EFiled: Aug 21 2017 06:34PM EDT
Filing ID 61012647
Case Number 179,2017 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARGARET C. UGHETTA, Petitioner-Below, Appellant, v. MARY HARDING CIST, individually, as Executrix of the Estate of John David Cist, and as Trustee of the Supplemental Trust Agreement of John David Cist, Respondent-Below, Appellee, Cross-Appellant.	)	C.A. No. 179,2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 7885-MG

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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Dated: August 21, 2017

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NATURE OF PROCEEDINGS

This is the appeal by one of the beneficiaries of a trust from the decision of the Court of Chancery that granted summary judgment to the Trustee. The Trustee has filed a cross-appeal from the Court of Chancery's decision that also declined to invoke a No Contest clause in the Trust or to award the Trustee her attorneys' fees pursuant to the statutory fee-shifting provision in Delaware's trust law. The two decisions of the Court of Chancery took the form of affirming the Master in Chancery's two Final Reports after a full review of those recommendations.

This is the Trustee, Respondent-Below, Cross-Appellant's Answering Brief on Mrs. Ughetta's Appeal and Opening Brief on the Trustee's Cross-Appeal.

SUMMARY OF ARGUMENT

Response To Appellant's Summary Of Argument

1. Denied. The Trust language in contest ambiguously refers to "transfers" the Settlor made, without specifying what transfers should be used to carry out his intent to treat all of his children equally. Mrs. Ughetta's argument that any "transfers" made since a child's birth must be counted has the effect of frustrating the Settlor's intent and is without merit.

2. Denied. Mrs. Ughetta's belated attempt, after the Master recommended granting summary judgment, to rely on ambiguous letters she held for years was too little, too late and would also frustrate the Settlor's intent.

Respondent's Summary of Argument on Her Cross-Appeal

1. The Court of Chancery erred in failing to enforce the Trust's No Contest Clause when Mrs. Ughetta's action was an attempt to set aside the Trust's dispositive provisions.

2. Alternatively, the Court of Chancery erred in failing to award the Trustee her attorneys' fees under Delaware's statutory provisions for fee shifting in trust litigation.

STATEMENT OF FACTS

1. Background To The Present Litigation

John David Cist ("Mr. Cist") married Mary S. Cist ("Mrs. Cist") on November 24, 1956. They had four children: Dr. Dorothea Cist ("Dorothea"), born October 25, 1958; Margaret C. Ughetta ("Mrs. Ughetta"), born June 4, 1960; Dr. David B. Cist ("David"), born July 31, 1962; and Mary Harding Cist ("Mary Harding" or "Trustee"), born October 31, 1966. (B77.) [1]

Mr. and Mrs. Cist accumulated considerable wealth during their lifetimes, both from their own efforts and through family trusts and inheritances from their parents. As each of their parents had done before them, Mr. and Mrs. Cist determined to transfer that wealth in equal measures to their four children. (B78.) They carried out this intent by gifts that reflected the circumstances of their four children - a summer house to David; support for Dorothea's business ventures; a wedding for Mrs. Ughetta as well as occasional tuition payments for her four children; and their residence to Mary Harding effective after their death. (*Id.*)

Thus, their May 21, 1991 Wills provided that their "tangible personal property" be divided "to such of [our] children who shall survive [us], in substantially equal shares." (B208.) The remainder of their Estates was to be

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[1] Citations to "B___" are to the Appendix filed with this brief.

placed in the "trust" Mr. and Mrs. Cist "created" at that time. (B86-130.) That 1991 Trust Agreement and Will would be modified several times. (B86-205.)

Following the death of Mrs. Cist in 2008, Mr. Cist realized that their trusts did not treat their children equally. Mr. Cist sought to equalize what their four children would receive from their parents' combined estates. After some preliminary amendments to his estate documents, on July 17, 2009, Mr. Cist executed a new First Amendment. As his First Amendments stated, it "intended to express my goal that, insofar as possible, the combined estates of my late wife, Mary S. Cist, and me shall be divided into equal shares" for each of our children.[2] (B16.)

Three months after executing these amendments, in October 2009, Mr. Cist engaged Victor Pelillo, C.P.A. ("Mr. Pelillo") to review his financial records to assist in "equalizing the lifetime gifts and transfers made to each of his four children." (B67.) Later that same month, Mr. Pelillo completed his review and Mr. Cist had each child review Mr. Pelillo's report with his/her equalizing total. (B71-76.)

On January 6, 2010, after Mr. Pelillo had completed his review, Mr. Cist executed his Second Amendment to Supplemental Trust Agreement of John David

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[2] The 2008 document actually states ". . . equal shares – one share for each child of ours living . . ." (B16.)

Cist (the "Second Trust Amendment"). As the governing instrument, the Second Trust Amendment provided in Paragraph D:

> This amendment is intended to express my goal that, insofar as possible, the combined estates of my late wife, Mary S. Cist, and me shall be divided into equal shares – one share for each child of ours living at the time of my death, and one share for each child of ours deceased at such time but with issue then surviving. For purposes of this division:
>
> 1. The Trustee shall add to the value of my wife's and my combined estates the cumulative value of transfers to our children (including transfers to, or for the benefit of, issue of a child as transfers to that child, and including payments made on behalf of a child or issue even if such payments were not deemed transfers under IRC Section 2503(e) for gift tax purposes) made by my wife and/or made by me during our lifetimes, as well as made upon death pursuant to my wife's will and/or trust and/or pursuant to my will and/or trust, as well as by beneficiary designation. These gifts shall be included at their date-of-gift (i.e., transfer) values.
>
> 2. After calculating the aggregate amount to which each such child (or issue of a child) has received and is entitled to receive from all sources as provided above, the trustee shall modify (i.e., reduce or increase) the shares for my children (or issue of a child) under this Agreement as necessary so that the aggregate amount received by such child (or issue of a child) from all such sources is equal to the aggregate amounts received by each other child (or issue of a child) of mine from all such sources.
>
> 3. Such equal shares shall be further modified (i.e., reduced or increased) if required pursuant to the No-Contest Provision included below.
>
> 4. I intend to make substantial equalizing transfers during my lifetime after the execution of this supplemental trust agreement. Such lifetime equalizing transfers reflect my intent to devise my one-half interest in real property at 1102 Brandon Lane to my daughter Mary Harding Cist upon my death, by reducing my lifetime transfers to such daughter. The trustee shall take such transfers into account in making

> distribution hereunder to achieve my intent as nearly as possible, so that if such equalizing transfers were completed during my lifetime, upon my death my one-half interest in the real property at 1102 Brandon Lane will be distributed to Mary Harding Cist, and the balance of my remaining estate and trust assets shall be divided equally among my children, or the issue of a deceased child, *per stirpes*.

(B201-02.)

Also on January 6, 2010, Mr. Cist adopted the Second Codicil to his Will that provided in Paragraph B:

> To the extent not disposed of by memorandum, I give all of my tangible personal property, together with any policies of insurance on that property, to my children who survive me, in equal (or as nearly equal as possible) shares. If my children are unable to agree upon a method of distribution among themselves, distribution will be by alternating selection in an order to be determined by the drawing of lots.

(B233.)

Mr. Cist died on June 24, 2010. (B23 ¶ 3.) Mary Harding then was appointed the Executrix of his Estate on July 15, 2010 (*Id.* ¶ 5.) She is also the Trustee of his Trust (*Id.* ¶ 2.)

