2025 Delaware Bankers Association Trust Conference:
Survive and Thrive with Trust Act 25

By: Jocelyn M. Borowsky, Esq. - Duane Morris LLP[1] – jmborowsky@duanemorris.com

Gregory J. Weinig, Esq. – Connolly Gallagher LLP – gweinig@connollygallagher.com

Statutes:

I. Trust Act 2025

A. 12 *Del. C.* § 3315 – Trustee's exercise of discretion

1. What is this statute? It's the statute governing Delaware's general standard of review regarding a fiduciary's discretion – in other words, to what extent and how is a court going to determine whether the fiduciary properly exercised its discretion?

- Subsection (a) of the statute explains that Delaware answers this question by following an older version of the Restatement of Trusts (Restatement (Second), section 187 – not Restatement (Third), sections 50 and 60).
- Subsection (b) heavily curtails the ability of a beneficiary of a discretionary trust (and anyone else) to compel a distribution.
- Subsection (c) is the recent codification (in Trust Act 2024) of rules regarding letters of wishes.

2. Why are changes needed and what changes are being made?

a) This statute already (in our view) provided that a beneficiary who has a discretionary interest in a trust doesn't have an inherent right to compel a distribution from a trust (particularly given recent amendments in Trust Act 2021). It already included language stating that a beneficiary who is eligible for distributions has a discretionary interest in the trust; that a discretionary interest is a "mere expectancy, not a property right"; that this was so even if the right to receive distributions is subject to an ascertainable standard; and that even seemingly mandatory language such as "shall" nonetheless creates a discretionary interest if such language is qualified by discretionary distribution language. Despite all of that, at least one commentator thought that section 3315 isn't as clear as language in section 3315's predecessor (former subsection (f) of section 3536), which stated "A discretionary interest is neither a property interest *nor an enforceable right* – it is a mere expectancy." Though we disagree, for the sake of clarity, we added the sentence "A beneficiary that has a discretionary interest in a trust shall not be deemed to have a right to compel a distribution from the trust."

[1] Jocelyn Borowsky would like to thank her summer associates who assisted with the preparation of some of these materials – Elizabeth Lieb, Brett Mastrangelo, and Kaelyn Shurtz.

b) We then also moved the sentence in subsection (b) that talks about not altering the standard of review under subsection (a) from the end of subsection (b) to right after the new subsection (b) language (to better show that those two sentences work in harmony with each other).

c) We didn't simply clone the previous "nor an enforceable right" language because we think that's an oversimplification of trust law. Put differently, even at the highest levels of fiduciary discretion, the fiduciary must be answerable to someone; otherwise, the arrangement can't validly be called a "trust."

B. 12 *Del. C.* § 3556 – Trust for other noncharitable purposes

1. What is a purpose trust? A purpose trust is a trust that serves a purpose, other than a charitable purpose. A common example is a "pet trust,"[2] but a purpose trust may be used for any declared purpose that is not impossible of attainment.

2. Why are changes needed?

a) First, prior to the amendment, the statute allowed enforcement of a purpose trust but did not have an office of "enforcer." Treating an enforcer as a position or office opens the door to other Trust Act provisions which support the administration of the trust and brings the statute into alignment with other similar state laws that expressly incorporate the position of "enforcer." An enforcer is presumed to act in a fiduciary capacity, but the trust agreement may provide otherwise. The trust agreement may authorize an enforcer or other person to enforce the terms of the purpose trust.

b) If the office is vacant or there is no office of enforcer, the statute authorizes a person that has an interest in the declared purpose of the trust other than a general public interest to petition the court for an order that appoints a person as enforcer. The amendment allows the trust agreement to eliminate this power.

c) Second, the amendment facilitates future amendment under modification statutes. The modification statutes, 12 *Del. C.* § 3338 and 12 *Del. C.* § 3342, require "interested parties" to consent to a trust modification or nonjudicial settlement. Where there are no identifiable beneficiaries of a purpose trust, this amendment authorizes the enforcer to act as an "interested person" in connection with any such amendment.

d) The statute does not define who is considered an "identifiable beneficiary" of a purpose trust, or when identifiable beneficiaries are

[2] 12 Del. C. § 3555 expressly covers pet trusts; Section 3556 may also be utilized for pet trusts.

lacking, but does provide that a person will not be deemed to be a beneficiary of a purpose trust "solely because the person received or receives disbursements from the trust in furtherance of the declared purpose of the trust."

