



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLEE/CROSS-APPELLANT'S
REPLY BRIEF ON CROSS-APPEAL**

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INTRODUCTION

This is the Reply Brief of the Trustee, Respondent-Below, Cross-Appellant in support of her Cross-Appeal from the decision of the Court of Chancery declining to apply a No-Contest Clause or to shift attorneys' fees in favor of the Trustee pursuant to 12 *Del. C.* § 3584.

The Appellant's Combined Reply Brief On Appeal and Answering Brief on Cross-Appeal ("App. R. Br. __") contains material that should have been included in a full and fair opening brief. (App. R. Br. at 5-10). That new material, however, only confirms why fee shifting is appropriate here. To focus on that point, this brief will open with the reasons why fee shifting is warranted. It will then discuss the No-Contest Clause.¹

¹ References to "BR__" are to the Supplemental Appendix filed by the Trustee with this reply brief.

ARGUMENT

I. AN AWARD OF ATTORNEY FEES MAY BE APPROPRIATE UNDER 12 *DEL. C.* § 3584 EVEN ABSENT BAD FAITH

A. Introduction

The Trustee’s Opening Brief on her Cross-Appeal (“Tr. O. Br. ___”) set out the precedent that holds Section 3584 (and the similar statutes from which it was derived) does not require proof of bad faith as a condition to fee shifting. (Tr. O. Br. at 44-47.) Appellant Mrs. Ughetta’s Answering Brief simply ignores all that precedent. (*See* App. R. Br. at 33-35.) Instead, her brief selectively quotes *obiter dicta* from decisions that dealt with allegations of bad faith. None of those decisions apply here based on their facts.²

This is the first time this Court has been asked to explain when to shift fees under Section 3584. The measured approach applied by other state courts (Tr. O. Br. at 46-47) has much to recommend it to decide if “justice and equity” warrant fee shifting in trust cases. In this case, applying those standards warrants fee shifting.

² *See e.g., In re Trust for Grandchildren of Gore*, 2013 WL 771900, at *2 (Del. Ch. Feb. 27, 2013) (conduct “was not in bad faith”) (conduct complained of “is tied to the concept of []bad faith”); *In re Jean I. Willey Trust*, 2011 WL 3444572 (Del. Ch. Aug. 4, 2011) (refusing to deny trustee fees); *Paradee v. Paradee*, 2010 WL 3959604 (Del. Ch. Oct. 5, 2010) and *Merrill Lynch Trust Co. FSB v. Campbell*, 2009 WL 2913893 (Del. Ch. Sept. 2, 2009) (applying American Rule without discussing Section 3584). The other Delaware decisions Mrs. Ughetta cites do not deal with Section 3584.

B. The Reasons Why Fee Shifting is Appropriate

Mrs. Ughetta’s argument against fee shifting boils down to her claims that the positions she took during the course of this long litigation were at least fairly debatable. (App. R. Br. at 5-10 and 36-40.) While even if it were true (and it is not true), that “fairly debatable” test is not the sole criteria to apply to a Section 3584 application. In addition, the Court should also consider: (a) if she unnecessarily prolonged the litigation, (b) the results obtained in the litigation and (c) the unnecessary cost to the beneficiaries of the litigation. (*Id.*) But in any case, Mrs. Ughetta’s positions in this litigation were not reasonable for the following reasons.

1. The Alleged Factual Disputes Do Not Justify This Litigation

Mrs. Ughetta first claims that various factual disputes warranted her continuing to press her claims. (App. R. Br. at 5-10.) That claim is both factually inaccurate and illogical as a matter of law.

(a) The Autograph Collection Claim

First, Mrs. Ughetta claims her litigation raises a fair dispute over whether David Cist’s autograph collection was transferred to him before he graduated from college. (*Id.* at 5.) This argument flies in the face of the unrebutted evidence that the document reflecting the transfer of the autograph collection to him is dated “1970.” (B310-11.) As the Master correctly pointed out, the so-called “Supplemental Documents” do not show that the autograph collection was

transferred to David Cist by Mr. Cist after David Cist graduated from college. (Master's December 21, 2016 Report, B561-564.) In fact, the "Supplemental Documents" add credibility to David's claim that the transfer happened in 1970. And as Mrs. Ughetta admits "she also has no information as to when David actually took possession of the autograph collection" that would contradict the 1970 date. (App. R. Br. at 7.) Litigation cannot become reasonable with "no" evidence to support it.

