



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD HURD, JR., Individually and
as Trustee of the Marie Ann Hurd Trust,

Appellant/Respondent-Below,

v.

MARIE ANN HURD,

Appellee/Petitioner-Below.

C.A. No. 455, 2018

Court Below, Chancery Court of the
State of Delaware, C.A. No. 4675-MG

APPELLEE'S AMENDED ANSWERING BRIEF

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NATURE AND STATE OF PROCEEDINGS

This matter was presented for trial on February 8, 2016. After exceptions were taken to the Master's post-trial Final Report, and a subsequent bad faith hearing was held, Vice Chancellor Glasscock accepted the Final Report. As a consequence thereof, Leonard Hurd, Jr. ("Appellant") was removed as Trustee of the Marie Ann Hurd Trust (the "Trust" or "MAH Trust") and Cover & Rossiter was appointed as Receiver of the Trust (the "Receiver"). The Court subsequently ordered the Receiver to conduct a full accounting of Trust, present its findings to the Court, and to manage the Trust in the interim.

The Receiver's Report (the "Report") was provided to counsel on November 6, 2017 and mailed to the Register in Chancery the same day. Due to problems with LexisNexis File & Serve, the Report was not docketed until January 30, 2018. A scheduling conference was held on January 30, 2018, attended by counsel for both parties as well as the Court's Case Manager. A schedule for consideration of the Report was thus stipulated to.

Plaintiff, Marie Ann Hurd ("Appellee"), and Appellant both filed responses to the Report. After consideration of the Report and the parties' responses thereto, a Final Report was docketed on March 26, 2018.

The Defendant took exception to the Report on April 2, 2018 and subsequently filed a brief in support of those exceptions. The Court issued its

findings on the exceptions on August 2, 2018. On September 4, 2018, Appellant filed the present appeal.

SUMMARY OF THE ARGUMENT

This appeal is from the Chancery Court's rulings upholding the Master's Final Report dated March 26, 2018, which determined that property of the MAH Trust was misappropriated by Appellant, set damages and interest, and denied Appellant attorney's fees. Appellant has challenged these rulings on several grounds, and Appellee opposes those grounds as follows:

I. Appellant argues that the Chancery Court "improperly relied upon the Interim Receiver's Accounting Report and its methodologies and conclusions while not allowing the Appellant to file a rebuttal forensic accounting report." Appellee denies that the Court of Chancery acted improperly in relying upon the Receiver's report, and further denies that it was improper for the Court of Chancery to reopen the record in order to allow Appellant a renewed opportunity to obtain an expert report.

II. Appellant argues that the Court of Chancery "improperly relied upon the Interim Receiver's asserted interest rate and improperly overruled the Appellant's objection to said interest rate." Appellee denies that it was improper for the Court of Chancery to adopt the interest rate proposed by the Receiver because the proposed interest rate is consistent with both the facts and law.

III. Appellant argues that the Court of Chancery "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.”

Appellee denies that the Court of Chancery acted improperly by rejecting

Appellant’s attempted reliance on the reasonable prudent investor standard.

IV. Appellant argues that the Court of Chancery “improperly found that the Appellant was unable to use MAH Trust funds to pay his attorney fees arising out of the underlying litigation.” Appellee denies that the Court of Chancery acted improperly by denying Appellant recovery of his attorney’s fees due to his bad faith actions as Trustee.

V. Appellant argues that the Chancery 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.” Appellee denies that it was improper for the Court of Chancery to order the use of MAH Trust principal to pay for the ongoing healthcare and living expenses of the Beneficiary, consistent with the trust instrument.

STATEMENT OF THE FACTS

Appellee adopts the exhibits provided by Appellant with his *Opening Brief* and supplements them with the attached appendices marked as Appellee's Appendix B. Some duplication of Appellant's Appendix is provided in order to provide better quality reproductions of certain attachments. Further, Appellee adopts the statement of facts and findings as presented by the Master in Chancery in her Final Report dated March 6, 2018 and further states as follows:

Mrs. Hurd was born December 31, 1934. When Leonard Hurd, Sr. married Marie Ann Hurd (Appellee and Petitioner-Below), executed a Revocable Trust Instrument, dated March 21, 1997 (the "Trust Agreement") to provide her with support and a home in the event he passed before her. Leonard Hurd, Sr. did ultimately precede her, passing away on April 18, 2000. In accordance with the Trust Instrument, the Marie Ann Hurd Trust was created. It is the MAH Trust, and its administration by the Trustee, which are the subject of this litigation.¹

The designated Trustee was Leonard Hurd, Jr., the son of the decedent from prior to his marriage to Mrs. Hurd, who is the sole Beneficiary. Pursuant to the Trust Instrument, upon Beneficiary's death, the principal of the MAH Trust is to pass to the descendants of Leonard Hurd, Sr., which includes the first the Trustee, and also the Trustee's children.