2. The Evidence of Mr. Cist's Intent

The current issue before the Court is the meaning of "transfers to our children . . . during our lifetimes" as used in Mr. Cist's Trust.[3] There are four types

[3] In the Court of Chancery, Mrs. Ughetta also argued that Mr. Cist's tangible personal property (called the "TPP") had not been divided properly among the Trust beneficiaries and that the Trustee had treated her unfairly. Both those arguments were rejected by the Court of Chancery. Given those arguments are not made in Mrs. Ughetta's appellate brief, those issues are not involved in this appeal.

of evidence that show what Mr. Cist intended by his Trust's direction to take into account transfers "during our lifetimes." They are: (a) what he told his attorneys and children; (b) the contemporaneous actions Mr. Cist took to carry out his intentions; (c) the other language in his Trust; and (d) what Mrs. Ughetta was told that Mr. Cist intended. Each is summarized below.

a. Testimony of Mr. Cist's Attorneys and His Children

Shortly after Mrs. Cist died in February 2008, Mr. Cist changed his estate planning attorneys from Donald Sparks, Esquire to Joanna Reiver, Esquire ("Ms. Reiver"). (B357 at 8-9.) Mr. Cist told Ms. Reiver that he wished to provide an equal division of his assets and that of his wife to "all four of his children." (B358 at 12.) To help meet his goal, Ms. Reiver asked Mr. Cist for information about the "prior transfers" he and his wife had made to their children that he wanted her to consider as part of the equalization process. He, in turn, supplied her with gift tax returns and preliminary equalization numbers. (B359 at 18.)

In the early 1980s, Mr. Cist wrote a computer program to track expenditures, keeping detailed records of every check written. In addition to this "computer register," and prior to its creation, Mr. and Mrs. Cist recorded entries in their

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Emerald Partners v. Berlin, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

bankbooks and/or directly on a monthly statement report.[4] Later, at Mr. Cist's request, a more formal compilation was performed by his accountant, Mr. Pelillo. (B375 at 166-67; B376 at 193.)

Ms. Reiver was clear about what transfers Mr. Cist told her he intended to include:

> [Mr. Ferry] Would I be correct then where it talks about wanting to discuss transfers made during he and his wife's lifetimes, he's talking about all transfers he and his wife ever made to his beneficiaries?
>
> [Ms. Reiver] No.
>
> Q. What is he talking about?
>
> A. He's talking about transfers made to them after they were – this is my language – after they were emancipated. He didn't use that language, but he wanted to look back to transfers that had been made over the years but not prior to the point which each child was fully educated with college.
>
> Q. Why doesn't it say that? Why does it say "transfers made during our lifetimes" rather than "transfers made during our lifetimes after our children were emancipated or after they graduated college" or something to that effect?
>
> A. We were just trying to – we were still attempting to get – when I say we, I mean, Mr. Cist and me with Kristen's help were still trying to get information so that we could quantify the transfers, that we wouldn't have to define them.

(B360 at 40-41.)

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[4] *See* as an example, B1-15, the list for 1983 that describes for each check the amount, the purpose and the children, if pertinent, who benefited from each transfer.

That intent was consistent with "all the information about transfers" Mr. Cist gave to Ms. Reiver. (B361 at 43.) Ms. Reiver then made "calculations" of how to divide Mr. Cist's assets to take into account the "lifetime transfers" Mr. Cist wanted to include in the process of achieving equal treatment for his children. (B363 at 59-60.) Mr. Cist created and intended to fund four irrevocable trusts (one for each child) with varying amounts so as to achieve the equal treatment he sought. (B374 at 133-34.) In his repeated calculations done over months, Mr. Cist did not include any transfer to a child prior to his or her graduation from college.

P. Kristen Bennett, Esquire ("Ms. Bennett"), an associate of Ms. Reiver's, also testified as to conversations that she had with Mr. Cist about what transfers he intended to include as part of his equalization process. Ms. Bennett recalled that Mr. Cist "wanted to start on a staggered date" based on the college graduation of each child. (B349 at 38-39.)

> [Mr. Ferry] So would it be accurate to say your understanding was Mr. Cist did not want to include in lifetime transfers any support like you just described that was provided to the children up until the time they turned 18?
>
> [Ms. Bennett] Mr. Cist never mentioned any of the pre-college transfers, gifts, other things that they had done for the children. So I did not, based on the numbers he was giving us and the primary numbers he was setting out, do not believe there was ever any intention to include that.

(*Id.* at 38.)

She confirmed that Mr. Cist gave his attorneys information on the transfers he wanted included. (B350 at 46-47; B354 at 86-88.) Mr. Cist would have actually funded his four irrevocable trusts to achieve equalizing those particular transfers, but for his attorneys' concerns over the uncertainties in the 2009 and 2010 tax laws and over the exact amounts to be funded. (B351 at 52-53; B355 at 103; B374 at 133.)

These testimonies of what Mr. Cist said to his attorneys are corroborated in their contemporaneous notes of those conversations with him. For example, Ms. Bennett's email of July 20, 2009 confirms that "[Mr. Cist] supplied the amounts to be used as previous lifetime gifts to his children . . . [w]e reviewed the amount that would be needed to equalize the distributions made to each child during his lifetime and also from [Mrs. Cist's] Trust." (B329 at 14.) Similarly, Ms. Reiver made notes of her multiple meetings with Mr. Cist to review the "lifetime" gift calculations he had made to equalize the treatment of his children. (B364; B365-66; B367-68; B369-72; B316-17.) None of those calculations utilized pre-college graduation transfers.

Mr. Cist also tasked his son David to help come up with an equalization tally. (B312 at 91; B313-14 at 96-99.) David confirmed that he assisted Mr. Cist in his work with Mr. Cist's accountant, particularly in reviewing the calculations of what was to be included in lifetime transfers. David testified, after being asked by

the accountant what to include, that Mr. Cist excluded transfers before each child's college graduation. (B315 at 263-65; B340-45; B346.)

b. The Evidence of What Mr. Cist Did that Explains His Intent

In addition to the testimony of his attorneys and his son, Mr. Cist's intent is also substantiated by his actions. As already noted, (*infra* at 4) Mr. Cist retained Mr. Pelillo to help tally the transfers to each of his children. After reviewing Mr. Cist's records, Mr. Pelillo then prepared his report. Each child was shown his or her tally. (B288-89; B299 at 306.)

Mr. Pelillo's October 22, 2009 report asked questions about 41 items that included pre-graduation transfers. (B340-45.) Mr. Cist determined those items "were not needed to go into the rough numbers that [he and his son] were going to give for equalization." (B315 at 265.) Thereafter, Mr. Cist reviewed numerous calculations of what transfers were to be included for the equalization process and discussed those with his attorneys. (B316; B318-19; B320; B321-23; B324-25; B326-28; B329-30; B331-32; B333-37.) None of those calculations included pre-graduation transfers. By the beginning of 2010, Mr. Cist had satisfied himself that the transfers to be included had been determined correctly. He converted sufficient securities into cash; he established four trusts, one for each child and he sought to fund these Trusts as early as February 2010. (B333-37; B338-39.)

c. The Evidence of What Mr. Cist Intended Found in His Trust Itself

The Trust's language describes the type of transfers to be used in calculating an equal division among his children by referring to the "substantial equalizing transfers [Mr. Cist intended to make during his lifetime] after the execution of this supplemental trust agreement." (B202.) Mr. Cist calculated those "equalizing transfers" by reference to the transfers he and Mr. Pelillo determined had already been made to each child and that should be counted. Mr. Cist calculated those equalizing transfers promptly after signing the amendments to his Trust, leaving little doubt that these are the "equalizing" transfers referred to in his Trust. In effect, Mr. Cist determined what to give each child by reference to those prior transfers he had determined should be counted. Thus, the Trust's other language confirms what Mr. Cist meant by "transfers . . . during our lifetimes."

