freedom, and offers a fantastic conclusion: "Thus, the Court below unequivocally clarified that Jesse was the owner of EJKC due to the contract that existed with Everett."[76] This is a complete misrepresentation.

As recognized in the 2012 Proceedings, Jesse held only the contractual right to withhold consent to Everett's attempted transfer of the LPI. Jesse obtained any right to the LPI only as residuary beneficiary of the Trust. Jesse ignores the express legal arguments in his 2012 Motion for Summary Judgment, mischaracterizes the Court's rationale for its decisions in the 2012 Proceedings, and identifies no contractual provisions in the LPA to support his position.

2. Because the LPI is a residuary asset of the Trust, it must be returned to the Successor Trustee.

It is axiomatic that a residuary beneficiary of a trust takes his or her interest subject to the expenses and debts of the trust. This long-standing principle is confirmed in Delaware's abatement statute, 12 *Del. C.* § 3595, which provides the order in which gifts abate in the event that a trust needs funds to pay expenses or debts. Except for property not addressed by the Trust, residuary gifts abate first.[77] Simply put, a residuary beneficiary is not entitled to any gift until the debts, taxes, expenses and higher priority specific bequests are satisfied.[78]

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[76] AOB, 30.

[77] 12 *Del. C.* § 3595(a).

[78] *See In re Estate of Farren*, 131 A.3d 817, 840 (Del. Ch. 2016) (citing *In re Ortiz' Estate*, 27 A.2d 368, 372 (Del. Ch. 1942)).

As an initial matter, Jesse has waived his argument regarding the payment of the estate debts. This Court instructed in *Flamer v. State* that "the appealing party's opening brief [must] *fully* state the grounds for appeal, as well as the arguments *and supporting authorities* on each issue or claim of reversible error."[79] Merely stating a conclusion is insufficient to constitute an argument on appeal.[80] If the appellant fails "to present and argue a legal issue in the text of an opening brief," then the argument is waived.[81]

Jesse's argument regarding the payment of Estate debts is waived because Jesse's Opening Brief offers no logical or legal support for his argument that creditors cannot reach the 69% LPI held by the Trust. Instead, Jesse simply analogizes the situation to the failure of Janice's gift. Jesse's analogy is not accompanied by any analysis or support.[82] This alone is a basis for the Court to conclude Jesse has waived this argument.

Even viewed on its substance, Jesse's argument lacks merit because Jesse ignores the nature of a residuary clause and the rights of a residuary beneficiary. In affirming the Court of Chancery's 2012 Decision, this Court held that the LPI

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[79] 953 A.2d at 134 (emphasis in original).

[80] *Id.* at n.8.

[81] *Id.* at 134-35.

[82] If Jesse means to say that adding the LPI to the Trust's residuary assets is somehow improper, then the time to address that was in 2012. Now, it is precluded under *res judicata*.

became a residuary asset of the Trust, subject to the same rules relating to priority and distributions under any estate or trust. Accordingly, the Court of Chancery properly ordered Jesse to return the LPI (and the assets constituting that interest), notwithstanding Jesse's contrary arguments.

Jesse attempted to side-step the Order by arguing that the Trust still *had* the 69% limited partnership interest in the assets of the Partnership because the Trust still held the 69% LPI. Jesse also argued that his retitling of the Fulton Stock from the Partnership's name to his individual name was not improper even though as a minority partner, he had liquidated Partnership assets. In short, Jesse attempted to justify his actions by stating that "funds would be available for payment of the distributions and expenses of the Trust."[83] However, this is a smoke screen. Jesse should not have transferred Partnership assets to himself without the Co-Trustee's consent.

Retitling or transferring Partnership assets is an action that requires *all* co-executors (if distributed from an estate) or all co-trustees of a trust, unless otherwise provided in the Will or Trust.[84] In addition, Section 3A of the LPA provides that, "No steps shall be taken which may result in a substantial change in the operation or objectives of the Limited Partnership without the prior written

[83] *See* AOB, Ex. F, 9:15-20.