¹ See Master's Final Report dated Sept. 20, 2016 at B101-B107.

The corpus of the MAH Trust was originally populated as follows:

Gift to Marie Ann Hurd Trust. If Marie Ann Hurd survives Me, the Trustee 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 Settlor's death, of the other property passing under this Paragraph 3.3.²

The travel trailer and pick-up truck were sold and combined with six stocks to fund the MAH Trust by the Trustee, and although the original valuation of the MAH Trust could not be confirmed, an Accounting Summary & Distributions Report dated July 31, 2001 created by the Trustee, valued the original corpus of the Trust at \$414,996.72.³ The condominium located at 7 Rockford Road, Wilmington, Delaware, remained in the Trust, and is where Mrs. Hurd resided from 2000 until recently.

More specifically, the MAH Trust was purportedly populated with: (i) \$31,321 for the travel trailer and mobile home; (ii) \$7,500 for the Dodge pick-up truck; (3) \$62,000 for the condominium; (iv) \$74,169.43 for 4,231 shares of

² Revocable Trust Agreement at A162.

³ See Master's Final Report dated Sept. 20, 2016 at B101-B107.

Connectiv common stock; and (v) \$19,337.08 contained in a cash account, \$185,148.44 for 3,250 shares of Telefonos de Mexico stock, \$23,623.20 for 2,400 shares of Lone Star Steakhouse and Saloon, Inc. stock, \$5,981.88 for 1,126 shares of Bergen Brunswick Corporation (now Amerisourcebergen Corporation) stock, \$29,117.66 for 653 shares of Computer Associates (now CA Inc.) stock, and 2,100 shares of Nucor Corporation stock.⁴

The Revocable Trust Agreement provides that the Trustee would pay to the Beneficiary all net income of the Trust in installments. Mrs. Hurd relied upon these distributions for her welfare each month. She anticipated receiving approximately \$1,000 per month of MAH Trust income.⁵

If the income was insufficient, the Trustee was permitted to expend MAH Trust principle to provide for the Beneficiary's health, education, support and maintenance. Mrs. Hurd rarely sought such expenditures. In fact, since the Trust's inception in 2000, she made only two requests for assistance from the MAH Trust beyond the income distributions: once for a bathroom sink, which the Trust paid for; and, once to replace a broken refrigerator which the MAH Trust refused to pay for.⁶

The refusal by the Trustee to pay for the refrigerator in question marks one of multiple breaches of Trust by the Trustee. On May 7, 2008, Mrs. Hurd replaced her

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

27-year-old refrigerator which had broken. That same day she wrote a letter to the Trustee requesting reimbursement for the replacement cost. Respondent refused this request on the basis that the replacement was purchased without his consultation. The cost of the refrigerator was \$702.97.⁷

On March 6, 2007, Petitioner received correspondence from the Trustee stating that assets had been removed from the Trust to adjust it to \$500,000 value. The next day, on March 7, 2007, Respondent removed \$65,640.00 in cash from the Trust and 6,075 shares of NuCor Corporation common stock (price per share: \$59.95 for a total of \$364,196). Upon receiving this news, Beneficiary contacted Respondent for an explanation. His response: “[H]e said, ‘It doesn’t matter,’ it’s all going to be his anyway.” As it turns out, he took the assets for himself.⁸

In an effort to discover the truth about what was going on with the Trust, Respondent retained legal counsel and accounting professionals to conduct an audit of the Trust. By letter dated March 17, 2009, Kristen Shaw, CPA, on behalf of Petitioner, requested access to the books and records of the Trust. On March 31, 2009, Respondent demanded \$5,250, to be expended at a rate of \$350/hour, for access to the books and records. In doing so, Respondent charged \$707.00 to Petitioner to respond to this request.⁹