Mrs. Ughetta contends that any "transfer" made by Mr. or Mrs. Cist to any of their children since birth must be included in the equalization calculation. The Trust language does not say "any" transfer and to include every gift made to each child since they were born is impractical. Mr. Cist, for example, apparently did not record those gifts made before each of his children had graduated from college.

d. Mrs. Ughetta is Told of Mr. Cist's Intent

Following efforts to equalize the division of Mr. Cist's assets, Mr. Cist asked David to visit Mrs. Ughetta to let her know how Mr. Cist proposed to

equalize his Trust distribution. In October 2009, David showed her a spreadsheet that plainly focused on a limited set of transfers, not everything she had received since birth. (B82.) After Mr. Cist's death, when Mr. Pelillo actually did the equalization calculations, Mr. Pelillo wrote to all of the beneficiaries that "Gifts and transfers made before you graduated from college are not included." (B293.) Even after Mrs. Ughetta filed her petition, she did not initially contend that pre-graduation transfers should be included. Both the Petition itself and Mrs. Ughetta's Answers to Interrogatories focus on the process (not the date) used by Mr. Pelillo to calculate the post-graduation transfers. Mrs. Ughetta in those sworn pleadings never contended that pre-graduation transfers should be included. (B45-46.)

3. The Decisions Below

a. The History of the Proceedings Below

The docket entries in the Court of Chancery span 75 pages (A1 to A74), involving not typical proceedings.[5] To clarify what occurred, here is a brief outline:

1. Mrs. Ughetta's Petition Filed	September 21, 2012	Trans. ID 46580843

[5] The docket sheets in Mrs. Ughetta's Appendix are confusing because they also include a separate petition filed by Mr. Ughetta over a trust established by Mrs. Cist. That case settled.

2. Trustee Answer and Counterclaim Filed	October 22, 2012	Trans. ID 47221342
3. Trustee Discovery Requests	October 23, 2012 to March 13, 2013	Trans. ID 47256954 Trans. ID 47258144 Trans. ID 51013488 Trans. ID 51013704
4. Trustee Motion for Summary Judgment	July 22, 2013	Trans. ID 53301259
5. Judicial Officer Reassignment	October 1, 2013	Trans. ID 54309183
6. Master's Report Granting Mrs. Ughetta's Request for Leave to Take Discovery	November 25, 2013	Trans. ID 54612640
7. Teleconference Directing Parties to Brief Issue Whether Trust Was Ambiguous	June 13, 2014	Trans. ID 55642236 Trans. ID 60635816
8. Master's Draft Report Finding Trust Ambiguous and Directing Briefing on Trustee's Summary Judgment Motion	October 23, 2014	Trans. ID 56239791 Trans. ID 56335970
9. Master's Final Report Recommending Grant of Summary Judgment to Trustee	May 29, 2015	Trans. ID 57311776
10. Mediation Ordered	January 12, 2016	Trans. ID 58414128
11. Mrs. Ughetta's Motion to Compel	June 21, 2016	Trans. ID 59176115

12. Order Overruling Objections to Master's Final Report and Granting Trustee Summary Judgment	August 3, 2016	Trans. ID 59369833
13. Order Referring Motion to Compel to Master	September 30, 2016	Trans. ID 59635419
14. Teleconference and Master's Report on Motion to Compel	December 21, 2016	Trans. ID 59982376 Trans. ID 60004005
15. Order Affirming Master's Final Report on Motion to Compel	March 27, 2017	Trans. ID 60388213
16. Mrs. Ughetta's Notice of Appeal	April 27, 2017	Trans. ID 60526661

b. The Actual Decisions That Are On Appeal

The decisions of the Court of Chancery were made in the form of two Final Reports from the Master in Chancery, followed by exceptions to those Reports, full briefing and argument to the Court of Chancery. The Court of Chancery issued an Order Overruling Objection And Affirming Master's Report on August 3, 2016 granting the Trustee summary judgment. (Attached hereto as Exhibit A.)

Briefly, the Master and the Court of Chancery concluded that the Trust's reference to "transfers" to Mr. Cist's children did not unambiguously state what was to be considered by the Trustee in equalizing the four Cist children's shares of Mr. and Mrs. Cist's wealth. Then after considering the testimony of everyone who

had worked with Mr. Cist to carry out his intent and Mr. Cist's own actions, the Master and Court of Chancery upheld the Trustee's actions in dividing the Cist family assets equally.

While briefing was going on over Mrs. Ughetta's Exceptions to the Master's August 3, 2016 Report, Mrs. Ughetta filed a motion to supplement the record and compel production of documents concerning an autograph collection David testified he had received before he graduated from college. After even more briefing, the Master agreed that Mrs. Ughetta could supplement the record by adding two notes she contended might show David was not really given the autograph collection until much later. The Master, however, held those notes showed the collection had been given to David by his Grandmother and did not show what Mrs. Ughetta claimed and denied her motion to compel.

In their second rulings, the Master and Court of Chancery also upheld the Trustee's decision not to include an autograph collection given to David Cist prior to his college graduation in that equalization process. On March 27, 2017, the Court of Chancery entered its second Order Overruling Objections And Affirming Master's Report. (Attached hereto as Exhibit B.)

ARGUMENT

I. A PARTY OPPOSING A SUMMARY JUDGMENT MOTION MUST SHOW THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE

A. Question Presented

May summary judgment be granted in a dispute over the meaning of a contract or trust when the language used is not entirely clear, but all the evidence indicates what the language was intended to accomplish? This question was presented in the briefing on the Trustee's motion for summary judgment. *See* B378-407.

B. Scope of Review

The decision to grant summary judgment is subject to a *de novo* review. *Motorola Inc. v. Amkor Tech., Inc.*, 849 A.2d 931 (Del. 2004).

C. Merits of Argument

Summary judgment is a prompt and economical means of disposing of litigation. *Hartman v. Buckson*, 467 A.2d 694, 700 (Del. Ch. 1983) (citing *Davis v. Univ. of Del.*, 240 A.2d 583 (Del. 1968)). Pursuant to Court of Chancery Rule 56, summary judgment should be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56; *Johnson v. Shapiro*, 2002 WL 31438477, at *3 (Del. Ch. Oct. 18, 2002) (citing *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)).

Although a party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists, a properly supported motion for summary judgment shifts the burden to the non-moving party who must submit admissible evidence sufficient to generate a factual issue for trial or suffer an adverse judgment. *Shapiro*, 2002 WL 31438477, at *3 (citing *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979)); Ct. Ch. R. 56(e). It is not enough for the non-moving party merely to assert the existence of a disputed fact; "[t]he fact at issue must be material to the outcome of the case." *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003), *aff'd*, 840 A.2d 641 (Del. 2004) (TABLE).

The requirement to show a material dispute of fact is not to be taken lightly. As this Court held in *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), quoting the United States Supreme Court:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

D. Conclusion

Here there is no genuine issue of material fact in dispute. Mr. Cist's intent is well-established from the evidence that stands unrebutted. It is particularly noteworthy that Mrs. Ughetta's brief fails to mention any evidence she might offer at trial to prove her claim. Indeed, she admitted she has none. (B301.) Instead, Mrs. Ughetta's real claim is that the Trust is unambiguous and therefore no evidence of Mr. Cist's intent is to be appropriately considered by a Court. That is a legal argument that did not require a trial to resolve. Hence, Mrs. Ughetta's complaints about being denied a trial are misplaced.

II. WHERE A TRUST INSTRUMENT IS AMBIGUOUS, THE SETTLOR'S INTENT MAY BE ESTABLISHED BY EXTRINSIC EVIDENCE

A. Question Presented

Is the Trust equalization language ambiguous so that extrinsic evidence may be used to establish the Settlor's intent? This question was preserved in the Trustee's motion for summary judgment. (B378-407.)

B. Scope of Review

The grant of summary judgment is subject to a *de novo* review. *Motorola Inc.*, 849 A.2d 931.

