



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD HURD, JR., Individually and
as Trustee of the Marie Ann Hurd Trust,
THE MARIE ANN HURD TRUST .

Respondent-Below, Appellant.

v.

MARIE ANN HURD,
Petitioner-Below, Appellee.

C.A. No. 455, 2018

Court Below, Chancery Court of the State
of Delaware, C.A. 4675-MG

APPELLANT'S AMENDED OPENING BRIEF

AUSTRIA SHRUM LLC

/s/ Jack Shrum

“J” Jackson Shrum, Esq. (DE 4757)
ONE COMMERCE CENTER
1201 North Orange Street, Suite 502
Wilmington, DE 19801
Tel.: 302.543.7551
Fax.: 302.543.6386
Email: jshrum@austriashrum.com

Attorney for Appellant

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I. **NATURE AND STAGE OF PROCEEDINGS**

The Appellant restates the Nature and Stage of the Proceedings as more fully set forth in the Appellant's Post-Trial Opening and Reply Briefs in Support of Exceptions to the Master's Final Bench Report. On April 2, 2018, the Appellant filed its *Notice of Exceptions to the Master's Final Report*. On April 24, 2018, the Appellant filed its *Brief in Support of Exceptions to the Master's Final Report*.

On August 2, 2018, the Lower Court held a hearing on the Appellant's Notice of Exceptions to the Master's Final Report. The Lower Court overruled all of the Appellant's filed Exceptions.

On September 4, 2018, the Appellant filed this Appeal. This is the Appellant's Amended Opening Brief.

II. SUMMARY OF ARGUMENT

This Appeal is from the Chancery Court's ruling upholding the Master's Final Report dated March 26, 2018, which determined that property of the MAH Trust was wrongfully withheld from the Trust, and that the Appellant's attorney's fees were not to be paid out of the Trust. The Appellant herein takes issue with the Lower Court's rulings on five separate grounds.

- I. The Lower Court improperly relief upon the Interim Receiver's Accounting Report and its methodologies and conclusions while not allowing the Appellant to file a rebuttal forensic accounting report.
- II. The Lower Court improperly relied upon the Interim Receiver's asserted interest rate and improperly overruled the Appellant's objection to said interest rate.
- III. The Lower Court improperly overruled the Appellant's objection to the Interim Receiver's finding that the Appellant did not have discretion to make discretionary financial decisions for the MAH Trust.
- IV. The Lower Court improperly found that the Appellant was unable to use MAH Trust funds to pay his attorney fees arising out of the underlying litigation.

V. The Lower Court improperly ordered the release of MAH Trust assets and income to the beneficiary of the MAH Trust in plain violation of the terms of the MAH Trust.

III. STATEMENT OF FACTS

Appellee Marie Ann Hurd (the “Appellee”) was the wife of Leonard Hurd, Sr. who passed away on April 18, 2000.¹ Leonard Hurd, Sr. (the “Settlor”) was the father of Appellant Leonard Hurd, Jr. (hereinafter “Appellant”). *Id.* In the Revocable Trust Agreement dated March 21, 1997 (the “Trust”), executed by Leonard Hurd, Sr., the Marie Ann Hurd Trust (the MAH Trust”) was created as follows:

3.3 Gift to Marie Ann Hurd Trust. If Marie Ann Hurd survives me, the trustees shall distribute the following to the trustees to be placed into a separate trust Known as the Marie Ann Hurd Trust and administered as provided in Paragraph 4.1: (i) settlor’s Terry 35’ Fifth Wheel Trailer or any travel trailer purchased to replace it, including furnishings, (ii) settlor’s Dodge pick-up or any tow vehicle purchased to replace it, (iii) settlor’s condominium located at No. 7, Rockford Road, D-15, Wilmington, Delaware, (iv) settlor’s Delmarva Power common stock, and (v) an amount equal to the excess, if any, of Five Hundred Thousand Dollars (\$500,000.00) over the value, determined as of the date of the settlor’s death, of the other property passing under this Paragraph 3.3. ²

The Appellant was Leonard Hurd, Sr.’s son who was designated Trustee by the Trust. Upon Beneficiary’s death, the principal of the MAH Trust is to pass to the descendants of Leonard Hurd, Sr., which includes the Appellant.³

¹ Master’s Report dated March 26, 2018 at Appendix A81.

