



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 REPLY BRIEF

AUSTRIA SHRUM LLC

/s/ Jack Shrum

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

Attorney for Appellant

DATED: January 10, 2019

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
I. NATURE AND STAGE OF PROCEEDINGS.....	1
II. SUMMARY OF ARGUMENT.....	2
III. STATEMENT OF FACTS.....	5
IV. QUESTIONS PRESENTED.....	6
V. LEGAL ARGUMENT.....	8
I. THE LOWER COURT IMPROPERLY RELIED UPON THE INTERIM RECEIVER’S ACCOUNTING REPORT AND ITS METHODOLOGIES AND CONCLUSIONS AS THE DEFENDANT WAS UNABLE TO SUBMIT A REBUTTING EXPERT FORENSIC ACCOUNTING REPORT.....	8
(1)A. QUESTION PRESENTED.....	8
(1)B. SCOPE OF REVIEW.....	8
(1)C. MERITS OF ARGUMENT.....	9
II. THE LOWER COURT IMPROPERLY RELIED UPON THE RECEIVER’S ASSERTED INTEREST RATE AND IMPROPERLY OVERRULED THE APPELLANT’S OBJECTION TO THE INTEREST RATE.....	11
(2)A. QUESTION PRESENTED.....	11
(2)B. SCOPE OF REVIEW.....	11
(2)C. MERITS OF ARGUMENT.....	12

III.	THE LOWER COURT IMPROPERLY OVERRULED THE APPELLANT’S OBJECTION TO THE INTERIM RECEIVER’S ACCOUNTING REPORT’S FINDING THAT THE APPELLANT DID NOT HAVE THE DISCRETION TO MAKE DISCRETIONARY FINANCIAL DECISIONS FOR THE MAH TRUST.....	13
	(3)A. QUESTION PRESENTED.....	13
	(3)B. SCOPE OF REVIEW.....	13
	(3)C. MERITS OF ARGUMENT.....	14
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.....	16
	(4)A. QUESTION PRESENTED.....	16
	(4)B. SCOPE OF REVIEW.....	16
	(4)C. MERITS OF ARGUMENT.....	17
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.....	18
	(5)A. QUESTION PRESENTED.....	18
	(5)B. SCOPE OF REVIEW.....	18
	(5)C. MERITS OF ARGUMENT.....	19
VI.	CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Dupont v. Equitable Sec. Trust Co.</i> , 122 A.2d 429, 433 (Del. 1956).....	14
<i>DV Realty Advisors LLC v. Policeman’s Annuity and Benefit Fund of Chi., Ill.</i> , 75 A.3d 101 (Del. 2012).....	8, 11, 13, 16, 18
<i>Law v. Law</i> , 753 A.2d 443, 447-48 (Del. 2000).....	14
<i>Levitt v. Bouvier</i> , 287 A.2d 671, 673 (Del. 1972).....	8, 11, 13, 16, 18
<i>Montgomery Cellular Hldg. Co. v. Dobler</i> , 880 A.2d 206, 219 (Del. 2005).....	8, 11, 13, 16, 18
<i>Stegemeier v. Magness</i> , 728 A.2d 557, 561 (Del. 1999).....	8, 11, 13, 16, 18
<i>Wilmington Trust Co. v. Coulter</i> , 200 A.2d 441 (Del. 1964).....	14

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 an Appeal. On December 14, 2018 the Appellant filed an Amended Opening Brief.

On December 26, 2018. The Appellee filed an Answering Brief. This is the Appellant's Reply Brief.

II. SUMMARY OF ARGUMENT

The present 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 Appellee opposes the Appellant's issues with the Lower Court's rulings on five separate grounds:

- I. Appellee argues that "the vice chancellor did not err in relying on the receiver's accounting and in denying appellee ex post facto request to obtain an expert." Appellant denies that the vice chancellor did not err in relying on the receiver's accounting because the Interim Receiver's accounting was the only accounting considered in the rulings of the Lower Court.
- II. Appellee argues that "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". Appellant denies that the vice chancellor did not abuse its discretion because of the significant decline in the market during 2000 and 2002, and again in 2008, after determining that it is a high risk to invest, it is unrealistic to pay the amount of return/investment owed to the Trust on the 7.25% federal discount rate plus 5%.

- III. Appellee indicates that “the vice chancellor was correct in determining that the reasonable prudent investor standard did not permit Appellee to misappropriate funds from the MAH TRUST”. Appellant denies that the vice chancellor was correct because the Appellant, within his skill set, invested in the Trust within the requirements of the ordinary standard for a nonprofessional trustee.
- IV. Appellee indicates that “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”. Appellant denies that the vice chancellor correctly determined that attorney’s fees should not be paid by the trust because 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.
- V. Appellee indicates that “the vice chancellor properly permitted the use of the 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”. Appellant denies that the vice chancellor properly permitted the use of the trust principal to pay for ongoing healthcare and living expenses in light of the fact that Appellee did not raise

objection to the requested use of principal until after it had become a stipulation.

III. **STATEMENT OF FACTS**

Appellant adopts the Statement of Facts as more fully set forth in his *Opening Brief*, as well as the Appendix attached thereto.

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;¹
2. Whether the Lower Court improperly overruled the Appellant's objection to the interest rate used by the Receiver;²
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;³
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;⁴ and

¹ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

² See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

³ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

⁴ See generally Appellant's Brief dated April 23, 2018 at Appendix A101-A123.