C. Merits of Argument

1. The Trust Language is Ambiguous

As the Master found and the Vice Chancellor affirmed, the Trust language is ambiguous as to what transfers to count in the equalization process. The Delaware law on how to determine if language is ambiguous is set out clearly in many decisions, such as *Dittrick v. Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007) (citations omitted), *aff'd*, 935 A.2d 255 (Del. 2007):

> Pursuant to the widely accepted "objective theory" of contract interpretation-a framework adopted and followed in Delaware-the court must interpret a contract in a manner that satisfies the "reasonable expectations of the parties at the time they entered into the contract." Standing in the shoes of an objectively reasonable third-party observer, if the court finds that the terms and language of the agreement are unmistakably clear, the court should look only to the words of the contract to determine its meaning and the parties' intent. Thus, if the

> contract is unambiguous, the court must not consider parol or extrinsic evidence to accomplish this straightforward task.
>
> If, however, a reasonable third party would be unable to determine the meaning of certain contractual provisions, the agreement is considered ambiguous. Though ambiguity takes many forms, it generally exists "if the terms of the contract are inconsistent, or when there is a reasonable difference of opinion as to the meaning of words or phrases." In that case, extrinsic evidence is an appropriate resource for the court to use in determining the parties' reasonable intentions at the time of the contract. Sources of such evidence include "overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom and usage in the industry."

Applying this approach it is easy to see that the Trust language is ambiguous. First, Section 1 provides that "transfers to our children ... during our lifetimes" shall be counted in the equalization process. The word "transfers" is not directly modified by any word that defines what transfers count. For example, it does not say that "all" transfers or "any" transfers or even "the" transfers count. Mrs. Ughetta implicitly admits that the missing modifier of "transfers" is significant because her brief adds such a modifier, such as referring to "the transfers" and again "all" transfers. (Appellant's Op. Br. at 2-3.)

Second, it is not a reasonable expectation to construe "transfer" as including every gift to the Cist children from the date of their birth. That reading would task the Trustee with a virtually impossible job of going back over 50 years to 1958 when Dorothea was born. If language can be read to require a reasonable way to proceed, it should be read that way. The Trust language should be interpreted in

such a way as to make the Trust provisions capable of being carried out. Clearly, Mr. Cist did not want his Trustee to do the impossible in dividing his estate equally.

Third, as found by both the Master and the Vice Chancellor, Section 4 of the Trust must be read and implemented in interpreting "transfers ... during our lifetime."[6] Section 4 provides that Mr. Cist "intend[ed] to make substantial equalizing transfers during [his] lifetime after the execution of this supplemental trust agreement. Such lifetime equalizing transfers reflect my intent...." (B202.) And again, the Trustee "shall take such transfers [I make in the future] into account in making distribution hereunder to achieve my intent as nearly as possible." *Id.* (emphasis supplied). The modifier "such transfers" is added to make it clear which "equalizing transfers during my lifetime" that Mr. Cist intended to make but died before he could do so. This language means that Mr. Cist intended, by specific examples, to define "transfers" to be counted. As Mr. Cist's lawyers explained, "we were still attempting to get ... information so that we could quantify the transfers, that we wouldn't have to define them." (B360 at 40-41.) In short, the

[6] It is settled law that "a contract must be read as a whole and in a manner that will avoid any internal inconsistencies." *Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 550 (Del. 2013).

scope of the words "transfers...during our lifetimes" is just not clearly defined in the Trust and extrinsic evidence is needed to clarify them.

Finally, it should not be overlooked that Mr. Cist's two trust lawyers understood the Trust language to address only post-graduation transfers. Perhaps even more significantly, Mrs. Ughetta herself for the first two years of this litigation also believed that the Trust required post-graduation transfers be counted, not every "transfer" since birth. Not only did she first make her "gifts-from-birth" argument for the first time in March, 2014 (B305-08), but her detailed interrogatory answers about what transfers should or should not be included only mention the post-graduation transfers she contested. (B53-66.) In short, everyone in this case believed only post-college transfers counted, until Mrs. Ughetta came up with her new legal argument in March, 2014.

2. The Applicable Law on Interpretation

The cardinal rule in a trust case is that the intent of the settlor controls the interpretation of the instrument. *Chavin v. PNC Bank*, 816 A.2d 781, 783 (Del. 2003). When trust language is ambiguous, however, *Otto v. Gore*, 45 A.3d 120, 136 (Del. 2012) states the law clearly:

> Where a term is ambiguous, however, then the settlor's intent controls the interpretation of the term. The intent is determined by considering the language of the instrument, read as an entirety, in light of the circumstances surrounding its creation.

(Citations and internal quotations omitted.)

Sources of extrinsic evidence a court may look to in interpreting a settlor's intent include the settlor's acts or expressions of intent prior to and subsequent to, as well as those contemporaneous with the trust instrument and other parts of the trust language. *See Chavin*, 816 A.2d at 783 (evidencing a testator's intent from the settlor's verbal expressions); *In re Will of Fleitas*, 2010 WL 4925819, at *6 (Del. Ch. Nov. 30, 2010) (evidencing the settlor's intent towards her daughter in her trust from various provisions in her will); *Dittrick*, 948 A.2d at 406 (explaining that sources of extrinsic evidence include acts of contracting party);[7] *In re Shank*, 2004 WL 1587567, at *6 (Del. Ch. July 6, 2004) (evidencing a testator's intent from his contemporaneous expressions to the will's scrivener and the introductory language of the will).

Delaware courts have repeatedly given great weight to how the parties acted to determine the meaning of a contract. *See e.g. Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939):

> It is a familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts.

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[7] Delaware applies this rule of contract interpretation to trusts as well. *See Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153, 162-163 (Del. Ch. 1940), *aff'd*, 24 A.2d 309 (Del. 1942).

See also Dweck v. Nasser, 2012 WL 161590, at 15 (Del. Ch. Jan. 18, 2012), citing *Radio Corp.*, 6 A.2d 329 (Del. 1939).

Here, Mr. Cist's intent is clearly established by the language he used in his Trust, his consistent contemporaneous expressions of his intent, his actions over an extended period and the circumstances surrounding his execution of his Trust. This is apparent from the undisputed facts, viewed chronologically.

3. The Evidence Of Intent

The evidence needed to understand Mr. Cist's intent for asset equalization can be followed chronologically. The record shows (a) why he decided to equalize, then (b) how he intended to carry it out and finally (c) what he wanted to count in his equalization.

a. Why Mr. Cist Decided To Equalize

Following the death of Mrs. Cist in 2008, Mr. Cist determined that his and his wife's Trusts did not treat his children equally. He consulted Joanna Reiver and later P. Kristen Bennett, both estate planning lawyers. He explained to them that Margaret Ughetta was making "unwanted petitions for funds" to pay tuition for her children and that he wanted to treat all of his children equally, taking into account those substantial tuition bills and other specific gifts he and his wife had made over the years. (B357 at 8; B358 at 12; B362 at 52-53.)

Mr. Cist expressly confirmed to his attorneys that: "[H]e wanted to look back to transfers that had been made over the years but not prior to the point which each child was fully educated with college." (B360 at 40.) Mr. Cist also told Kristen Bennett that he wanted to use the college graduation as a start date for considering transfers to his children. (B349 at 38-39.)

b. How Mr. Cist Tried To Equalize

In 2008 Mr. Cist tasked his son David with helping him tally what prior "transfers" should be included in his "equalization" process. Then in 2009, Mr. Cist had an accountant, Mr. Pelillo, do a more formal equalization calculation. All of the calculations Mr. Cist did over the two years prior to his death started after each of his children graduated from college. None of those calculations included pre-college graduation transfers. So by early 2010, Mr. Cist had determined the amounts he was comfortable transferring to each of his four children to equalize. He set up four unfunded irrevocable Trusts and was set on meeting with his broker to transfer the equalizing amounts when he was advised by his lawyers to wait to see what changes were going to be made in a few months to the tax code.[8] (B338-39.) He unexpectedly died before doing the transfers. Mr. Cist's actions are

[8] Mr. Cist was surely aware of the transfers he and Mrs. Cist had made to their children before they graduated from college. For example, they had paid to send three of their children to Princeton and one to Harvard. Yet, Mr. Cist did not include any of those "transfers" in his calculations.