² Revocable Trust Agreement at Appendix A162.

³ Master’s Report dated March 26, 2018 at Appendix A81-A82.

Pursuant to the terms of the Trust, the MAH Trust was originally funded (in error) with shares of stock, totaling approximately \$414,996.72 in value, in conjunction with the liquidation of certain assets.⁴ The Trust provides that the Appellant would pay to the Appellee all the net income of the MAH Trust in installments and *if the income was insufficient*, make discretionary distributions for the Appellee's health, education, support and maintenance out of the principal of the MAH Trust and by the MAH Trust.⁵ (emphasis added).

The following shares were placed in the MAH Trust and valued on April 18, 2000 and totaling \$414,996.72 in value:

Connectiv 4,231 shares \$74,169.43
Telefonos de Mexico 3,250 shares \$185,148.44
Lone Star Steakhouse 2,400 shares \$23,623.20
Bergen Brunswick Corp. 1,126 shares \$5,981.88
Computer Associates 563 shares \$29,117.66
Nucor2 100 shares \$96,928.13⁶

The remaining assets set forth in section 3.3 of the Trust, with the exception of the condominium, were liquidated to fund the MAH Trust. *Id.* Notably, section 3.3 above did not call for funding the MAH Trust with any of the value of the above-referenced shares of stock, *except the Connectiv shares*, but the Appellant

⁴ Appellant's Brief at Appendix A107.

⁵ Appellant's Brief at Appendix A107.

⁶ Appellant's Brief at Appendix A107.

elected to fund the MAH Trust with the value of the remaining shares nonetheless.⁷

The other items listed in section 3.3 of the Trust which were used to fund the MAH Trust included the following, along with their undisputed liquidated values:

- i settlor's Terry 35' Fifth Wheel Trailer \$4,000.00²
 - ii settlor's Dodge pick-up \$7,500.00³
 - iii settlor's condominium \$62,000.00⁴
 - iv settlor's Delmarva Power common stock \$74,169.43⁵
- Total \$147,669.43**

- v [PLUS] an amount equal to the excess, if any, of Five Hundred Thousand Dollars (\$500,000.00) over the value, determined as of the date of the settlor's death, of the other property passing under this Paragraph 3.3.⁸

Upon the passing of Marie Ann Hurd, the principal of the MAH Trust is to be distributed to Leonard Hurd, Sr.'s descendants, including Leonard Hurd, Jr., the Appellant.⁹

Notably, the MAH Trust states as follows:

A) **Distributions to Marie.** The Trustees shall pay to the Marie [sic] all of the net income of the trust in convenient installments, at least quarterly and preferably monthly. The trustees shall also pay to the Marie [sic] any amounts out of the principal of the trust (if income is insufficient) as, *in the sole reasonable discretion of the trustees*, are necessary or advisable for the Marie's [sic] health, education, support, or maintenance.¹⁰

⁷ Appellant's Brief at Appendix A108.

⁸ Appellant's Brief at Appendix A108.

⁹ Appellant's Brief at Appendix A108.

¹⁰ Appellant's Brief at Appendix A108.

Further, at section 5.2 of the Trust, it states, “A trustee shall not exercise the power to make discretionary distributions of the income or principal of a trust to a beneficiary in a manner that would discharge that trustee’s legal obligation, if any, to support the beneficiary.”¹¹

With respect to compensation of the Appellant and the ability to employ agents to help with the administration of the Trust, the Trust states:

6.1 Compensation. Any Trustee is entitled to receive for services in that capacity reasonable compensation not exceeding the customary and usual compensation where the fiduciary services are performed. Any trustee is entitled to reimbursement for all expenses incurred in the administration of any trust estate, including, among other expenses, compensation to agents or fees for professional services.¹²

Further, the Trust states:

6.3 Fiduciary Powers. The trustees shall have, but not be limited to, the following powers and authorities, which they may exercise in their uncontrolled discretion and judgment:

. . .

(G) To employ attorneys, accountants, agents, brokers and other persons they deem advisable and to pay reasonable compensation for their services; . . .¹³

With respect to the Appellee’s request for an audit of the books and records of the MAH Trust, the following relevant provision controls:

¹¹Revocable Trust Agreement at Appendix A167.