3. What are the follow on amendments?

a) 12 *Del. C.* § 3301(d) – definition of fiduciary

(1) The definition of "fiduciary" was broadened to include an "enforcer" acting in a fiduciary capacity. The definition of "nonfiduciary" was similarly broadened to include an enforcer not acting in a fiduciary capacity.

b) 12 *Del. C.* § 3580 – trustee definition in Subchapter VII

(1) Subchapter VII deals with the liability of a trustee. Section 3580 defines the term "trustee" very broadly to include direction and consent advisers and designated representatives. This amendment further broadens the definition to include "enforcers."

c) 12 *Del. C.* § 3326 – resignation of officeholders was amended to include resignation of enforcers.

C. 12 *Del. C.* § 3326 - Resignation of Officeholders

1. What is this statute? This is simply the statute that had covered resignation of trustees but was recently expanded to cover resignation of other officeholders as well (whether fiduciaries or nonfiduciaries).

2. Why are changes needed and what changes are being made?

a) Adding the "enforcer" role to the definition of "officeholder" in 3326(a) (per the purpose trust amendments that JB just discussed).

b) Resolving what might otherwise seem to be a potential conflict between sections 3326 and 3327 (resignation and removal of officeholders, respectively – recall that the "officeholder" definition of 3326(a) carries over to section 3327 as well) versus section 3338 (nonjudicial settlement agreements). Accordingly, it is now clear that a nonjudicial settlement agreement under section 3338 is an accepted method to effectuate the resignation of an officeholder, so long as the governing instrument is silent concerning both resignation and appointment of trustees.

c) Accordingly, the "resignation hierarchy" for when and how an officeholder may resign is:

(1) If governing instrument expressly allows resignation, then per the instrument.

(2) If governing instrument neither expressly allows nor prohibits resignation, but does include a procedure for filling vacancies, then by giving 30 days written notice to the beneficiaries, those who appoint the successor officeholder, and any other officeholders.

(3) Even if the 2 previous methods are available, via a nonjudicial modification of the trust under 12 *Del. C.* § 3342.

(4) If none of the 3 previous methods are available, then via a nonjudicial settlement agreement under 12 *Del. C.* § 3338.

(5) Otherwise ("in all other cases") with the approval of the Court of Chancery.

d) Note that this statute is not dealing with modification or addition of a provision dealing with resignation in the trust's governing instrument. Such endeavors should continue to be dealt with via the usual trust modification methods – decanting, merger, nonjudicial modification of the trust under 12 *Del. C.* § 3342, nonjudicial settlement agreement under 12 *Del. C.* § 3338, etc.

D. 13 *Del. C.* § 1513 - Gifts Between Spouses

1. Definition of "marital property." Title 13, the Delaware Divorce and Annulment Act, was recently amended in the past few years to recognize that trust property is not marital property, but the past amendments did not clearly address the status of property transferred by one spouse to the other. This amendment provides that if one spouse transfers property as a gift to another spouse, outside of a trust, that property could be marital property. However, a gift from one spouse in trust for the other spouse results in the property not being marital property unless the trust agreement expressly so provides.

II. Uniform Parentage Act

A. Amendments in Title 12

1. What are the changes in Title 12 of the Delaware Code that relate to the Uniform Parentage Act? The Title 12 changes center on intestate succession.

Intestate succession occurs when a decedent dies without a valid will. By default law, property passes to the decedent's intestate heirs. Various statutes in Title 12 define "intestate heirs" and other terms. In turn, Section 101 relies on the intestate succession rules to define "child" and "parent."

2. Why are the changes needed? The changes to Title 12 were needed to modernize the intestate succession provisions by taking into account the prevalence of assisted reproductive technologies and children born into nontraditional families. The changes tie key definitions to the Uniform Parentage Act in Title 13 of the Delaware Code so that biologically related persons who are not family members do not accidentally inherit under the intestate succession statutes.

3. 12 *Del C.* § 301- Shares of after-born children.

a) Section 301 relates to the share of a deceased parent's estate a child would inherit if such child was born after the deceased parent made such parent's last will (an "after-born child") and the will fails to include the after-born child. Prior to amendment, an after-born child would inherit the same share as a child would be entitled to if the parent had died intestate. The amendment expands the reach of the provision to apply (1) in any case where the testator "becomes a parent," not just when a child is "born," and (2) in the case where such after-born child predeceases the parent, leaving surviving descendants. Such surviving descendants can take under the will to the same extent as they would be entitled to if the parent had died intestate.