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.⁵

⁵ *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**

Appellee argues that 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. Appellant disagrees.

(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. 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 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 Appellee offered no new arguments to contradict the Appellant's argument that the Appellant was not afforded a reasonable opportunity to present a rebuttal expert forensic accounting report. The Appellee stated in her Answering Brief at page 16, "Appellant conveniently neglects to reveal that he was provided with the Report in September 2017 and again in October 2017." Both of these statements are incorrect. The first time the Appellant was presented with a "draft" of the Report was in November 2017. The Appellee's own reference to an email included in the Appellee's Appendix at B217-B218 clearly shows that the email including the draft report was dated November 6, 2017 at 5:28 PM. This was the first time the Appellant was presented with any draft report.

It was specifically noted that this draft may be subject to change before filing. The Appellant simply was not in a position to engage a competing expert to review and assess the analysis provided by the interim receiver at that time.

As previously noted, the Appellant's wife passed away in early December 2017. The interim receiver's final report was not filed until January 2018. The

lower court then promptly adopted the interim receiver's filed report wholesale without affording the Appellant to provide a competing 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. Lastly, the Appellee offers no evidence that there would be any harm in allowing the lower court to review two expert reports so that it could make a fully informed and unbiased assessment of the accounting presented to it.

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

The Appellee argued that the Vice Chancellor did not abuse his discretion by applying the legal rate for interest which accurately reflects the return for a trust whose assets are predominantly comprised of securities. Appellant disagrees.

(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*.

(2)C. MERITS OF ARGUMENT

The Appellee and lower court completely glossed over the fundamental problem of fixing an arbitrary interest rate to the Trust over a 17-year period. Quite simply, the investments and the markets do not follow a steady year over year interest rate calculation. By setting the interest rate in the way the interim receiver did, and then compounding that rate year over year, it created an artificially high return on investment that could not possibly have been achieved. Thus, the Appellant is being asked to repay money that was not taken and did not exist. For example, one of the principal assets of the Trust was the condominium where the Appellee lived. By its nature the condominium could not and did not generate a ROI at 7.25%.

One other point is noteworthy here. The Appellant managed the assets of the MAH Trust for over 15 years without invading the principal. He was able to pay costs of the MAH Trust through the yields, dividends, and interest over the entire period. Cover & Rossiter has been managing the MAH Trust for less than two years and are now attempting to liquidate the assets of the Trust, including the sale of the condominium.

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

The Appellee next argues that the lower court properly overruled the Appellant’s objection to the interim receiver’s report. Appellant disagrees.

(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)).

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.

The Appellee once again ignores the import of the Appellant's argument that he has always treated his role as Trustee in a manner consistent with his understanding of his fiduciary duties to the Trust, and specifically with regard to his discretion to make financial decisions for the Trust. The fact that he misunderstood a critical portion of how the MAH Trust was to be funded should

not be transformed into a finding that he did anything “intentionally” wrong.

When the Appellant assumed his role as Trustee of the MAH Trust shortly after his father passed away, he had never managed a Trust and was learning how to manage the instrument over time. He relied on outside accountants and attorneys to assist him with the proper management of the Trust.

Throughout the lower court proceedings, the Appellant has been placed in an impossible Catch-22 scenario where he is held to the highest treatment as an expert in the management of the Trust assets when reviewing his fiduciary responsibilities, but at the same time, he apparently did not have the discretion to make independent judgments with respect to certain investments 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

The Appellee next argues that the lower court correctly determined that Appellant’s attorney’s fees should not be paid out of the trust. Appellant disagrees.

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

(4)C. MERITS OF ARGUMENT

The entire premise of the lower court's finding that Appellant's attorney's fees should not be paid out of the MAH Trust lies with a separate finding by the lower court that the Appellant acted in bad faith with respect to the management of the Trust. The bad faith finding that has been repeatedly quoted involved a separate hearing on the question of whether sufficient grounds existed to remove the Appellant as Trustee of the MAH Trust. Even at that hearing, the lower court noted that it did not believe the Appellant did anything intentionally wrong. He simply made a mistake in his interpretation of the instrument that the lower court attempted to fix.

Since the Appellant did not really want to serve as Trustee any longer, that bad faith finding was not challenged below. However, that finding has been invoked repeatedly to issue other harsh findings against the Appellant, including references in the Master's Final Report endorsing the interim receiver's report and refusing to allow the Appellant to provide an competing expert report.

Therefore, the Appellant'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

The Appellee lastly argues that the lower court permitted the use of trust principal to pay for ongoing healthcare and living expenses for the beneficiary.

(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. 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 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, this Court’s review is *de novo*.

(5)C. MERITS OF ARGUMENT

The Appellee simply mischaracterized the Appellant's final argument in his Opening Brief that the lower court should not have permitted MAH Trust funds to be paid to the beneficiary directly. The Appellant did not take issue with the use of Trust assets to provide for the health, maintenance and welfare of the beneficiary. Indeed, this is the primary purpose of the Trust. At all relevant times, the Appellant while he served as Trustee followed that directive and paid for the care and expenses of the beneficiary. It is simply incongruous that the interim receiver has the authority to liquidate Trust assets, invade the principal and hand it over to the beneficiary.

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