"entitled to great weight" and a construction of his Trust based on those actions should "be adopted and enforced by the courts." *Radio Corp.,* 6 A.2d at 340.

c. What Mr. Cist Intended

As explained in detail, *supra* at 7-13, Mr. Cist explained to his trust attorneys and to his accountant what he wanted to include by way of prior transfers to his children in equalizing their share of his assets. All his words and actions show he did not want to include transfers before college graduation.

d. The Trust Language

The Trust's very language supports the interpretation that "transfers" were meant to be limited just to the transfers Mr. Cist himself counted. After all, he surely was aware of other "transfers" he and Mrs. Cist had made to their children during his lifetime and he excluded those made before the children had finished college. The "equalizing transfers" he intended to make that he referred to in his Trust were based on the prior transfers he determined to include in the equalization process. Mr. Cist, in that respect, confirmed in his Trust that the later equalizing transfers he computed were based on what lifetime transfers he decided to include as a starting point.

The Trust language should be interpreted in such a way as to make the Trust provisions capable of being carried out. While Mr. Cist kept extensive records, amassing those records as far back to 1958 when his first child, Dorothea, was

born would be an extremely difficult task. Mr. Cist certainly did not intend that the Trust impose that burden upon his Trustee. Rather, he must have intended only to count the post-graduation transfers because the transfers before graduation were considered support to his children. (B360 at 40.)

Finally, there is compelling evidence that even Mrs. Ughetta understood that Mr. Cist intended only to include post-graduation transfers in the equalization process his Trust provided. First, in 2009 Mrs. Ughetta was shown what she was going to receive to equalize prior transfers. Second, in 2011 Mrs. Ughetta saw the Pelillo equalization report that only used post-college transfers and she did not object that it should also include transfers made before graduation. That Mrs. Ughetta all along has understood Mr. Cist's intent to include only post-college transfers is shown by her failure to contend otherwise in her September 2012 Petition, and in her Answers to Interrogatories. (B45-46.) Only after reviewing Respondent's Summary Judgment Motion and appreciating its force did Mrs. Ughetta suddenly come up with her new argument that pre-college graduation transfers must be counted.[9]

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[9] While this circumstantial evidence indicates Mrs. Ughetta believed the equalization process was to start with transfers made after graduation, it is also important to note that she has admitted that Mr. Cist did not discuss his 2009 Trust and its equalization provision with her. (B301-02 at 12-14.) Hence, Mrs. Ughetta has no evidence that contradicts the evidence presented here of Mr. Cist's intent.

D. Conclusion

The Trust language about the Equalization Process is ambiguous. Thus, evidence of intent is required to understand Mr. Cist's intent. The evidence shows that Mr. Cist intended to include only transfers to a child after graduation from college. His communications to his attorneys and his children, his repeated actions to carry out that intent and the language of his Trust all support that interpretation of what he intended. Thus, it was entirely proper to grant summary judgment in this case.

III. THE MOTION TO COMPEL WAS PROPERLY DENIED WHEN IT WAS TOO LATE AND SOUGHT IRRELEVANT MATERIAL

A. Question Presented

Was Mrs. Ughetta's Motion to Compel properly denied because when it was filed years late, after the summary judgment motion was briefed and argued, and sought the production of materials the Court has already noted were not relevant? This question was preserved by the Trustee's brief in opposition to Mrs. Ughetta's Motion to Compel. (B509-31.)

B. Scope of Review

The denial of a discovery motion is subject to review for abuse of discretion. An abuse of discretion depends on a showing that the trial court acted in an arbitrary and capricious manner. *Spencer v. Wal-Mart Stores E., L.P.*, 930 A.2d 881, 887 (Del. 2007).

C. Merits of Argument

1. The Background To The Motion To Compel

After the filing of the Petition on September 21, 2012, Mrs. Ughetta was given additional access to the Trust's property held in storage units, including what she characterized as the "genealogy documents." An email from Jeff Gibson (the estate paralegal hired by the Trustee and who assisted Mrs. Ughetta) details her inspection of these materials at various times from September 12, 2013 through November 1, 2013 – a total of over 47 hours. (B516.)

Mrs. Ughetta made "copies of over 7,500 documents" during those visits. While she would later make other, prolonged inspections in early 2016, it was during the 2013 inspections that she first copied the September 1967 and the February 1973 letters (the "Supplemental Documents").[10]

Notably, Mrs. Ughetta undertook her own document inspection without assistance of her counsel. It apparently took Mrs. Ughetta until "February of 2016" (or about 3 years) to "first" focus on the September 1967 letter or the unsigned February 1973 letter that she calls the "Supplemental Documents."

On June 21, 2016, Mrs. Ughetta filed a "Motion For Permission to Supplement The Record and Renew Motion to Compel" (the "Motion to Compel"). The Motion to Compel argued that the Supplemental Documents showed that David Cist may not have actually received an "Autograph Collection" from his father prior to graduating from college, and therefore the value of the Autograph Collection should be counted against David Cist's share of the Trust. The Motion to Compel is somewhat out of the ordinary given that David Cist is not a party to this litigation, resides in Massachusetts and is the holder of the

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[10] *See* B518-26, the two documents and a transcribed version of the hard-to-read September 1967 letter. Mrs. Ughetta fails to mention that the 1973 document makes no mention of an autograph collection. There is no dispute that Mrs. Ughetta first copied the Supplemental Documents in 2013. (Appellant Op. Br. at 20.)

Autograph Collection. The Master granted Mrs. Ughetta's request to supplement the record, but declined to order the Autograph Collection be produced.

The 2016 Master Report on Mrs. Ughetta's Motion to Compel noted that the September 1967 letter was from Mrs. Ughetta's Grandmother and plainly spoke of the autograph collection as belonging to the Grandmother (B562-63.) Hence, the autograph collection was not part of the Trust to begin with, a point that Mrs. Ughetta cannot dispute.[11]

2. The Legal Standard

In considering the merits of Mrs. Ughetta's Motion to Compel, it is appropriate to consider the following factors that are also used to consider a motion to supplement the record after a decision is issued:

a. whether the evidence has come to the moving party's knowledge only after the parties had submitted the case for disposition;

b. whether the exercise of reasonable diligence would have caused the moving party to discover the evidence earlier;

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[11] Mrs. Ughetta relies on the fact that previously no one disputed that the collection belonged to Mr. Cist. (Appellant's Op. Br. at 9-10 and 17.) Of course that was because Mrs. Ughetta had not disclosed that she found the September 1967 letter showing it belonged to Mr. Cist's mother. Mrs. Ughetta's brief concedes "Mr. Cist's mother ... considered making to her son and grandchildren" a gift of the "Autograph Collection". (*Id.* at 20.)

c. whether the evidence is so material and relevant that it will likely change the outcome;

d. whether the evidence is material and not merely cumulative;

e. whether the moving party has made a timely motion;

f. whether undue prejudice will inure to the nonmoving party; and

g. considerations of judicial economy.[12]

3. The Standard Applied Here

Put simply, the Motion to Compel fails to pass muster on every one of the seven tests applicable to it. Thus:

a. The Supplemental Disclosures were copied by Mrs. Ughetta back in 2013 – long before the Master's Report;

b. Reasonable diligence would surely have brought the Supplemental Disclosures to Mrs. Ughetta's attention earlier, perhaps if she had her counsel help her review;

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[12] *Whittington v. Dragon Grp., LLC,* 2012 WL 3089861, at *3 (Del. Ch. July 20, 2012); *Vianix Del. LLC v. Nuance Commc'ns Inc.*, 2011 WL 487588 (Del. Ch. Feb. 9, 2011); *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296 (Del. Ch. July 26, 2010) and *Pontone v. Milso Indus. Corp.*, 2014 WL 4352341, at *5 (Del. Ch. Sept. 3, 2014) (denying reargument).