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

Having received this response from Respondent, Petitioner’s counsel, William Erhart, Esq., by letter on April 23, 2009, reminded Respondent that access must be free, stating that it could be “performed at such place as you designate, assuming there is space and light for the auditor. Or the books and records requested can be sent to the auditor....” Not to be deterred, and to continue his efforts at obstruction, one day later, Respondent again refused to provide free access to the books and records of the Trust, stating, “I am merely setting terms for my labors...” and demanding payment for the initial request for access to books and records.¹⁰

Suit against the Trust and the Trustee was ultimately initiated, during which what appears to be the majority of the documents were produced, but not without a fight. Alas, not all of the documentation was provided and Beneficiary’s accountant, Thomas Spychalski, CPA, stated that he was unable to complete an accounting and audit because “[n]ot all the statements and supporting documentation were available for review. There were missing months, incomplete statements (missing pages) and lack of supporting documentation for certain expenses charged against the beneficiary’s income distribution.”¹¹

Subsequent to trial, Cover & Rossiter, a Wilmington-based accounting firm, was appointed by Stipulation and Order as Receiver of the MAH Trust and was

¹⁰ *See id.*

¹¹ *See id.*

charged with the task, *inter alia*, of conducting a complete forensic accounting of the MAH Trust.¹²

The accounting ordered by the Court was a significant task, requiring a forensic analysis of the MAH Trust's history from inception through the present. A significant contributing factor to the length of this process was the now-former Trustee's failure to provide documentation necessary for the completion. Appellant's refusal to provide all documentation ultimately led to the Master in Chancery ordering a coercive fine against Appellant.¹³ The coercive fine was ultimately lifted, but only because it had served its purpose of convincing Appellant to produce documents which should have been produced in discovery prior to trial, let alone post-trial, in response to a Court order.¹⁴

Upon completion of the initial report by the Receiver, an Interim Accounting Report was made available to the parties on or about November 6, 2017.¹⁵ Due to technical trouble with uploading the report, it was not docketed until January 2018. Nevertheless, the parties were provided with copies of the report several months prior, in November 2017.¹⁶

¹² *See id.*

¹³ Judicial Action Form dated April 26, 2017 at B256.

¹⁴ Master's Report dated March 6, 2018 at B197-B198.

¹⁵ Plaintiff's Answering Brief in Opposition to Defendant's Exceptions to the Master's Final Report, Exh. 1 at B217-218; Transcript of Exceptions Hearing dated August 2, 2018 at B223, Lines 15-18.

¹⁶ *Id.*

The accounting concluded that Appellant pay \$611,971.44 in income, plus any additional income deficiencies that had accrued since September 30, 2017, and further, pay \$450,559.64 in cash in principal, as well as 6,075 shares of Nucor stock (or cash equivalent) to the Trust and Appellee to bring the Trust and beneficiary to whole.¹⁷

Appellant subsequently filed his appeal to this Court.

¹⁷ Master's Final Report dated March 6, 2018 at B198-B199.

QUESTIONS PRESENTED

1. Whether the Court of Chancery properly accepted the Receiver's accounting report as evidence; and, whether the Court of Chancery properly denied Appellant's *ex post facto* request for additional time to obtain an expert and issue an expert report.¹⁸
2. Whether the interest rate assigned by the Court of Chancery was proper.¹⁹
3. Whether the Court of Chancery should have applied the reasonable prudent investor standard.²⁰
4. Whether the Court of Chancery abused its discretion in denying Appellant's request for attorney's fees.²¹
5. Whether the Court of Chancery properly permitted the use of MAH Trust principle to pay for Appellee's ongoing healthcare and living expenses, consistent with the trust instrument, when Appellant failed to offer comment upon, or take exception to, the order, permitting it to become a stipulation.²²

¹⁸ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B115.

¹⁹ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B116.

²⁰ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B117.

²¹ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B119.

²² See Defendant's Brief in Support of Exceptions to the Master's Final Report at B121.

LEGAL ARGUMENT

I. THE VICE CHANCELLOR DID NOT ERR IN RELYING ON THE RECEIVER'S ACCOUNTING AND IN DENYING APPELLEE'S EX POST FACTO REQUEST TO OBTAIN AN EXPERT.