[84] *See May v. DuPont*, 229 A.2d 784, 786 (Del. 1967).

consent of the General Partner and not less than sixty percent (60%) of the ownership interest of the Limited Partners."[85] Jesse's unilateral retitling of the Partnership Account in his own name was a transfer of the sole asset of the Partnership without the consents required in the LPA. Had Jesse not unilaterally distributed the single asset of the Partnership to himself, Mr. Baird would have the same rights as Jesse under the LPA: to determine the outcome of the Partnership Account, or if necessary, to seek termination of the Partnership, to accomplish the distribution of Partnership assets in accordance with the LPA.[86] At the time Jesse retitled the Partnership Account, the Trust held the 69% of the limited partnership interest and 50% of the general partnership interest.[87]

Here, the LPI, although vested in Jesse as residuary beneficiary of the Trust, is not distributable to him until the debts, taxes, expenses and higher priority specific bequests are satisfied.[88] Mr. Baird, as successor Trustee, has equal rights with Jesse as co-owner of the Confam, Inc. general partnership interest in the Partnership (1%), and holds the majority limited partnership interest in the Partnership (69%). Mr. Baird is obligated to carry out the express provisions of Section 2D and 3 of the Trust. An as explained in Argument Section I, this must

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[85] A0035.

[86] *See* LPA, § 9(D) & 10(C), A0039.

[87] *See* Trust, § 2-D, A0020.

[88] *See In re Estate of Farren*, 131 A.3d 817, 840 (Del. Ch. 2016).

occur under an integrated testamentary plan that addresses both the Will and the Trust. This requires distribution of Partnership assets up to the equivalent value of the Trust-held Partnership interests, to pay debts, expenses and fund specific bequests of Fulton Financial Stock to the named beneficiaries.[89] The Court's directive to Jesse to return the LPI, with interest and dividends, is the correct ruling, in that it confirms the Successor Trustee's rights as co-partner of Partnership regarding distribution of partnership assets and Successor Trustee's obligations regarding payment of specific bequests, debts and expenses.

As the Court below correctly summarized, a residual beneficiary takes subject to the satisfaction of "specific bequests, estate expenses, creditors, et cetera."[90] To allow Jesse to leap-frog the specific beneficiaries and remove an asset first would violate the intent of the settlor and would work an unjust and inequitable result – it would force expenses to be paid from the specific gifts rather than the residue. Such a result is contrary to Delaware law and to the wishes of the settlor.

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[89] If Jesse refuses to allow Mr. Baird to apply Partnership Assets equivalent to the Trust held Partnership interests to Trust debts and expenses, Mr. Baird can also seek judicial termination of the Partnership to accomplish the same result. *See* 6 *Del. C.* § 17-802.

[90] Bench Decision, AOB Ex. E, 5. *See* 12 *Del. C.* § 3595.

3. The law of the case doctrine does not apply to the issues in this appeal.

In contrast to other doctrines, such as *res judicata* or *stare decisis*,[91] the law of the case doctrine applies only to "the same case in the trial court or in a later appeal."[92] The doctrine's purpose is to provide "closure to matters already decided in a given case," "particularly when . . . that same court is considering matters in a later phase of the same litigation."[93] It operates within proceedings "during the course of a single continuing lawsuit," not between separate actions.[94] In a trial court, the doctrine applies to two distinct situations: (1) the trial court's discretion to adhere to its own interlocutory rulings prior to its final judgment in that case; and (2) the trial court's obligation to follow an appellate court's decision in proceedings in the same case.[95] And even when it does apply, the doctrine gives a

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[91] Jesse's Opening Brief did not argue that any other doctrine applies, and those arguments are now waived. Supr. Ct. R. 14(b)(vi)A(3). *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

[92] *Ins. Corp. of America v. Barker*, 628 A.2d 38, 40-41 (Del. 1993). *See Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *8 (Del. Ch. Sept. 10, 2015) ("The law of the case doctrine, by its terms, contemplates one continuous action within the same court system.").

[93] *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (2000).

[94] 18B Wright & Miller, *Federal Practice & Procedure* §§ 4478, 4478.1 (2d ed. & 2016 supp.)

[95] *See id.*

trial court flexibility to clarify earlier rulings and or to address changed circumstances.[96]

First, the law of the case doctrine does not apply because this is a new case, not a review of an interlocutory decision or a decision on remand. While this case involves the same estate as the 2012 Proceedings, this case arose under a separate procedure and it addresses separate issues. Even Jesse's opening brief acknowledges that this separate case began after "the finality of the original litigation."[97] According to Jesse, this case arose "after the court decisions on the prior litigation[.]"[98] Though related in a general sense, this case is separate and distinct from the 2012 Proceedings. Consequently, the law of the case doctrine does not apply, and Jesse's assignment of error on this ground fails.

Second, the doctrine does not apply because as explained above, the prior holdings are inapposite to Jesse's representations. In the 2012 Proceedings, Jesse advocated for the Court's finding that as a result of the failed gift to Janice, Jesse was entitled to the LPI as residuary beneficiary of the Trust. The Chancery Court agreed, and this Court affirmed the decision.