¹² Revocable Trust Agreement at Appendix A168.

¹³ Revocable Trust Agreement at Appendix A169.

6.12 Books and Records. The trustees shall keep (or cause to be kept) accurate books of accounting reflecting all of the receipts and disbursements of the trusts. . . . Any beneficiary may cause the books, records and accounts of any trust in which the beneficiary has a beneficial interest to be audited at any time, *but the cost of the audit shall be paid by the beneficiary demanding it.*¹⁴

Section 6.17 governs the fiduciary capacity of the Trustee with respect to the administration of the MAH Trust. It states in relevant part as follows:

6.17 Fiduciary Liability. Any trustee may rely upon the written opinion of a competent attorney, any facts stated in any instrument in writing and believed to be true or any evidence deemed sufficient. . . . No trustee receiving compensation for services in that capacity shall be liable for any loss which may occur as a result of any actions taken or not taken by the trustee if the trustee has exercised reasonable care, skill and prudence generally exercised by a competent fiduciary with respect to the administration, investment, and management of similar estates or trusts. . . .¹⁵

Moreover, section 6.18 of the Trust states as follows:

6.18 Exercise of Discretion. Wherever the judgment or discretion of the trustees may be exercised, the trustees' determination shall be final and binding upon all interested persons. Any trustee exercising any discretionary power relating to the distribution or accumulation of principal or income, or to the termination of any trust, shall be responsible only for lack of good faith in the exercise of the power.¹⁶

¹⁴ Revocable Trust Agreement at Appendix A173.

¹⁵ Revocable Trust Agreement at Appendix A174-75.

¹⁶ Revocable Trust Agreement at Appendix A175.

The Appellee's complaint alleged that the Trustee had failed to provide an accounting of the MAH Trust as required by the Revocable Trust Instrument; and, that the Trustee had mismanaged the MAH Trust by divesting the MAH Trust of valuable assets, charged excessive and unexplained fees, delayed payment of income necessary distributions to the Beneficiary, made decisions with respect to the MAH Trust that are self-interested and placed his own interests above those of the Beneficiary, has caused the depletion of the MAH Trust's assets through neglect and mismanagement, and has misused MAH Trust assets for his own benefit.¹⁷

Moreover, the Trust and the MAH Trust itself is to be controlled under Texas law. "6.13 **Situs.** The construction and validity of any trust created in this agreement shall be controlled by the laws of the State of Texas."¹⁸ Notably, the Appellant has provided a full accounting of the MAH Trust to the Appellee regularly and multiple times during the course of the underlying litigation. Specifically, the Trustee has given quarterly statements about all relevant aspects of the MAH Trust to the Appellee and/or her counsel at all relevant times. Thus, the count for "Information and Accounting" has been fully satisfied. The remaining count(s) for "Breach of Trust-Conjunctive Relief" [sic], "Breach of

¹⁷ D.I. 1 at pp. 5-8.

¹⁸ Revocable Trust Agreement at Appendix A174.

Trust-Removal of Leonard Hurd”, and “Breach of Trust-Recovery of Trust Income” are the principal subjects of this action.

Additionally, the Appellant was suspended as Trustee while the current Receiver was appointed on February 10, 2017.¹⁹ Subsequently, the Receiver requested documents to prepare its final accounting report. A *draft* accounting report was not provided to the Appellant until early November 2017. The final accounting report was not filed until January 30, 2018.²⁰ The Receiver’s final report states that the Appellant purportedly owes the Trust \$791,002.64 in principal from a purported underfunding of the Trust at inception and subsequent removal of assets, and an additional \$611,971.44 (dividends of \$187,160.37 and interest of \$424,811.07). The Appellant was unable to file a rebuttal accounting report due to, among other things, tax season which rendered reputable accountants unavailable. Further, the Appellant’s wife had passed away in December 2017.²¹

The Master issued her Final Report on March 26, 2018.²² The Master’s Final Report relied exclusively upon the methodologies and conclusion contained with the Receiver’s final account report, specifically the rate of return used by the Receiver to calculate the appreciation of Trust assets. Additionally, the Master did

¹⁹ See D.I. 90, 91.