Even worse, Mrs. Ughetta's arguments over the autograph collection persistently distort the facts and are illogical. To begin with, as David Cist testified, there is no "Purported Gift Letter" (App. R. Br. at 5) that the Trustee should have produced. As has been often explained to Mrs. Ughetta, there exists simply a note on the collection indicating it was transferred to David Cist in 1970. (B310-311.) Mrs. Ughetta is illogical in arguing that it makes a difference if the autograph collection was held "in trust for" David Cist. (App. R. Br. at 19.) But that point proves nothing since he was an adult in possession of that collection before he graduated from college in his early 20s. (B77, "David B. Cist...born July 31, 1962.")

Finally, Mr. Cist would certainly have been aware of the transfer of the autograph collection to David Cist. Yet, when compiling his list of post-college

transfers, Mr. Cist did not include the autograph collection. Thus, all the evidence points to a transfer before David Cist graduated from college.

(b) The Gift To Spouse Claim

Second, Mrs. Ughetta claims she is litigating because a gift to her husband should not have been counted in the Equalization Process. (App. R. Br. at 7.) That ignores the again uncontested evidence that Mr. Cist wanted that gift included in Mrs. Ughetta's tally, just as he wanted the gift to David Cist's wife included. The Master directly addressed this claim and found it was without merit based on the evidence that Mr. Cist had included those transfers in his own tallies. (Master's Final Report at B445-446, BR83.)³

(c) The Claim Of Insufficient Time And Documentation

Third, Mrs. Ughetta's claims she was entitled to litigate because she "was given only five days" to review and dispute her charges on Mr. Pelillo's tally. (App. R. Br. at 8.) That is wrong as Mr. Pelillo's letter gave all beneficiaries 25 days to do so (B293), and she had much more than five additional days to review any adjustments. Indeed, after she filed suit, Mrs. Ughetta had ample time to note her contested objections to any charges in her tally and she did so. (B57-66;

³ As the Master's Report correctly noted (*Id.*), in responding to a motion for summary judgment "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party" must set forth "specific facts showing that there is a genuine issue for trial." Ct. Ch. R. 56(e).

BR38.)⁴ In any case, it is with ill grace that she complains at all about being given the opportunity to correct any errors when the Trust did not require that review. As to Mrs. Ughetta's allegation that the beneficiaries, including the Trustee, were not required to provide documentation to justify changes to her tallies, that is demonstrably false and all the evidence shows it is not true. (BR85.)

(d) A New Claim: The Bluff House Valuation

Fourth, Mrs. Ughetta now claims she is entitled to litigate because the valuation on the "Bluff House" in David Cist's equalization tally is too low. That again ignores the undisputed testimonies that Mr. Cist transferred interests in the Bluff House to David Cist through installments to minimize gift taxes and reported that value to the IRS. (BR93; BR100-102.) Moreover, Mr. Cist expressly adopted the gift tax values for the Equalization Process when he commanded in the Trust that "gifts shall be included at their date-of-gift (*i.e.*, transfer) values." (B201 and B321.)⁵ Mrs. Ughetta's attempt to argue that some other value must be applied is just another example of her contesting the dispositive provisions of the Trust.

⁴ Mrs. Ughetta erroneously claims that Mr. Pelillo added to her tally but did not "provide documentation." (App. R. Br. at 8.) Not only does her citation to the record prove no such thing, but that is contrary to what Mr. Pelillo said. In fact, most of the "charges" to Mrs. Ughetta's tally that Mr. Pelillo made were his, not the Trustee's. (BR1-31, 38, 85.)

⁵ Mrs. Ughetta complains that the Court of Chancery did not address her dispute over the value attributed to the Bluff House. (App. R. Br. at 9.) That was because she never made that claim directly to the Master or Vice Chancellor.