c.-d. The undisputed testimony of David Cist is that he did receive the Autograph Collection in 1970 – three years after the September 1967 letter, removing any doubts about the delivery to him (B310-11.) If anything, this new evidence only verifies David Cist's testimony and confirms the Court's prior determination.[13]

e. The Motion is not timely, having been made after briefing and argument on the exceptions to the Master's 2015 Report;

f. The Trust and its other beneficiaries are unduly prejudiced by the late Motion that threatens to further extend this now over five year old litigation over Mrs. Ughetta's baseless charges; and

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[13] Mrs. Ughetta argues that "it is possible" the Supplemental Materials would affect the Court's decision to grant summary judgment. (Appellant's Op. Br. at 17.) That is wrong because: (1) the evidence is that Mr. Cist knew of the autograph collection but did not include it in his own calculations of what he had given to David Cist either because it was a pre-college gift or because as the Master ruled, it never belonged to Mr. Cist, and (2) the test to deny a summary judgment is whether the adverse party has done more than "rest upon the mere allegations or denials of the [moving party's evidence but] must set forth specific facts showing that there is a genuine issue for trial." Ct. Ch. R. 56(e). There is no evidence that contradicts David Cist's testimony that he was given the autograph collection before he graduated from college.

g. It was a waste of the Court's limited time to re-open the record since the Supplemental Documents do not prove that the Autograph Collection was given to David Cist after his college graduation.

D. Conclusion

Mrs. Ughetta wanted the Court of Chancery to let her wait two and one-half years to produce some of her copies of "7,500" documents and to then let her re-open proceedings based on her imaginative interpretation of the Supplemental Documents that to anyone else really proves the opposite of what she is contending. The denial of the Motion to Compel plainly was not an abuse of discretion.

IV. THE NO-CONTEST CLAUSE APPLIES TO A BENEFICIARY WHO CHALLENGES THE TRUST'S DISPOSITIONS

A. Question Presented

Does the No Contest Clause in the Trust apply to Mrs. Ughetta's claims about the Trust? This question was presented by the Trustee's summary judgment brief that asked the Master to apply the No Contest Clause. (B454-508.)

B. Scope of Review

The question of the application of the No Contest Clause is subject to *de novo* review. *Motorola Inc.,* 849 A.2d 931.

C. Merits of Argument

1. Introduction

The Trust's No-Contest Provision is very broad. It provides:

> If any beneficiary under this instrument files an action in any court seeking to set aside any aspect of the document, or to challenge any aspect of the disposition provided herein, the bequest to such beneficiary shall be partially ineffective and void, and the bequest such beneficiary would have received, but for such challenge, shall be reduced by one-half (i.e., fifty percent). The contestant's share shall also bear the costs of attorneys' fees and costs incurred by the contestant as well as attorneys' fees and costs incurred by my fiduciaries in defending the action. The portion by which such contesting beneficiary's bequest is reduced shall be distributed in equal shares to the non-contesting beneficiaries. The provisions of this provision shall also apply to specific takers in default, if any, provided in such bequest hereunder. This provision shall apply in the case of challenges based on fraud, mistake, undue influence, or incapacity, or upon any other basis.

(B197) (emphasis added). This language was added out of Mr. Cist's concern that Mrs. Ughetta would sue when her siblings' share of Mr. Cist's Estate was equalized. (B362 at 50-53.) Mrs. Ughetta has now done what Mr. Cist feared, both seeking to set aside aspects of the Trust (remove the Trustee he chose) and to challenge the trust distributions (*e.g.*, the Equalization Process). She seeks to rewrite the heart of the "disposition provided" by the Trust and go beyond simply challenging its administration. Over the last seven years, starting with the morning after Mr. Cist's burial when Mrs. Ughetta's counsel first requested documentation to the present litigation, Mrs. Ughetta, alone among the beneficiaries, has challenged nearly every disposition of Mr. Cist's Estate.

Before the Master, Mrs. Ughetta sought to avoid the No-Contest Provision by arguing she was not challenging the distribution provided for by the Trust, but rather contesting the methods by which the Trustee had decided to carry out the distribution provision of the Trust. But that distinction is not enough to avoid the No-Contest Provision. First, it is not actually true that Mrs. Ughetta only sought to obtain instructions about how the Trustee should act. Second, her argument is incorrect as a matter of law given the terms of the No-Contest Provision.

2. Mrs. Ughetta Has Challenged The Key Parts Of The Trust Including The Dispositions Provided By The Trust

Mrs. Ughetta has directly challenged key terms of the Trust. Her Petition was not a petition for instructions about what the Trust terms mean. Instead, it

sought to: (1) remove the Trustee, (2) enjoin "any further distribution from the Trust," and (3) sanction the Trustee for what the Court of Chancery later ruled are the Trustee's proper actions to carry out the Trust's provisions for the disposition of Mr. Cist's Estate. It is a direct attempt to "set aside . . . aspect[s] of the" Trust and to "challenge aspect[s] of the disposition provided" for by the Trust. (B197.) Mrs. Ughetta's attempt to call her Petition something else does not change what it is – a challenge to her Father's wishes.[14] *See, e.g., In re Pittman*, 73 Cal. Rptr. 2d 622, 629 (Cal. Ct. App. 1998) characterizing such an attempt to avoid a no-contest clause as "disingenuous."

Mrs. Ughetta's main argument against the application of the No Contest Clause is that she was only seeking the Court's instruction about what the Trust's Equalization Clause meant and to compel the Trustee to act fairly towards her. To begin with, Mrs. Ughetta's Petition does not seek instructions about the Trust's meaning at all. Thus, as a threshold matter, she did not file the sort of petition for instructions permitted by 12 *Del. C.* § 3329.

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[14] "Delaware law generally enforces no-contest clauses . . . ." *Mitchell v. Reynolds*, 2009 WL 132881, at *13 (Del. Ch. Jan. 7, 2009). While 12 *Del. C.* § 3329 does permit a beneficiary to seek instructions about will or trust terms, that is not what Mrs. Ughetta did here. Instead of just asking the Court what the Trust meant, she alleged the Trustee's distributions were invalid and that the Trustee should be removed.

Moreover, while we acknowledge that Mrs. Ughetta's Petition in some respects might fall under the conduct permitted by 12 *Del. C.* § 3329 to seek instructions, that is not actually what this litigation has been about for some time. After conducting document discovery, on July 22, 2013, the Trustee filed her Motion for Summary Judgment. (B235-85.) That motion relied on the documents showing how Mr. Cist intended the Trust to equalize his family wealth distribution and affidavits from his trust counsel and accountant. After taking the depositions of those affiants, Mrs. Ughetta changed course when those depositions confirmed Mr. Cist intended to start the equalization process based on gifts he made to his children only after they graduated from college.

It was not until March, 2014 that Mrs. Ughetta began to argue that equalization required including all transfers to a child since birth. Thus, she then argued for the first time that the Trust language was not ambiguous and that whatever Mr. Cist might have intended was basically irrelevant. (B305-08.)[15] That is when Mrs. Ughetta crossed the line into actually contesting an "aspect of the disposition provided" for by the Trust. She continued to press that claim even

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[15] Mrs. Ughetta argues that it was only "through the course of taking depositions [that] she discovered" the equalization process was based on post-college transfers. (Appellant's Op. Br. at 12.) That is incorrect. Mr. Pelillo expressly told her before she filed suit that only post-graduation transfers were included. His letter is an exhibit to Mrs. Ughetta's petition.

now on appeal. But once Mr. Cist's intent was made clear by the undisputed evidence, Mrs. Ughetta cannot be said to be seeking a trust interpretation. Instead, she has been seeking to change the Trust disposition. Mr. Cist defined that to be a "contest" just as if Mrs. Ughetta had sought to set aside the Trust on incompetency or other grounds.