²⁰ D.I. 116.

²¹ *Id.*

²² D.I. 122.

not grant the Appellant's request for additional time, due to the extenuating circumstances, in which to file a rebutting forensic account report. Within the Master's Final Report, the Master determined that there was property that was wrongfully withheld from the Trust, that the Appellant's concerns with regard to the Receiver's failure to timely pay Trust expenses and liquidate Trust principle to distribute to the beneficiary, and the Appellant's attorney's fees were not to be paid out of the Trust.²³

²³ *Id.*

IV. QUESTIONS PRESENTED

1. Whether the Lower Court improperly relied upon the Receiver's accounting report and its methodologies and conclusions as the Appellant: 1.) was unable to obtain a rebutting expert forensic accountant due to the late filing, January 30, 2018, of the accounting report; 2.) could not obtain a forensic accountant able to review the Receiver's accounting report due to the busy tax season; and 3.) the death of the Appellant's wife;²⁴
2. Whether the Lower Court improperly overruled the Appellant's objection to the interest rate used by the Receiver;²⁵
3. Whether the Lower Court improperly overruled the Appellant's objection to the Receiver's accounting report's finding that the Appellant did not have the discretion to make discretionary final decisions for the MAH Trust;²⁶
4. Whether the Lower Court improperly found that the Defendant is unable to use MAH Trust funds to pay his attorney's fees arising out of the above-referenced matter;²⁷ and

²⁴ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

²⁵ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

²⁶ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

²⁷ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

5. Whether the Lower Court improperly ordered the release of MAH Trust assets and income to be paid to the beneficiary of the MAH Trust in violation of the terms of the MAH Trust.²⁸

²⁸ *See generally* Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

V. LEGAL ARGUMENT

I. **THE LOWER COURT IMPROPERLY RELIED UPON THE INTERIM RECEIVER'S ACCOUNTING REPORT AND ITS METHODOLOGIES AND CONCLUSIONS AS THE APPELLANT WAS UNABLE TO SUBMIT A REBUTTING EXPERT FORENSIC ACCOUNTING REPORT.**

(1)A. QUESTION PRESENTED: Whether the Lower Court improperly relied upon the Receiver's accounting report and its methodologies and conclusions as the Appellant: 1.) was unable to obtain a rebutting expert forensic accountant due to the late filing, January 30, 2018, of the accounting report; 2.) could not obtain a forensic accountant able to review the Receiver's accounting report due to the busy tax season; and 3.) the death of the Appellant's wife.²⁹

(1)B. SCOPE OF REVIEW

This Court reviews Chancery Court's conclusions of law de novo. *See DV Realty Advisors LLC v. Policeman's Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012)(citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court's factual findings "unless they are clearly wrong and the doing of justice requires their overturn." *See id.* (citing *Montgomery Cellular Hldg.*

²⁹ *See generally* Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

Co. v. Dobler, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This appeal involves mixed questions of law and fact. To the extent the lower court's Opinion improperly relied upon the interim receiver's report without affording the Appellant time to file a rebuttal report, this Court's review is *de novo*.

(1)C. MERITS OF ARGUMENT

The Appellant was denied his right to fundamental due process by the Court's refusal to allow him reasonable time to provide a rebuttal forensic accounting report. The Interim Receiver's report was the only accounting report that the Lower Court considered in its rulings. The Interim Receiver's report was a completely one-sided smear report that completely ignored certain standard accounting methodologies and similarly ignored the plain language of the MAH Trust.

The Lower Court relied upon the Receiver's accounting report without affording the Appellant with adequate time to review, retain, and provide a rebutting forensic accounting expert to prepare a report challenging the methodologies and conclusions that the Receiver's report improperly relies upon.

Delaware Rules of Evidence Rule 702 requires that:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or

otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

DEL. R. EVID. 702.

In this instance, the Interim Receiver based its opinions upon methodologies and conclusions that are unreliable based upon the Interim Receiver's findings that the: (i) total principal amount due to the Trust from the former Trustee is \$791,002.64; and (ii) income due to the Trust in the amount of \$611,971.44 which is comprised of \$187,160.37, plus interest of \$424,811.07. These determinations, specifically with regard to the asset appreciation/interest, are unreliable given the unrealistic returns on income purportedly due to the Trust. Additionally, the Receiver's final accounting report was not filed with the Court until January of 2018, almost one year after the Receiver was appointed, and more than eight months after the Receiver was provided with all of the requested documents in preparation of its report.