Jesse's attempt to reframe the 2012 Proceedings as he now argues is misleading. The sentence of the 2012 Decision that Jesse emphasizes must be read in context:

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[96] *Gannett Co., Inc.*, 750 A.2d at 1181.

[97] AOB, 13.

[98] *Id. See* OB 1.

> Everett tried but failed to appoint Janice as the successor to his trust in the Partnership Interest. He failed because that transfer was contrary to the LPA by which he was bound. 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.*[99]

As context shows, the sentence was neither the Court's holding nor a determination that Jesse received the LPI as a matter of contract law. Rather, the sentence confirmed that Janice's ownership (actually, lack of ownership) of the LPI was determined as a matter of contract law – *i.e.*, pursuant to a provision of the LPA.

Finally, even if the law of the case doctrine were applicable, the doctrine allows a court to clarify its earlier ruling. The Chancery Court did exactly that, as explained above and as acknowledged by Jesse's counsel.[100] After acknowledging that some of the language in the 2012 decisions was "sloppy," the Court clarified that the LPI *would pass* to Jesse (subject to creditors' demands) through the residuary clause, not that it *had passed* to Jesse.[101] Thus, even construing it in Jesse's favor, he still cannot prevail on his misplaced law-of-the-case argument.

In sum, the law of the case doctrine is inapplicable to this case because it is a separate matter and because the prior holdings are not as Jesse presents them. Even if the doctrine did apply, this case falls within an established exception to the doctrine.

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[99] 2012 Reargument Decision, 2 (emphasis added).

[100] AOB, Ex. F, 15:7-11.

[101] Bench Decision, AOB, Ex. E, 4-5.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The Court of Chancery erred in ordering Janice to pay legal interest on the two advances of funds from the sale of the CDI Stock. Janice was both the income and principal beneficiary of the CDI Stock payments, and the advances were proper. Janice's only liability was and is a charge to her remaining beneficial interest, of the amount advanced, especially since Janice would have been due interest had the funds remained in the Trust. The Court of Chancery's unexplained imposition of legal interest was contrary to law, contrary to Everett's intent and contrary to the equities of this case.

2. The Court of Chancery also erred in ordering Janice to repay $77,987 in advances with legal interest. Again, as a beneficiary, Janice's liability was limited to a charge to her remaining interest. Upon Jesse's return of the Trust's interests in the assets attributable to the LPI, the Trust will be solvent and Janice's remaining interest is larger than the amount of the advances. Also, the Court of Chancery failed to explain its imposition of legal interest on Janice's advance when the Court of Chancery imposed actual interest (or increase in value) on other amounts to be returned.

STATEMENT OF FACTS ON CROSS-APPEAL

Everett's Will and Trust, both executed September 21, 2009, were in effect when he passed. Everett's Will provided, *inter alia*, for the disposition of certain tangible personal property to Janice Conaway and the pour-over of all of the rest, residue and remainder of assets to the Trust.[102]

The Trust provides Everett's specific direction as to the disposition of the majority of the Everett's assets. Janice was to receive 23,000 shares of Fulton Stock, the Morgan Stanley Active Assets Account (valued at $36,088.24) and the CDI Stock.[103] In the event that the CDI stock was sold, then any proceeds were to go to Janice.[104] As with all other specific beneficiaries, Janice was to receive the income from her specific gift, too.[105]

Before his death, Everett sold the CDI stock to Harry Cook, LLC, pursuant to the terms of the SPA.[106] Under Section 2.2 of the SPA, two $75,000.00 payments came due following Everett's death, and a third, conditional payment has not yet become due.[107] Then-Estate attorney Mr. Ellis requested Harry Cook, LLC to make distributions directly to Janice, with notice to Jesse. Mr. Ellis "never

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[102] Will, A0002

[103] Petition for Instructions, A0104-0106.

[104] Trust, § 3-D, A0021.

[105] Trust, § 3, A0020.

[106] SPA, A0062-0085.