A. QUESTION PRESENTED.

Appellant poses two questions concerning the acceptance of the Receiver's Report, specifically: Whether the Court of Chancery properly accepted the Receiver's accounting report as evidence; and, whether the Court of Chancery properly denied Appellant's *ex post facto* request for additional time to obtain an expert and issue an expert report.²³

B. STANDARD OF REVIEW.

The decision to admit or deny evidence is in the sound discretion of the trial court, and consequently, an abuse of discretion standard is appropriate, and if no objection to that evidence is made, then a plain error standard is applied.²⁴ Because no objection to the admission of the Receiver's report into evidence was made, the acceptance of that evidence is reviewed for plain error.

Although the Court is confined to the record in considering the evidence on appeal, the Court may make its own findings of fact, but will not typically disturb the Chancery Court's findings if "there was sufficient evidence to support it."²⁵ As

²³ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B115.

²⁴ *Capano v. State*, 781 A.2d 556, 586 (Del. 2001); D.R.E. 403.

²⁵ *Nardo v. Nardo*, 58 Del. 400, 410-11 (Del. 1965).

it concerns the findings of the Receiver's report, the only evidence in the record is the Receiver's report itself.

The decision whether to grant additional time to Appellant to obtain an expert, a request that was not made until after the Master in Chancery had already issued a Final Report, is reviewed for abuse of discretion.²⁶ Under an abuse of discretion standard, the Court should not substitute its judgment for that of the trial court so long as the trial court's judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.²⁷

C. ARGUMENT.

Appellant offers neither legal nor factual basis for his contention that he was somehow denied due process. And while Appellant may wish to criticize the Receiver's findings as a "one-sided smear," he offers no legal or factual basis to justify that criticism. Instead, he offers broad conclusory statements that the Receiver's determination of asset appreciation and interest are "unreliable" and "unrealistic."

The fact remains that Appellant did not offer any evidence challenging the Receiver's findings. It is noteworthy that the evidence in question—the Receiver's

²⁶ See *Burton v. Burton*, 2004 Del. LEXIS 151, at *3-4 (Del. 2003) (noting that the Family Court did not abuse its discretion in relying upon one party's filings when the other party failed to file appropriate papers with the court timely after proper notice).

²⁷ *Corrado v. Simpson*, 1991 Del. LEXIS 235, at *16-17 (concluding that the Chancery Court did not abuse its discretion in denying a late application for a lengthy extension of time).

Accounting Report—was not a “one-sided smear” offered by a hired gun for Appellee. Rather, the Receiver’s Report was a forensic accounting performed by a well-established and well-respected Delaware accounting firm, stipulated to by the parties and appointed by the Court.

Putting aside Appellant’s attempt to malign the reputation of Cover & Rossiter, Appellant complains that he was not afforded an opportunity to obtain an expert to review the Receiver’s Report. This complaint stands in sharp contradiction to the events leading up to the Master’s Final Report.

In the first of two red herrings, Appellant focused on the length of time it took for the Receiver to generate its accounting report. The amount of time taken by the Receiver to complete the accounting has no bearing on the Appellant’s ability to obtain an expert to review the Report. The period of time taken for completion of the accounting was significantly extended by the Defendant’s failure and/or refusal to produce documents to the Receiver necessary for the completion of the accounting.²⁸ The Appellant was aware the Court had ordered an accounting as far back as the order appointing the Receiver. The Appellant could have secured an expert at any time from that date forward.

Further, once Appellant had obtained the Receiver’s report, Appellant took no action to obtain an expert, which brings focus to the second red herring offered up

²⁸ See Master’s Final Report dated March 6, 2018 at B198-B199.

by Appellant. While seeking to draw the Court's attention on the date when the Report was formally docketed with the Court of Chancery (January 2018), Appellant conveniently neglects to reveal he was provided with the Report in September 2017, and again in October 2017.²⁹ Appellant could have retained an expert at this time but chose not to.

Even where the Court to give credence to this second red herring, considering only the January 2018 docketing date, Appellant's contention still lacks credibility. Once the Report was docketed, a scheduling conference was held on January 30, 2018, for the express purpose of scheduling the parties' responses to the Report. Counsel for both parties were present.

The schedule that came out of this conference was stipulated and agreed to by both parties.³⁰ At no time during the scheduling conference did the Defendant request time to obtain an expert. When the schedule was docketed, the Defendant again made no request for additional time to obtain an expert.

Appellant timely filed a response to the Receiver's accounting, containing many of the same generalized criticisms offered on appeal, but importantly, there is no mention of any certified public accountant or other expert cited to challenge the

²⁹ Plaintiff's Answering Brief in Opposition to Defendant's Exceptions to the Master's Final Report, Exh. 1 at B217-218; Transcript of Exceptions Hearing dated August 2, 2018 at B223, Lines 15-18.