As a result of the prolonged review process, the late filing, and pending tax season the Defendant was unable to secure a forensic accounting able to review the Receiver's final report and rebut the methodologies and conclusions in which the Receiver based its final report. The Appellant did have a rebuttal forensic accountant and a draft report ready before the hearing on August 2, 2018, but the Court denied the Appellant the ability to submit said rebuttal report. In light of

these extenuating circumstances, the Appellant requested, but was not provided with, an extension of time in which to submit a final rebuttal accounting report so that the Court would be adequately and fairly informed of the appropriate accounting methodologies and conclusions on which to base a Final Report.

II. THE LOWER COURT IMPROPERLY RELIED UPON THE INTERIM RECEIVER’S ASSERTED INTEREST RATE AND IMPROPERLY OVERRULED THE APPELLANT’S OBJECTION TO THE INTEREST RATE.

(2)A. QUESTION PRESENTED: Whether the Lower Court improperly overruled the Appellant’s objection to the interest rate used by the Receiver.³⁰

(2)B. SCOPE OF REVIEW

This Court reviews Chancery Court’s conclusions of law de novo. *See DV Realty Advisors LLC v. Policeman’s Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012)(citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court’s factual findings “unless they are clearly wrong and the doing of justice requires their overturn.” *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This appeal involves mixed questions of law and fact. To the extent the lower court’s Opinion improperly relied upon the interim receiver’s report without affording the Appellant time to file a rebuttal report, this Court’s review is *de novo*.

³⁰ *See generally* Appellant’s Brief dated April 23, 2018 at Appendix A101-A123.

(2)C. MERITS OF ARGUMENT

The Appellant originally funded the MAH Trust in 2001. Over the course of the sixteen years in which the Appellant served as Trustee of the Trust, there have been two significant economic declines; one between 2000 and 2002, and then in 2008. These declines coupled with conservative year-over-year growth from resulting from savings account interest and marketable security interests would not yield a return on investment of 5% over the federal discount rate or approximately 7.25%.

Over the past sixteen years, the federal discount rate has fluctuated significantly ranging from 0.50% in 2009 to 6.02% in 2006. If a base return is pegged to the federal discount rate with additional 5% added to the return which would require higher risk investments, the return for the Trust would be between 5.50% and 11.02%.

Given the nature and purpose of the Trust the Appellant determined that investigating in such high risk, high yield investments was not a prudent investment decision. Therefore, basing the amount of return/interest owed to the Trust on the 7.25% federal discount rate plus 5% amount is unrealistic given the economic environment and could have been a breach of the former Trustee's fiduciary duty to the Trust by engaging in high risk security trading. Had the Lower Court allowed the Appellant to submit his own forensic rebuttal report, the

inherent problems in the Interim Receiver's interest rate calculations would have been evident to the Court.

III. THE LOWER COURT IMPROPERLY OVERRULED THE APPELLANT’S OBJECTION TO THE INTERIM RECEIVER’S ACCOUNTING REPORT’S FINDING THAT THE DEFENDANT DID NOT HAVE THE DISCRETION TO MAKE DISCRETIONARY FINANCIAL DECISIONS FOR THE MAH TRUST.

(3)A. QUESTION PRESENTED: Whether the Lower Court improperly overruled the Appellant’s objection to the Receiver’s accounting report’s finding that the Appellant did not have the discretion to make discretionary final decisions for the MAH Trust.³¹

(3)B. SCOPE OF REVIEW

This Court reviews Chancery Court’s conclusions of law de novo. *See DV Realty Advisors LLC v. Policeman’s Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012)(citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court’s factual findings “unless they are clearly wrong and the doing of justice requires their overturn.” *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

³¹ *See generally* Appellant’s Brief dated April 23, 2018 at Appendix A101-A123.

This appeal involves mixed questions of law and fact. To the extent the lower court's Opinion improperly held that the Appellant did not have the discretion to make final decisions for the MAH Trust, this Court's review is *de novo*.