(e) A New Claim: The Trustee Failed To Include Transfers To Herself

Fifth, Mrs. Ughetta's most outrageous claim is that after five years of litigation she is entitled to litigate if there are any "unknown [] appropriate charges [that should be] attributed to Mary Harding for the use of her mother's credit card." (App. R. Br. at 10.) Again, Mrs. Ughetta should have some evidence before making such a claim. In fact, the evidence is that the Trustee demonstrated her honesty by adding charges to her tally that Mr. Pelillo omitted. (B315 and AR49, BR38.) Mrs. Ughetta's claim then is completely false.⁶

(f) The TPP And Equalization Process Claims

Finally, Mrs. Ughetta tries to resurrect her claim that the TPP distribution process was unfair and warranted litigation and the Equalization Process was "not the same as the process set forth in the Trust." (App. R. Br. at 37.) Both those claims were forcibly rejected by the Court of Chancery and Mrs. Ughetta has not

⁶ Mrs. Ughetta claims that "[she] questioned charges to her mother's credit card at her deposition, including charges of \$15,000 that were eventually attributed to Mary Harding." (AR55) (App. R. Br. at 10.) The word "eventually" is misleading. Mary Harding herself corrected the record within thirty days in December, 2011 by adding it to her own tally. Mrs. Ughetta did not question this charge until April 30, 2013. (BR38 and BR41.)

even bothered to appeal that decision on those claims. She cannot show those claims were supported by any facts.

For example, Mrs. Ughetta's basic argument about the TPP distribution process is that it should have been done in a different way more to her liking. That claim is not based on any violation of the Trust language, but is merely an assertion that she, rather than the Trustee, had the authority to decide how to distribute the 1,900 or more items involved. That is plainly meritless.

Equally meritless is Mrs. Ughetta's claim involving the equalization of each beneficiary's shares from the Trust. She actually objects to the Trustee's willingness to allow Mrs. Ughetta to review the Pelillo Report and object to any parts of it. (App. R. Br. at 38.) That too is not a valid legal claim and is frivolous. Once again, Mrs. Ughetta offers no evidence that warranted her pressing that claim, let alone holding a trial.

(g) Conclusion

In short, none of the claims Mrs. Ughetta brought is fairly debatable. Her long list of complaints and objections is an improper attempt to barrage the Court with objections in the hope that one of them will land. Instead, those claims only serve to reinforce that this case is not based on evidence, but rather is based upon Mrs. Ughetta's hostility toward the Trustee. Even if Mrs. Ughetta believed she had been wronged in some way when she filed suit, in the years required to take eight

depositions and examine extensive document discovery, she had every reason to know she was mistaken and desist. Yet, she continued to litigate. Taken together, the unbroken string of meritless objections does in fact “rise to the level required for [the] Court to shift fees....” (App. R. Br. at 37.)

2. The Other Factors Warranting Fee Shifting

In her opening brief, the Trustee pointed out that several other factors warranted fee shifting. (Tr. O. Br. at 48-50.) For example, Mrs. Ughetta’s “all-transfers-since-birth” argument (that the Trust unambiguously required those pre-college transfers be counted) only arose after she initially claimed she needed discovery to respond to the Trustee’s summary judgment motion. Once that discovery confirmed the Trustee had followed Mr. Cist’s intent, Mrs. Ughetta reversed course and argued all the evidence of intent was irrelevant. (Tr. O. Br. at 23.) This is no small point. This case might have been decided on the basis of the Trustee’s 2013 motion for summary judgment that was supported by affidavits from Mr. Cist’s trust attorneys and accountant. The years of litigation that followed were caused by Mrs. Ughetta’s refusal to accept the truth about what Mr. Cist intended by his Trust. That delay and expense are unwarranted.

It is also appropriate to consider who is paying for this litigation. The share of the Trust that would otherwise have gone to David Cist, Dorothea Cist and Mary

Harding Cist has been diminished by hundreds of thousands of dollars due to Mrs. Ughetta's meritless litigation. That burden should not be borne by them.⁷

3. Conclusion

It is one thing for a litigant to contest valid legal issues based on the evidence. But when all the evidence refutes the Petitioner's claims, continuing the litigation provides thin cover for open hostility. At some point the facts should prevail. When, as in this case, a litigant continues to press evolving claims "justice and equity" requires her to bear the costs of her intransigence. The history of this litigation and the damages it has caused support fee shifting.