³⁰ Letter from Court of Chancery dated January 30, 2018 at B177-B178.

Receiver's findings. Perhaps more importantly, for purposes of this appeal, is the complete lack of any request for an extension of time to obtain an expert in that filing.

It is also noteworthy that the "extenuating circumstances" asserted by Appellant simply do not apply. Appellant had access to the Report in September and October of 2017. That is not tax season. Even if we focus instead on the date the Report was formally docketed, the Defendant made no request for additional time despite numerous opportunities to do so.

Given this series of events, the Vice Chancellor, in ruling on the exceptions to the Master's Final Report, properly surmised that Appellant simply decided not to retain an expert, and that is was only after he had lost that he wished to revisit that decision. The Vice Chancellor made an additional important point, noting that the Beneficiary is an elderly woman and that any further delay would have a significant and substantial impact both on the MAH Trust and the Beneficiary.³¹ This conclusion is well founded in conscience and reason and consequently, the Vice Chancellor did not abuse his discretion.

³¹ Transcript dated August 2, 2018 at B240, Line 11 – B242, Line 18.

II. THE VICE CHANCELLOR DID NOT ABUSE ITS DISCRETION BY APPLYING THE LEGAL RATE FOR INTEREST WHICH ACCURATELY REFLECTS THE RETURN FOR A TRUST WHOSE ASSETS ARE PREDOMINANTLY COMPRISED OF SECURITIES.

A. QUESTION PRESENTED.

Whether the interest rate assigned by the Court of Chancery was proper.³²

B. STANDARD OF REVIEW.

The Court of Chancery has broad discretion in fashioning appropriate remedies and is reviewed for abuse of discretion.³³

C. ARGUMENT.

The Defendant complains that the interest rate applied by the Receiver is inappropriate, declaring that the Defendant determined that investing in such high risk, high yield investments was not a prudent investment decision, but without any expert to base this declaration upon. Putting aside the fact that this assertion is without basis in the record, the Chancery Court did not abuse its discretion in applying the legal rate, 6 *Del. C.* §2301, because it's application is well-founded in both the law and facts.

In determining the interest rate to be applied, the interest rate applied should be sufficient to restore the trust corpus and account for any income that would be been received.³⁴ In this light, the Chancery Court has broad discretion in setting the

³² See Defendant's Brief in Support of Exceptions to the Master's Final Report at B116.

³³ *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 Del. Ch. LEXIS 263 (Del. Ch.), at *7-8.

³⁴ See *Pennsylvania Co. v. Wilmington Trust Co.*, 189 A.2d 679, 682 (Del. Ch. 1963).

appropriate interest rate, with the legal rate as the historical benchmark and guide.³⁵

The Vice Chancellor appropriately agreed with the Receiver that the most significant portion of the Trust's assets were traditionally held in securities, and thus the assets misappropriated from the trust would have most likely been invested in securities.

It naturally follows that the interest rate should be an equity-based rate rather than a money market or cash account rate that would produce yields that are not commensurate with an expected rate of return. The S&P500 provides an appropriate measuring stick by which to determine whether the legal rate would reasonably approximate the rate of return that would be expected. As it turns out, the legal rate measures up well. From 2001 through 2017, the S&P500 yielded an average return of 7.98%.³⁶ The legal rate recommended by the Receiver is 7.25%, well within any reasonable margin of error.³⁷

Furthermore, the application of the legal rate to matters of breach of fiduciary duty is not uncommon. In *Gilmore v. Gilmore*, 2008 Del. Ch. LEXIS 177 (Del. Ch. Dec. 3, 2008), this Court found a trustee liable for various breaches of trust, and in awarding damages, granted interest at the legal rate. In another case, *In*

³⁵ *Rollins Envtl. Serv., Inc. v. WSMW Indus.*, 426 A2.d 1363, 1366 (Del. 1980).

³⁶ Transcript dated August 2, 2018 at B237, Line 22 – B239, Line 15.