(3)C. MERITS OF ARGUMENT

Trustees of a trust's assets and/or property are held to a prudent investor standard in the management and investment of a trust's assets or property. *Law v. Law*, 753 A.2d 443, 447-48 (Del. 2000); *see also Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. Supr. 1964). “[T]rustees must act with skill, care, diligence and prudence in light of the circumstances.” *Law*, 753 A.2d at 448. When a non-professional trustee is a trustee of a trust, they have a “duty to the beneficiaries in administering a trust is to exercise the skill and care that a man of ordinary prudence would exercise in dealing with his own property in light of the situation existing at the time.” *Id.* (citing *Dupont v. Equitable Sec. Trust Co.*, 122 A.2d 429, 433 (Del. Supr. 1956)). Additionally, the Court shall review the administration of a trust in light of the trustor's intent when the trust was created. *Law*, 753 A.2d at 448.

In this instance, the Appellant acted in a manner consistent with his fiduciary duty to the Trust with regard to his discretion to make financial decisions for the Trust. Specifically, under the Section 6.3(A) of the Trust document, the trustee of

the Trust shall have the authority to manage Trust assets and to invest Trust assets in corporate stock, bonds, other corporate securities, or other pooled investment vehicles. The Trust does not provide guidance to a trustee nor does it suggest or require a specific risk tolerance or diversification of assets. As such, the Appellant, as trustee, had the discretion to invest the Trust assets in a manner that was within his skillset and within the requirements of the ordinary prudence standard for nonprofessional trustees.

Additionally, the Appellant exercised his discretion in accordance with the directions of the testator and in a manner that was consistent with prior conversations that the Appellant had with the testator. There was no finding of self-dealing, conflict of interest, or any other connection between the Trust investments and the Appellant that would give rise to a breach of fiduciary duty or a failure to invest the Trust assets as an ordinary prudent man would given the circumstances. The testator directed the Appellant to ensure that the Trust held the necessary assets in order to provide for the beneficiary. As a result of these directions, the Appellant had a low risk tolerance for investment Trust assets and utilized Trust assets in a manner that was in furtherance of the Trust's goals. Therefore, since the Appellant prudently exercised his discretion with regard to Trust assets, invested the assets in accordance with the goals of the Trust, and with

the Trust terms themselves, the Appellant had the discretion to make discretionary financial decisions when the Appellant served as Trustee of the Trust.

IV. THE LOWER COURT IMPROPERLY FOUND THAT THE APPELLANT WAS UNABLE TO USE MAH TRUST FUNDS TO PAY HIS ATTORNEY'S FEES ARISING OUT OF THE ABOVE-REFERENCED MATTER.

(4)A. QUESTION PRESENTED: Whether the Lower Court improperly found that the Defendant is unable to use MAH Trust funds to pay his attorney's fees arising out of the underlying action until the time he was suspended as Trustee.³²

(4)B. SCOPE OF REVIEW

This Court reviews Chancery Court's conclusions of law de novo. *See DV Realty Advisors LLC v. Policeman's Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012)(citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court's factual findings "unless they are clearly wrong and the doing of justice requires their overturn." *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This appeal involves mixed questions of law and fact. To the extent the lower court's Opinion improperly held that the Appellant did not have the

³² *See generally* Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

discretion to make final decisions for the MAH Trust, this Court's review is *de novo*.

(4)C. MERITS OF ARGUMENT

Delaware law provides that a trustee may be reimbursed for attorney's fees and costs out of the trust in trust litigation when the actions of the trustee are challenged. *McNeil v. McNeil*, 798 A.2d 503, 514-15 (Del. 2002). Additionally, the Court in *McNeil* held that even where a trustee's breach of fiduciary is serious, ill-considered and wrong, attorney fee may still be paid out of the trust. *Id.* Additionally, Paragraph 6.3(G) of the Trust document specifically provides that the trustee has the authority "[t]o employ attorneys, accountants, agents, brokers, and other persons they deem advisable and to pay reasonable compensation for their services."