⁷ The other Cist siblings objected to Mrs. Ughetta's litigation that they believed was without merit. (BR77.)

II. TO CARRY OUT THE SETTLOR'S INTENT, THE NO-CONTEST CLAUSE APPLIES

A. Introduction

In response to the Trustee's Opening Brief, Mrs. Ughetta makes a single argument claiming that she did not actually challenge the terms of the Trust, but only sought to have the Trustee properly carry out those Trust provisions. (App. R. Br. at 27-32.) But as the authorities cited by the Trustee point out (Tr. O. Br. at 41-42), just calling litigation a "petition for instruction" does not turn an actual contest into something more benign. Nor is the application of the No-Contest Clause properly confined just to a review of the complaint (as the Master did in her limited analysis). Instead, what actually took place during the litigation counts too. A No-Contest Clause as broad as that adopted by Mr. Cist is intended to prevent attempts "to frustrate [the testator's] unequivocally expressed intent." *Nairne v. Jessop-Humblet*, 124 Cal. Rptr. 2d 726, 728 (Cal. Ct. App. 2002). That also includes conduct that will "place the testamentary scheme in jeopardy, and harass the [executor]." *In re Ellis*, 683 N.Y.S. 2d 113, 115 (N.Y. App. Div. 1998).

B. Why The No-Contest Clause Applies

Mr. Cist specifically intended the No-Contest clause to stop Mrs. Ughetta from filing suit over his Trust's equalization of his estate among his children. (B362.) He used very broad language to do so. He also chose language that directly addressed the need to include in that equalization process the substantial

tuition payments (“including payments made on behalf of a child or issue.”) (A183.) There can be no dispute that Mrs. Ughetta’s interrogatory answers admitted that she “objects” to including those tuition payments and transfers to her husband in the Equalization Process. (B52-66, 201.) That years later she decided not to press that objection before the Master is of no matter. She “contested,” in every sense of the word, key distribution plans provided for by the Trust. Nor was that of little moment. That challenge placed the testamentary scheme in jeopardy, since tuition payments tallied \$520,325.47 for Mrs. Ughetta’s children’s private schools, a substantial part of the Trust. (B65; A66 and BR22-25.)

Mrs. Ughetta, in bringing a new claim regarding the Bluff House valuation, argues that “John David Cist’s operative trust documents state that transfers should be valued at the time of the transfer, but are silent as to whether a discounted gift tax return value is appropriate.” (App. R. Br. at 9.)

Mrs. Ughetta’s care not to cross the line into a direct challenge of the Trust is not nearly careful enough. As argued above, the “discounted gift tax return value” is exactly the “date of gift value” Mr. Cist transferred. The Trustee cannot change the values Mr. Cist declared to the IRS in 1999. So by suing for her preferred value, Mrs. Ughetta is directly challenging Mr. Cist’s Trust disposition.

Of even greater importance, however, is the entire course of Mrs. Ughetta’s conduct in this litigation. She has “contested” a fairly straightforward Trust at

every step. The Trust administration should not have been that complicated. It involved just three steps:

- (1) The TPP was to be appraised and selected by four beneficiaries.
- (2) TPP values were to be added to each child's lifetime transfers.
- (3) After equalizing these prior transfers, the Estate was to be added up and divided by four.

This should not take over seven years and hundreds of thousands of dollars to achieve. If the delay were due to litigation by multiple beneficiaries, or due to evidence of misconduct or hostility, it might be understandable. Instead, Mrs. Ughetta has stood alone in the path of closure, and incredibly, continues to press a case without producing any actionable evidence to support it. For example, Mrs. Ughetta insisted on preferential treatment during the TPP distribution. She complained about the implementation of the Equalization process, initially refusing to participate, then later objected to the result without any legal basis. She refused to permit a final distribution of the so-called Genealogy materials until after the Court of Chancery denied her last attempt to block it, thus ending a five year stay on TPP distribution.⁸

⁸ On three separate occasions during the litigation, Mrs. Ughetta filed a motion to stop the distribution of Trust assets, on September 6, 2013 (TID 54054760), January 25, 2016 (TID 58474076) and September 30, 2016 (TID 59634168).