[107] A0066-0067. Section 2.2(1)(d) of the SPA describes this conditional payment.

received any objection to the payments from Mr. Cook, his attorney, Jesse or Mr. Rutt [Jesse's attorney]."[108] Upon his death, Everett also held 3,592 shares of Fulton Stock, other individually owned stocks, cash and tangible personal property, the total value of which was $100,696.79, as itemized and reported on the Inventory.[109]

Although Mr. Baird alleged in the Petition for Instructions that the two $75,000 payments were "improperly" distributed to Janice,, the Court below concluded that they were proper, because Janice was gifted the right to the payments under the Trust, but advanced prematurely.[110] The alleged improper distributions to Janice also included sums distributed to Janice during 2012 and 2013, totaling $77,986.22.[111] Janice believed, however, that the receipt or advance of these sums was made upon advice of Mr. Ellis, to be treated as advances on Everett's specific bequest to her of 23,000 shares of Fulton stock, all of which was sold at the outset of the Estate administration to pay the DNB loan.[112]

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[108] Ellis Report, B0031.

[109] Petition for Instructions, A0104.

[110] Order, AOB Ex. G, 1 at (b).

[111] Janice's Response to Petition for Instructions, B0107.

[112] *See id.*, B0110-114; Ellis Report, B0027-0028.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ORDERING JANICE TO PAY INTEREST ON THE TWO $75,000 ADVANCES OF FUNDS FROM THE SALE OF THE CDI STOCK.

A. Question Presented

Did the Court of Chancery err by ordering Janice, a beneficiary of the Trust, to pay legal interest on two proper advances of $75,000 each, when Janice would have been due interest payments on the advanced funds had those funds remained in the Trust? *See* AOB, Ex. F, 16:12-17:3.

B. Standard and Scope of Review

This Court reviews the Court of Chancery's legal conclusions, including its interpretation of written agreements, *de novo*.[113] Review of the Court of Chancery's exercise of its equitable powers is for abuse of discretion.[114] But if the Court of Chancery fails to explain its reasoning, then that is a *per se* abuse of discretion.[115]

C. Merits of Argument

1. The Court of Chancery erred in ordering Janice to pay interest on proper advances of funds from the sale of the CDI stock, because as an income beneficiary, Janice would have been due interest had the funds remained in the trust estate.

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[113] *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999).

[114] *In re Peierls Family Testamentary Trusts*, 77 A.3d 223, 226 (Del. 2013).

[115] *See Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1104 (Del. 2001).

Delaware traditionally follows the Restatement approach on settled principles of trust law, such as advances.[116] The Restatement is clear: If a beneficiary receives an advance from a solvent trust estate, then the beneficiary's only liability is a charge to the beneficiary's remaining interest of the amount advanced.[117] In this context, an advance includes any "payment to the beneficiary before the time when by the terms of the trust the payment should be made."[118] The Restatement's "well-settled" approach flows from the traditional rule that beneficiaries are not usually liable to trusts.[119] It also recognizes that income beneficiaries have a right to income from the date an asset becomes subject to a trust.[120]

Here, the payments at issue are two $75,000.00 payments arising out of Everett's December, 2009 sale of 100 shares of CDI Stock under the SPA. The SPA required the first payment to be made on December 22, 2010 and the second to be made on December 22, 2011.[121] Under the Trust, Janice receives the entire

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[116] *See, e.g.*, *Otto v. Gore*, 45 A.3d 120, 130 (Del. 2012) (citing *Restatement (Third) of Trusts* (2003)); *McNeil v. McNeil*, 798 A.2d 503, 510-511 & 515 (Del. 2002) (citing *Restatement (Second) of Trusts*) (1959)).

[117] *Restatement (Third) of Trusts*, § 104 & comment (d) (2012 & supp. 2016); *accord Restatement (Second) of Trusts* § 255 & comment (b) (1959).

[118] *Restatement (Second) of Trusts*, § 255, comment (b).

[119] *Restatement (Third) of Trusts*, Ch. 20 (Intro Note) & § 104, comment (b).

[120] 12 *Del. C.* § 61-301(a), (b). *See also*, 12 *Del. C.* § 2312(c) (analogous provision regarding payment of interest on pecuniary legacies).

[121] SPA, § 2.2(1)(b), (c), A0067.

beneficial interest because she is the specific beneficiary of these payments,[122] as well as "any accumulated income" from the payments.[123] On the instructions of the Estate's then-attorney, the purchaser of the CDI stock remitted the payments directly to Janice. At the time, there was no reason to believe the unified estate was insolvent.[124] The Court of Chancery determined that the $150,000 was ultimately due to Janice as specific beneficiary of the interest, and that these advances were proper.[125]

With regard to these two advances, the Court below erred in assessing legal interest. The Court's Order as to these two advances could be supplemented (as the Court included with its Order as to the miscellaneous personal property)[126] with language to confirm the advances are "without any reduction in that amount to pay Estate debts, unless the residue of the Trust proves insufficient to pay valid Estate debts."