³⁷ Although the Vice Chancellor did not expressly discuss the compounding of interest, and Appellant did not take express exception to the compounding of interest, compound interest has been found acceptable under Delaware law. See *Brandin v. Gottlieb*, 2000 Del. Ch. LEXIS 97, at *92-99 (noting that while compound interest is not the norm when applying the legal rate, the interests of fairness and equity do afford the Chancery Court the option compound interest and to set the rate at which it compounded).

re Buonamici, 2008 Del. Ch. LEXIS 112 (Del. Ch. Aug. 11, 2008), a guardian was held liable for breach of fiduciary duties, resulting in a damages award including interest at the legal rate.

The Defendant offered no reasonable alternative basis for calculation of the interest. Conversely, the interest rate recommended by the Receiver was appropriate to reach the intended equitable goal, was consistent with the anticipated rate of return, and was supported by law.³⁸ Consequently, the Court of Chancery did not abuse its discretion in applying the legal rate and compounding it annually.

³⁸ Transcript dated August 2, 2018 at B241, Line 23 – B243, Line 4.

III. THE VICE CHANCELLOR WAS CORRECT IN DETERMINING THAT THE REASONABLE PRUDENT INVESTOR STANDARD DID NOT PERMIT APPELLEE TO MISAPPROPRIATE FUNDS FROM THE MARIE ANN HURD TRUST.

A. QUESTIONS PRESENTED.

Whether the Court of Chancery should have applied the reasonable prudent investor standard.³⁹

B. STANDARD OF REVIEW.

The application of law, such as the reasonable prudent investor standard, is reviewed *de novo*.⁴⁰

C. ARGUMENT.

While certain investment decisions are theoretically within the realm of the reasonably prudent investor standard cited by Appellant, his actions in conducting the affairs of the Trust, as outlined in the Master’s Final Report post-trial and Final Report concerning the Receiver’s accounting report, simply do not fall within the scope of such discretion. Further, Appellant offers to the Court no specific investment decisions made which he believes should be afforded protection.

The Defendant has claimed, “[t]here was no finding of self-dealing, conflict of interest, or any other connection between the Trust investments and the Defendant that would give rise to a breach of fiduciary duty . . .” yet there has been a finding

³⁹ See Defendant’s Brief in Support of Exceptions to the Master’s Final Report at B117.

⁴⁰ *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999).

of self-dealing. The self-dealing included the misappropriation of trust assets, including thousands of shares of stock, and approximately \$65,000 in cash, amongst other determinations made, not by the Receiver, but by this Court after trial.

Appellant may argue that he made certain “discretionary” decisions, such as the liquidation of Lonestar Steakhouse and Telemex/American Movil stocks as “forced sales”, these arguments were rejected by the Court because they were premised upon an impossible reading of the trust instrument. It is noteworthy that Appellant has not challenged the Chancery Court’s rejection of his interpretation in this appeal.

The Court of Chancery did not err in rejecting Appellant’s reasonable prudent investor defense because Appellant offered no specific investment decisions which might be afforded protection, and the only investment decisions made by Appellant constituted the misappropriation of assets from the MAH Trust.

IV. THE VICE CHANCELLOR CORRECTLY DETERMINED THAT APPELLEE’S ATTORNEY’S FEES SHOULD NOT BE PAID BY THE TRUST GIVEN APPELLEE’S BAD FAITH AS TRUSTEE.

A. QUESTION PRESENTED.

Whether the Court of Chancery abused its discretion in denying Appellant’s request for attorney’s fees.⁴¹

B. STANDARD OF REVIEW.

The Chancery Court’s decisions whether to award attorney’s fees are reviewed for abuse of discretion.⁴²

C. ARGUMENT.

While it is true that Delaware law permits the payment, by a trust, of attorney’s fees for defending a trustee, it is not required.⁴³ Where a trustee has acted in bad faith—as here—attorney’s fees are not granted.⁴⁴ Appellee acknowledges that not all determinations of bad faith by a trustee necessarily result in the denial of attorney’s fees, but rather the denial of those fees is determined by the specific nature of the bad faith in question.

In this case, Appellant’s actions have been described by this Court as the “epitome of bad faith.”⁴⁵ His actions included substantial self-dealing, and truly

⁴¹ See Defendant’s Brief in Support of Exceptions to the Master’s Final Report at B119.

⁴² *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002).

⁴³ See *id.* at 515.

⁴⁴ *Id.*

⁴⁵ Transcript dated February 15, 2017 at B171, Lines 1-14.

callous behavior towards the beneficiary. By way of example, Appellant's refusal to pay for a new refrigerator and withholding of trust income when she brought suit against him, amongst many others. The Court even made note that Appellant's conduct was designed as retaliation against the Beneficiary for bringing suit.