The Master detailed Mrs. Ughetta's numerous objections and protests and how those delayed the Trust distribution. (Master's Report at B435-539.) *See e.g.*, the "History of Questions and Responses" that provides the full chronology of refusals, objections, obstructions and delays. (BR46-76.) It is difficult to imagine a more determined and well-resourced attempt to prevent carrying out a Trust's terms. She did all this despite the fact that, as the Master found and the Court of Chancery agreed, the Trustee acted properly at every turn. (Master's Report at B447-448.)

Mr. Cist's No-Contest Provision addresses "an action in seeking to set aside any aspect of the [Trust], or to challenge any aspect of the disposition provided" in the Trust. It is not limited to "challenges based on fraud, mistake, undue influence, or incapacity," but "shall apply" to challenges "upon any other basis." There is no basis to limit its' application to just an outright attempt to set aside the Trust. Instead, given that the Trustee has been found to have acted as Mr. Cist intended to distribute the Trust assets, Mrs. Ughetta's crusade to prevent that from happening is a "challenge" in every sense of the word.

Finally, it is important to note how Mrs. Ughetta made her challenges to the Trustee's implementation of the Trust's provisions. In virtually every pleading Mrs. Ughetta filed in this case, from her initial Petition in 2012 to her last brief to the Court of Chancery, she accused the Trustee of bias and ill will. None of those

accusations were necessary if Mrs. Ughetta was just seeking instruction about Mr. Cist's Trust. Mrs. Ughetta made those accusations to delay implementing the Trust and to try to get the Trustee not to follow Mr. Cist's intent. But, as the Master determined, there was "no evidence that the [Trustee] acted hostilely or lacked impartiality when dealing with" Mrs. Ughetta. (B448.) Mrs. Ughetta's litigation is the sort of harassment that other courts have held violates a no-contest provision. *See* Tr. Op. Br. at 41-42.

Focusing on the impact of Mrs. Ughetta's actions throughout the litigation provides an objective standard to determine if the No-Contest Clause should be applied. She significantly delayed the carrying out of Mr. Cist's intended distribution of his estate to his children, costing the Trust substantial fees that in turn diminished the shares going to each beneficiary. The remedy for that conduct is the No-Contest Clause, as Mr. Cist intended.

C. Conclusion

Mr. Cist's No-Contest Clause applies because Mrs. Ughetta has directly challenged and impeded key disposition provisions of his Trust. Thus: (1) she objected to his requirement that tuition payments to grandchildren be equalized, (2) she objected to having gifts to her husband included in her equalization, and (3) she is challenging the transfer valuation Mr. Cist used for the Bluff House, preferring a different value.

Mr. Cist's No-Contest Clause applies because, in addition to challenging several Trust dispositions, Mrs. Ughetta has tried to frustrate his intent through a pattern of meritless legal harassment of his Trustee.

It is understood that any pleading will contain a few errors of fact. But the many errors and misrepresentations characterizing Mrs. Ughetta's lawsuit, and typified in her most recent filing, continue to undermine her credibility and confirm Mr. Cist's foresight. As with Mrs. Ughetta's pattern of harassment since Mr. Cist died, the adverse false claims and misrepresentations are clearly more systematic than accidental and of a quantity and quality that go well beyond any honest investigation of the Trust administration. The No-Contest Clause should have been applied. The decision not to do so should be reversed.

CONCLUSION

The Trustee's appeal presents this Court with its first opportunity to determine when "justice and equity" requires a plaintiff in trust litigation to pay fees incurred by a trustee. When such a plaintiff: (1) pursues claims that are shown to be without merit, (2) unnecessarily prolongs the litigation by shifting her legal positions and (3) imposes substantial costs on the other beneficiaries whose trust benefits are thereby diminished, "justice and equity" warrant fee shifting. Finally, given the breadth of Mr. Cist's No-Contest Clause and Mrs. Ughetta's pattern of conduct, that Clause should have been applied in this litigation. Certainly there are rare cases warranting such relief. This is one of them.

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