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[122] *See* Trust, §3-D, A0021.

[123] *See id.*, §3, A0020.

[124] *See* Ellis Report, B0031.

[125] Bench Decision, AOB Ex. E, 17; Order, AOB Ex. C, 1 at (b), (c).

[126] *See* Order, AOB Ex. G, 2 at (d) (finding that Janice was "entitled to retain all of the Miscellaneous Property. . . without any reduction in that amount to pay Estate debts, unless the residue of the Trust proves insufficient to pay valid Estate debts."). *See also*, *Restatement (Second) of Trusts*, § 255, comment (c).

2. The Court of Chancery further erred by failing to explain its reasoning, including its departure from well-settled law.

Compounding its error, the Court did not properly explain its departure from established law or its decision to charge Janice interest. "The failure of a trial judge to give reasons for the court's disposition constitutes a *per se* abuse of discretion."[127] Mere incorporation of one party's argument, without independently-reasoned analysis, is insufficient.[128] Rather, trial judges must "make a record to show what factors were considered and the reasons for the decision."[129]

Here, the Court failed to address several factors or to explain its reasoning in its decision. The Court did not address Janice's right to the income from the funds in question, nor did the Court address the effect that Jesse's return of the LPI would have on the solvency of the Trust.[130] Further, the Court did not address the inconsistency between the charging of interest and the intent and nature of the advance. While the trial court made passing reference to the "time value of money,"[131] the Court offered no reasoned explanation for the application of the interest assessment. Perhaps the Court's adopted the Trustee's also inappropriate analogy, comparing the advances to a commercial loan. Even the period that the

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[127] *Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1105 (Del. 2001).

[128] *Id.* at 1104-05.

[129] *Id.* at 1104 (internal citations and punctuation omitted).

[130] *See* Argument II, supra.

[131] Bench Decision, AOB Ex. E, 6.

interest is to be assessed is amorphous – "from the time of the advance until the date the Trust would have distributed those assets to Janice. . .[.]"[132] Finally, the Court failed to consider the equities or to identify an equitable maxim or legal basis for its conclusion.

If the funds had been deposited into a Trust account, Janice would have been entitled to any interest on the funds attributable to these payments under a specific bequest. Excepting insolvency of the unified Estate and Trust, Janice would be entitled to interest on the un-advanced funds by statute.[133]

The Court did not explain how it reached its result, which constitutes another ground for reversible error.

3. The Court of Chancery's remedy improperly contradicted Everett's intent and worked an inequity to Janice.

Lastly, the Court's decision is an inequitable subversion of Everett's intent as expressed in the Will and Trust. A settlor's intent must guide trust interpretation and administration.[134] Though the Court recognized that it was Everett's intent for Janice to have these funds, the Court did not consider that the assessment of interest on advances contravenes this intent.[135]

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[132] Order, AOB Ex. G, 1 at (b), (c).

[133] *See* 12 *Del. C.* § § 61-301(a), (b).

[134] *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 263 (Del. 2013).

[135] *Compare* Bench Decision, AOB Ex. E, 6 *with* AOB Ex. F, 16-17.

Assessing interest to Janice subverts Everett's intent that Janice should receive the CDI stock payments together with interest, and provides an inequitable windfall to Jesse, as residuary beneficiary of the Trust. Because this result is contrary to the intent of the settlor and contrary to the tenets of equity, this part of the order of the Court below should be stricken.

II. THE COURT OF CHANCERY IMPROPERLY ORDERED JANICE TO REPAY $77,987 IN ADVANCES PLUS LEGAL INTEREST.

A. Question Presented

Did the Court of Chancery err when it ordered Janice, a beneficiary of the Trust, to repay advances totaling $77,987.00, plus interest, when her remaining beneficial interests in Trust assets is greater than the advances? *See* AOB, Ex. F, 16:12-17:3.

B. Standard and Scope of Review

This Court reviews the Court of Chancery's legal conclusions, including its interpretation of written agreements, *de novo*.[136] Review of the Court of Chancery's exercise of its equitable powers is for abuse of discretion.[137] But if the Court of Chancery fails to explain its reasoning, then that is a *per se* abuse of discretion.[138]

C. Merits of Argument

As explained in the preceding section, a beneficiary's liability for an advance of that beneficiary's interest is limited to a charge to the beneficiary's remaining interest of the amount advanced.[139] This is generally true regardless of

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[136] *Schock v. Nash*, 732 A.2d 217, 223 (Del. 1999).