In this instance, the Appellant was found to have breached his fiduciary duty to the Trust in bad faith. The Court, however, states that "the Court has the discretion, 'as justice and equity may require,' to award reasonable attorneys' fees to any party, to be paid by another party, or from the trust at issue." The Appellant did not in any way act in a nefariously manner or with the intent of defrauding or benefiting himself over the beneficiary of the Trust. The Appellant acted in a manner within what he believed to be within the goals of the Trust, the directions afforded to the Appellant by the testator, and by the what the Appellant believed to

be the correct course of action given that the Appellant is a nonprofessional trustee and this being the first time that he served as a trustee.

The Appellant's actions as trustee may have been ill-considered and ultimately incorrect given the interpretation by the Court, but the Appellant believes that he acted in accordance with, what he believed to be, the best interests of the beneficiary. An incorrect decision as a lay person in this instance does not give rise to such nefarious conduct that would otherwise render the Trust document's Section 6.3(G) without effect. At minimum, the Defendant should be reimbursed for attorney fees beginning with the litigation up until the time the Defendant was removed as Trustee of the Trust. Therefore, the Defendant's request for reimbursement of attorney fees is proper and said fees paid by the Trust.

V. THE LOWER COURT IMPROPERLY ORDERED THE RELEASE OF THE MAH TRUST ASSETS AND INCOME TO BE PAID TO THE BENEFICIARY OF THE MAH TRUST IN VIOLATION OF THE TERMS OF THE MAH TRUST.

(5)A. QUESTION PRESENTED: Whether the Lower Court improperly ordered the release of MAH Trust assets and income to be paid to the beneficiary of the MAH Trust in violation of the terms of the MAH Trust.³³

(5)B. SCOPE OF REVIEW

This Court reviews Chancery Court’s conclusions of law de novo. *See DV Realty Advisors LLC v. Policeman’s Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012)(citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dabler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court’s factual findings “unless they are clearly wrong and the doing of justice requires their overturn.” *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dabler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This appeal involves mixed questions of law and fact. To the extent the lower court’s Opinion improperly ordered the release of MAH Trust assets and

³³ *See generally* Appellant’s Brief dated April 23, 2018 at Appendix A101-A123.

income to be paid to the beneficiary of the MAH Trust in violation of the terms of the MAH Trust, this Court's review is *de novo*.

(5)C. MERITS OF ARGUMENT

Over the course of the past year, the Receiver has served in a fiduciary capacity to the Trust. During this time, the Receiver has, on three separate instances, failed to pay property tax due and condominium fees due as well as petitioned the Court to liquidate Trust principle in order to make distributions to the Appellee for her on-going long-term care and assisted living facility needs. Firstly, as a professional trustee, the Receiver owes a fiduciary duty to the Trust which includes paying any and all expenses necessary for the administration of the Trust and maintenance of Trust assets. The property tax and condominium fees that were not paid on several occasions when the Receiver was advised by the Appellant that they must timely remit these fees.

Additionally, the Receiver petitioned the Court to liquidate Trust principle in order to distribute to the beneficiary for \$6,200 in living and healthcare expenses. As mentioned above, the Receiver determined that an appropriate return on Trust assets is 7.5%. This yields a total annual return of \$20,449.10 or a monthly return of approximately \$1,600 in social security benefits yielding a total income of \$3,304.09. As such, the Court should have required that the Receiver conduct additional due diligence as to the Appellee's financial position, the Receiver's

ability to obtain their stated 7.5% in return with a low risk tolerance portfolio, and a showing that such expenses will be timely paid which thus far has not been done. Finally, the fees thus far collected by the interim Receiver, as stated by the Trust 2017 Income Tax Return, shows fees that were paid to the Receiver in the amount of \$35,393 exceed that of the fees generally charged by the Appellant during his administration of Trust assets. Although some of these fees may be attributable to the preparation of the Receiver's final accounting Report, the Master's Final Report failed to compare and analyze the manner in which both the Receiver and the Appellant managed the Trust assets.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant respectfully requests that the COURT REVERSE the Lower Court's orders, and GRANT the Appellant such other relief as requested by the Appellant.

Respectfully submitted,

AUSTRIA SHRUM LLC

/s/ Jack Shrum

"J" Jackson Shrum, Esq. (DE 4757)

ONE COMMERCE CENTER

1201 North Orange Street, Suite 502

Wilmington, DE 19801

Tel.: 302.543.7551

Fac.: 302.543.6386

Email: jshrum@austriashrum.com

Attorney for Appellant