Given the nature and extent of Appellant's actions, the Court of Chancery was correct to deny the request for attorney's fees.

V. THE VICE CHANCELLOR PROPERLY PERMITTED THE USE OF TRUST PRINCIPAL TO PAY FOR ONGOING HEALTHCARE AND LIVING EXPENSES FOR THE AND IN LIGHT OF THE FACT THAT APPELLEE DID NOT RAISE OBJECTION TO THE REQUESTED USE OF PRINCIPAL UNTIL AFTER IT HAD BECOME A STIPULATION.

A. QUESTIONS PRESENTED.

Whether the Court of Chancery properly permitted the use of MAH Trust principle to pay for Appellee's ongoing healthcare and living expenses, consistent with the trust instrument, when Appellant failed to offer comment upon, or take exception to, the order, permitting it to become a stipulation.⁴⁶

B. STANDARD OF REVIEW.

The Court of Chancery is afforded broad discretion to exercise authority over the supervision of trusts, and thus is reviewed by the Supreme Court for abuse of discretion.⁴⁷ To the extent that the Court must make a determination as to the interpretation of the Revocable Trust Instrument, however, the interpretation of the instrument would be *de novo*.⁴⁸

C. ARGUMENT.

Presenting a diversion to the Court, Appellant complains of various issues concerning trust administration and are not relevant to the use of MAH Trust principle for the payment of Appellee's living expenses. Equally irrelevant is the

⁴⁶ See Defendant's Brief in Support of Exceptions to the Master's Final Report at B121.

⁴⁷ *McNeil*, 798 A.2d at 509.

⁴⁸ See *Annan v. Wilmington Trust Co. Trustee*, 559 A.2d 1289 (Del. 1987).

claim that the Receiver was paid \$35,393 in fees from the Trust. As explained by the Receiver in its letter to the Court of May 9, 2018, Appellant is simply reading the Trust's tax return incorrectly, the Receiver had not yet been paid. The Receiver's payment was subject to separate requests to the Court, which are not on appeal.

In taking exception to the use of Trust principle to pay for Appellant's ongoing healthcare and living expenses, Appellant conveniently disregards the circumstances surrounding the decision to use MAH Trust principle for this purpose. On December 7, 2017, the Receiver requested instruction from the Court to pay for the Plaintiff's ongoing long-term care. The Court sought comment from the parties. While Appellee responded, Appellant remained silent. Even after the Court directed the Receiver to use Trust principle, Appellant remained silent.⁴⁹

Pursuant to Chancery Court Rule 143, any action of a Master denominated as an Order shall be treated as a "Final Report" under Chancery Court Rule 144. Turning to Chancery Court Rule 144(c), "[i]f a notice of exception to a final report is not timely filed, then the parties shall be deemed to have stipulated to the approval and entry of the report as an order of the Court." No exceptions were filed to the Master's decision ordering the use of trust principle and consequently it became a stipulation of the Court. It was not until well after the Receiver made the request,

⁴⁹ See generally Letter dated December 8, 2017, Emergency Petition for Instructions, *et seq.* at B257-B262.

and the Court directed the Receiver to take action, that Appellant challenged the Court's decision. As a stipulation under Chancery Court Rule 144(c), it is not appealable.

Even if it is determined to be an appropriate subject for appeal, the decision of the Chancery Court to apply the health, education, maintenance and support clause is was appropriate and well founded in law and fact. As noted by the Master in Chancery, the Receiver, acting as interim trustee, had the fiduciary duty to use trust principal for the support of the Appellee's health, education, support and maintenance.⁵⁰ Further, any use of Trust principal to pay for Appellee's healthcare, as the life tenant of the Trust, is appropriate given that the instrument provides that any such decisions should be made in her favor, even if the same is at the expense of the remaindermen beneficiaries.⁵¹ Consequently, not only did Appellant complain of the expenditure of trust principal too late, but the use of trust principal for the Beneficiary's healthcare and living expenses was consistent with the Receiver's fiduciary duties.

⁵⁰ Master's Report dated March 6, 2018 at B194-B196.

⁵¹ See Revocable Trust Instrument at A173, ¶6.11.

CONCLUSION

WHEREFORE, Appellee, Marie Ann Hurd, respectfully requests this Honorable Court affirm the rulings of the Court of Chancery.

Respectfully submitted,

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