[137] *In re Peierls Family Testamentary Trusts*, 77 A.3d 223, 226 (Del. 2013).

[138] *See Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1104 (Del. 2001).

[139] *Restatement (Third) of Trusts,* § 104 & comment (d); *Restatement (Second) of Trusts*, § 255 & comment (b).

whether a beneficiary's advance is proper or improper.[140] Unless the beneficiary's interest is insufficient to cover the amount advanced, the beneficiary's personal liability stops at the charge to the beneficiary's account.[141]

Here, the Court erred by ordering Janice to repay advances with interest to the Trust given that Janice's remaining beneficial interest in Trust assets is greater than amounts advanced. Janice is entitled to receive 23,000 shares of Fulton Stock and the balance of the Morgan Stanley Active Assets Account. Upon Jesse's compliance with the Court's Order for the return of the LPI (*i.e.,* Partnership assets of equivalent value to the Trust-held Partnership interests), there will be no need for abatement of Trust specific bequests. Again, the proper course of action would have been to order a charge to Janice's remaining beneficial interests in Trust assets, subject to a future divestiture in the event of the Trust's insolvency. As stated in the preceding section, and for the reasons stated, assessment of legal interest to prior advances, is also inequitable.

Even if assessment of interest is warranted, the interest rate should have been equal to the Trust's return rate on similar assets in the Trust estate. The Court used this actual-return standard with regard to Jesse's return of the LPI, and the Court offered no rationale for its imposition of a different standard for Janice. Accordingly, the Court also erred by awarding legal interest against Janice.

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[140] *See Restatement (Second) of Trusts*, § 255, comments (a) & (b).

[141] *Id.* at comment (c).

Though not directly on point, then-Chancellor Chandler's decision in *In re Lomker*[142] is instructive and persuasive. *Lomker* involved an estate dispute brought by the son and daughter-in-law of the decedent against the executrix, the decedent's long-time friend and caregiver. After son had frustrated the estate administration through petty acts (changing locks on the decedent's home, taking documents related to the decedent's financial holdings, etc.), the heirs brought the action. The duo alleged the executrix mishandled the estate by filing the inventory late, failing to inventory sentimental items of property, and obtaining an inadequately low appraisal of the real estate. Notably, however, the record showed that the son's taking of the financial documents delayed filing of the inventory; the heirs expressed no personal interest in any of the so-called sentimental property; and the real estate in question sold for less than the appraised value. The unfortunate effect of the dispute was to turn the estate into a "soap opera."[143] While the Court found that the inventory was untimely and incomplete, the Court declined to penalize the executrix. The Court determined that a non-statutory penalty would be inequitable given the heirs' contribution to the situation and the lack of harm to the heirs.

Here, as with the executrix in *Lomker*, there is no basis to penalize Janice. Janice's received advances and accounted for them; there has been no evidence of

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[142] 1999 WL 1022082 (Del. Ch. 1999).

[143] *Id.* at *1, n.1. The Master who first heard the case found the son's behavior to be in bad faith and his litigation to be vexatious, but the Chancellor could not reach the same conclusions based upon the information at the trial *de novo*. *Id.* at *5.

ill will or bad faith.[144] And, just as in *Lomker*, Jesse has greatly contributed to the circumstances surrounding the advances to Janice totaling $77,987.00, and generally to delays in the administration of the Estate and Trust.[145] Finally, as in *Lomker*, there is little or no harm to the estate. With Jesse's own return of the LPI to the Trust, the Trust is unquestionably solvent and Janice's remaining interest is sufficient to cover any charge. The remaining specific beneficiaries will receive their full intended gifts. Thus, just as in *Lomker*, there is no statutory or equitable basis – and certainly none articulated by the Court of Chancery – to penalize Janice.

Given all of the above, this Court should reverse the Court of Chancery's order that Janice repay advances (with interest) to the Trust or at minimum, this Court should reverse the Court of Chancery's unreasoned application of a higher interest rate to Janice.

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[144] *See* Janice's Response to Petition for Instructions, B0110-0114.

[145] *See* Ellis Report, B0028-B0029.

CONCLUSION

For all of the reasons above, this Court should affirm the Court of Chancery's determination that the LPI is a residuary asset of the Trust and therefore available to pay Estate and Trust expenses and debts, and this Court should reverse the parts of the Court of Chancery's Order that required Janice to return advances (with interest) to the Trust.

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