Second, as her Answers to Interrogatories stated, she "objects" to being charged for her children's tuitions in the equalization process. (B53.) However, that is exactly what the Trust required in its provision to include tuition transfers "for the benefit of, issue of a child." (B201.) She also challenged transfers to her husband (B53-66) in her Tally, even though Mr. Cist included them and referenced them in his Trust. (B75-76.) Thus, Mrs. Ughetta is trying to set aside specific directions of Mr. Cist simply because she does not like them.

In short, Mrs. Ughetta has tried to alter the dispositions provided for in the Trust to benefit herself which is exactly what the No-Contest Provision was designed to prevent.

3. As A Matter Of Law, Mrs. Ughetta's Attempt To Avoid The No-Contest Clause Lacks Merit

Mrs. Ughetta's distinction between directly contesting the terms of the Trust compared to contesting how the Trust is administered fails as a matter of law. The No-Contest Provision bars any challenge to the dispositions from it, "upon any . . . basis." (B197.) This broad language was used to cover challenges that are

different from those "based on fraud." At least when, as here, the Trustee has complied with the terms of the Trust, a failed challenge to the Trustee's actions in following the Trust's terms should invoke the No-Contest Provision. Otherwise, such no-content clauses will not be given the effect the settlor intended.

Broad no-contest provisions are not just limited to litigation that seeks to set aside an entire will or trust. After an extensive review of such provisions, *McKenzie v. Vanderpoel*, 61 Cal. Rptr. 3d 129, 137 (Cal. Ct. App. 2007) held:

> [B]y including language prohibiting an adjudication that the trust or any of its provisions is void, or seeking to otherwise void, nullify, or set aside any of its provisions, the express language clearly seeks to prohibit more than just "a challenge to the validity of the will in its entirety." . . . "[T]he clause in the [ ] trust . . . prohibits anyone from *seeking* to merely *set aside any* of the *provisions* of the trust."

(Emphasis in original; citation omitted.) The no-contest clause here also prohibits attempts to "set aside any aspect" of the Trust. That is what Mrs. Ughetta has tried to do here.

The proper analysis of the application of a no-contest clause to a plaintiff's conduct is set out with precision in *Nairne v. Jessop-Humblet*, 124 Cal. Rptr. 2d 726, 728 (Cal. Ct. App. 2002):

> Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used. [Citations] [T]he answer cannot be sought in a vacuum, but must be gleaned from a consideration of the purposes that the [testator] sought to attain by the provisions of [his] will. [Citation.] Therefore, even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court "must

> not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause."

See also In re Ellis, 683 N.Y.S.2d 113, 115 (N.Y. App. Div. 1998) construing a no-contest clause addressing "any manner, directly or indirectly" that frustrates a testator's intent and holding it applied to conduct "that would delay the probate of the will, place the testamentary scheme in jeopardy, and harass the [executor]." The facts show that for the last seven years Mrs. Ughetta has tried to frustrate Mr. Cist's intent to give his chosen Trustee the power to implement how TPP was to be distributed, and how equalization was to be achieved.

D. Conclusion

The No-Contest Clause should have been applied here. Mrs. Ughetta has repeatedly contested the Trust's asset distribution plan. First, she tried to enforce her own way to allocate the TPP and to avoid using the transfers to her children and spouse in the Equalization Process. When those claims were doomed to failure by the depositions of Mr. Cist's attorneys and accountant and the evidence of Mr. Cist's own actions, Mrs. Ughetta directed her contest to focus on what other transfers should be counted in the Equalization Process. Those actions sought to set aside Mr. Cist's plans in his Trust. Thus, the No Contest Clause applies.

V. AN AWARD OF ATTORNEY FEES IS APPROPRIATE UNDER 12 *DEL. C.* § 3584 WHEN "JUSTICE AND EQUITY" REQUIRE IT

A. Question Presented

Should the Court of Chancery award the Trustee her attorney fees under 12 *Del. C.* § 3584? This question was presented by the Trustee's motion seeking an award of fees. (B454-508.)

B. Scope of Review

The application of statutory fee shifting is normally subject to abuse of discretion review. *See Copeland v. Kramarck*, 2006 WL 3740617, at *4 (Del. Ch. Dec. 11, 2006) ("Section 3584 is permissive rather than mandatory.").

Here, however, the Master made two errors of law that warrant *de novo* review. First, the Master held that a showing of "bad faith" was required to warrant fee shifting under 12 *Del. C.* § 3585. (B452.) That is an incorrect legal interpretation of that statute. Second, to include it was not done in bad faith, the Master only addressed Mrs. Ughetta's decision to file her petition. (*Id.*). That ruling failed to address Mrs. Ughetta's post-petition pursuit of claims when the discovery showed those claims lacked merit and her shifting of her claims without justification. As to those reasons to shift fees, the Master did not exercise discretion at all, but simply did not address those points.

C. Merits of Argument

1. Section 3584 Does Not Require Proof of Bad Faith

Even if the No-Contest Clause does not apply, the Court of Chancery should also have awarded Mary Harding her attorneys' fees on an independent basis under 12 *Del. C.* § 3584. That statute provides: ("the court, as justice and equity may require, may award costs and expenses . . . to be paid by another party . . ." in a trust case).

In construing this "justice and equity" language, the Court of Chancery has distinguished it from the bad faith exception to the America Rule. *See In re The Hawk Mountain Trust Dated December 12, 2002*, 2015 WL 5243328, at *6 (Del. Ch. Sept. 8, 2015) ("I do not understand 12 *Del. C.* § 3584 to require a showing of bad faith as generally would be necessary under the American Rule."); *In re IMO Trust for Grandchildren of Wilbert L.*, 2013 WL 771900, at *2 (Del. Ch. Feb. 27, 2013) (explaining that Section 3584 grants the Court "somewhat greater flexibility in exercising its discretion to shift attorneys' fees" than the bad faith exception to the American Rule). *See also Hardy v. Hardy*, 2014 WL 3736331, at *1 (Del. Ch. July 29, 2014). Thus, the Master's belief that bad faith was required to shift fees is at least inconsistent with Court of Chancery precedent.[16]

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[16] The Delaware Supreme Court cited Section 3584 in one decision, *In re Unfunded Ins. Trust Agreement of Capaldi*, 870 A.2d 493, 496 (Del. 2005). That case, however, did not involve a request for fee shifting between the parties.

Outside of Delaware, there is also authority that the Court of Chancery's near-bad-faith standard under Section 3584 is too stringent. For instance, Massachusetts, the jurisdiction from which the Uniform Trust Code borrowed the fee-shifting provision, recently reinforced that bad faith is too stringent and inflexible a standard under the statute's "justice and equity" language.

In *In re Estate of King*, 920 N.E.2d 820 (Mass. 2010), the Massachusetts Supreme Court expressly rejected the argument that the State's version of Section 3584, (*i.e.*, Massachusetts General Law, Chapter 215, Section 45), required a finding of bad faith for fee shifting and that it was limited to rare and egregious cases. The court did agree that fees should not be shifted "as a matter of course" under Section 45. *See id.* at 826. And it also observed that lower courts in some instances used a bad faith standard "as a touchstone in determining whether to make an award," without criticizing that approach. *See id.* Nonetheless, the court explained that the appropriate standard is not one requiring bad faith or wrongful conduct, but a broad standard that requires only some equitable reason for departing from the norm and shifting fees:

Rather, it involved application of the rule that "[t]he award of fees is proper where the attorney's services are necessary for the proper administration of the trust or the services benefited the trust. 'The usual rule [provides] that trustees who defend litigation against the trust are entitled to *look to the trust* for reimbursement of that expense.'" *Id.* (citations omitted) (emphasis added).

> The statute expressly vests "discretion [in] the court" to award, or shift, costs and fees "as justice and equity may require." These words establish a broad standard, one that certainly reaches beyond bad faith or wrongful conduct. At the same time, the words, and standard, still pay homage to the usual American rule against an automatic award of fees to the prevailing party, and require a reason, grounded in equity, why an award shifting fees should be made.

Id. at 827; *see also Shelton v. Tamposi*, 62 A.3d 741, 751 (N.H. 2013) (following *King*).

Even more helpful, several jurisdictions have taken a detailed approach to defining when justice or equity may require fee shifting under a broad and flexible standard. These jurisdictions apply a multi-factor test to guide the court's exercise of discretion:

> The highly subjective phrase "justice and equity" does not state specific guidelines or criteria for use by a trial court or for use by a reviewing court. The phrase connotes fairness and invites flexibility in order to arrive at what is fair on a case by case basis. Hence, general criteria drawn from other types of cases provide nonexclusive guides. These include (a) reasonableness of the parties' claims, contentions, or defenses; (b) unnecessarily prolonging litigation; (c) relative ability to bear the financial burden; (d) result obtained by the litigation and prevailing party concepts; and (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.[17]

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[17] *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. Civ. App. 2001); *see Skyline Potato Co. v. Hi-Land Potato Co.*, 188 F. Supp. 3d 1097, 1159 (D.N.M. 2016) (citing *Atwood* factors); *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 491 (Iowa 2013) (citing *Atwood* factors); *Shurtleff v. United Effort Plan Trust*, 289 P.3d 408, 415 (Utah 2012) (citing *Atwood* factors); *Garwood v. Garwood*, 233 P.3d 977, 986 (Wyo. 2010) (citing *Atwood* factors).

Relying on this case law, the Court of Chancery's reading of Section 3584 as generally requiring conduct akin to bad faith to shift fees between the parties is too narrow. Like the approach in Massachusetts under *King* and in other jurisdictions following *Atwood*, "justice and equity" should be read more broadly.

2. Justice and Equity Require Fee Shifting Here

Under a proper interpretation of the statute "justice and equity [should] require" fee shifting in any one of three situations: (i) unreasonable claims plainly lacking real merit, even if there is no Rule 11 violation; (ii) claims that continue to be pressed after discovery shows the claims lack merit; and (iii) inconsistent claims that are used to just prolong litigation. Mrs. Ughetta's conduct in this case falls into all three of these categories. Section 3584 should be construed to provide for fee shifting when one of these tests is met.

To begin with, most of Mrs. Ughetta's claims plainly lacked any real merit when they were filed. Her allegation that the distribution of Mr. Cist's personal property must be done in just the way she preferred was groundless. Mrs. Ughetta's dispute over the TPP distribution comes down to complaining that she should have been given more time to inspect the TPP in the home she lived in for most of her life before her marriage and visited frequently. She argued the TPP distribution should have been done on an item-by-item basis with each beneficiary able to see what was being awarded the other beneficiaries as each of the 1,900 or

more items were being selected. (B303.) Mrs. Ughetta's preference for the TPP distribution process are plainly unworkably time-consuming and inconvenient for Dorothea (then living in California) and David (living in Massachusetts). But more to the point, there was no basis under the Delaware law to ask the Court to intervene in that process simply because Mrs. Ughetta chose to quarrel with her siblings, preferring the TPP distribution be done her way. So long as the Trustee awarded the TPP "by lot," she had the discretion to choose the exact method to do so. Mrs. Ughetta's arguments to the contrary were plainly meritless.

This is not a case where there was a fair dispute over the facts. The Master's May 29, 2015 Final Report confirms this:

> 1. "[t]he [Trustee] properly exercised her discretion in distributing the TPP and in following up the equalization process established originally by the trustor during his lifetime. (B409.)
>
> 2. Petitioner's request to change the TPP distribution process were not "granted"...because it would have given Margaret preferential treatment over the other beneficiaries." (B438.)
>
> 3. The TPP distribution process determined by the drawing of lots "...is what occurred here." (B439.)
>
> 4. "Each beneficiary was treated impartially ..." (B440.)
>
> 5. "Margaret has been unable to point to any specific evidence of unfairness or lack of impartiality during the TPP distribution process." [*Id.*]
>
> 6. "The record shows that the [Trustee] put in place TPP distribution and equalization processes that were applied equally to all four beneficiaries." (B447.)

7. "Margaret points to no evidence that the [Trustee] acted hostilely or lacked impartiality when dealing with Margaret." (B448.)

Despite these findings, the Master's report sought to understand Margaret's behavior as a reaction to Mr. Cist leaving her out of meetings and correspondences. (B452.) However, it is important to understand that the Master can only be referring to meetings and correspondences while Mr. Cist was alive, and not to the actions of Mary Harding as Trustee. Mr. Cist consistently excluded Margaret from decisions about equalization for his own good reasons. By contrast, as Trustee, Mary Harding was scrupulous in treating each beneficiary the same. (B440.) All the Estate documents were sent to each at the same time. All guidelines and deadlines were applied evenly. (*Id.*)

Second, Mrs. Ughetta's continued litigation was unwarranted in the face of the deposition testimony and documentary evidence that the Equalization Process was to include gifts to her spouse and her children and to commence after the beneficiaries graduated from college. This is a case where all the evidence showed what Mr. Cist intended, not what Mrs. Ughetta claimed.

Mrs. Ughetta's efforts to circumvent Mr. Cist's intent by claiming the Trust unambiguously provided for a result Mr. Cist did not intend was itself inequitable. As this Court has held many times, "inequitable action does not become permissible simply because it is legally possible." *Schnell v. Chris-Craft*

Industries, Inc., 285 A.2d 437, 439 (Del. 1971). Mrs. Ughetta should be required to pay the attorney fees her actions will otherwise impose on the other beneficiaries.

Finally, Mrs. Ughetta should pay fees incurred by her own inconsistent and ever changing complaint and litigation claims. As for the Equalization Process, her original complaint was that the deadlines were "unreasonable" and that there were "numerous mistakes and missing financial statements in the calculations," none of which she specified (B29 ¶ 25). Later, she did state her objection to charges in her Tally, including charges for her children's tuitions. (B65.) Later still, she claimed that in fact no extrinsic evidence was needed, since the Trust was clear and unambiguous on its terms, and that the equalization must go back to childbirth. Changing positions during litigation warrants fee shifting. *Choupak v. Rivkin*, 2015 WL 1589610, at *18 (Del. Ch. Apr. 6, 2015.)

In short, this type of conduct by Mrs. Ughetta merits paying the Trustee's fees. The other beneficiaries of the Trust should not be made to bear the heavy cost of a relentless lawsuit without merit. For them to pay for Mrs. Ughetta's false claims is not "justice and equity." Moreover, "misuse of the litigation process undermines the public's confidence in the legal system" and "affects the court." *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2013 WL 5152295, at *10 (Del. Ch. Sept. 16, 2013.)

D. Conclusion

This appeal permits the Court to set the precedent for fee shifting under Section 3584. The Court of Chancery is not to be used to resolve petty disagreements with a trustee. For almost seven years Mrs. Ughetta has sought through eight depositions and thousands of documents to find some support for her Petition. She has failed to find any evidence that she can cite to help her case, even at this late date. The cost to the other beneficiaries should not be theirs to bear, but should be placed on Mrs. Ughetta.

CONCLUSION

Mrs. Ughetta is asking this Court to not follow her father's intentions on how to equalize his children's treatment, but instead to use the term "transfers ... during our lifetimes" to require that intent be ignored. But even now after years of litigation, she has no evidence that warrants a trial on her claim. Finally, her attempt to frustrate her father's intent and her litigation tactics warrant application of the No Contest Clause and fee shifting. Her appeal should be denied and the Trustee's appeal upheld.

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Dated: August 21, 2017