4. 12 *Del. C.* § 503 – Share of heirs other than surviving spouse.

a) Section 503(a) provides for intestate succession for persons other than a spouse. It lists an order of priority, consisting of [i] the issue of a decedent (who dies intestate), [ii] if there is no surviving issue, the decedent's parents, [iii] if there is no surviving issue of the decedent and no surviving parent of the decedent, the issue of the decedent's parent, per stirpes, are the next takers. It is this last clause that was amended. Prior to the amendment, this clause referred to the decedent's "brothers and sisters" and their respective issue as the takers in default of surviving issue or parents of a decedent. The problem with referring to "brothers and sisters" is that this term is not defined anywhere in the Delaware Code. Therefore, in some cases, non-family members who are genetically related through artificial reproductive technology might inherit from an intestate decedent, even though they have not established a parent-child relationship with the decedent's parents. The amendment fixes this problem by using defined terms that tie to the Uniform Parentage Act in Title 13 of the Delaware Code. Under the Uniform Parentage Act, a donor of genetic material is not considered a parent. 13 *Del. C.* § 8-702.

b) Secondarily, the amendment to Section 503(c) provides other ordering rules where an individual is related to a decedent through more than one line of relationship, reflecting the complexity of modern family structures. In that event, the individual must choose one line of relationship, and will be deemed deceased with respect to the other line or lines of relationship to the decedent.

5. 12 *Del. C.* § 508 – Meaning of child and related terms for purposes of intestate succession.

a) The terms "child" and "parent" are defined in reference to Chapter 8 of Title 13, the Uniform Parentage Act. This change was added to reinforce the principal that any use of the terms "child" or "parent" require that a parent-child relationship be established under the rules that normally apply to the establishment of parentage.

6. 12 *Del. C.* § 3301 Definitions.

a) The definition of "issue" historically set forth the default rule that a decedent's issue, will inherit "per stirpes." This definition was expanded to include a cross reference to 12 *Del. C.* § 101 for the definition of child, parent, and issue.

B. Amendment to Title 13

1. 13 *Del. C.* §§ 1302, 1303, 1304 – statutes regarding inheritance with respect to an "illegitimate" person were repealed. Such statutes were superseded by intestate inheritance provisions in Title 12.

III. Transfers on Death Regarding Real Property

A. What is this act? It provides another way for people to transfer real property, outside of a will or trust. So it's much like a beneficiary designation or Transfer-on-Death or Payable-on-Death asset, except it's for real property. Apparently this was based on the Uniform Real Property Transfer on Death Act (promulgated by the Uniform Law Commission), but as Delaware usually seems to do, a number of Delaware-specific changes were made to it. A number of titles of the Delaware Code are affected -- not just Title 25 (Property), but also Titles 12 (Estates & Trusts), 18 (Insurance), and 30 (Taxes).

B. What does it do? It's a long act, but here are a few key provisions and results:

1. It's effective 90 days after enactment. It was signed by the Governor on Sept. 5, 2025, so it becomes effective Dec. 4, 2025 (section 203).

2. A TOD deed is revocable "no matter what" at any time during the owner's life (even if the TOD deed or some other instrument says otherwise (section 206).

3. A TOD deed is "nontestamentary" (section 207), but note:

a) It must be witnessed by 2 witnesses, one of whom can't be the beneficiary (section 209(2)).

b) The real property is still subject to creditor claims if the probate estate is insufficient, although there is an 8-month deadline from the decedent's death in order to enforce such liability (section 215).

c) There are Register of Wills-related procedures, such as:

(1) A beneficiary can file a certain form with the Register of Wills to make the transfer "of record" with that office, along with a death certificate (and thus can obtain a death certificate for that purpose) (section 218(a) through (c)).

(2) If a probate estate is opened, TOD property must be included on the Inventory (section 218(d)).

(3) The duly-appointed Personal Representative (one who was granted letters testamentary or letters of administration) has the right to access TOD property to safeguard personal property of the decedent (section 218(e)).

4. A TOD deed doesn't require notice/delivery/acceptance by the beneficiary during the owner's life, and also doesn't require consideration (section 210).

5. A TOD deed inherently has no title covenants or warranties no matter what the instrument might otherwise indicate (section 213(d)).

B. What should trust and estate professionals watch out for?

1. Although this Act may be said to promote estate planning flexibility and reduce estate planning costs, it seems to us that unless your firm or company have both real estate professionals and estate planning professionals who really know what they're doing, your firm/company should stay away from including these in the estate planning process.

2. Having to deal with them in the estate administration process, however, is probably inescapable. The existence of these devices in the future may mean that any firm or company involved in estate administration has yet another reason to require (as a routine part of the administration process) a title and lien search for the decedent and any real property the decedent owned at death.

Cases (October 2024-October 2025):

Highlighted cases:

1. *Matter of Helene Eicoff Barrington Living Tr. U/A/D June 29, 2015, as amended*, C.A. No. 2020-0782-PAF, 2024 WL 5103824 (Del. Ch. Dec. 13, 2024)
(https://courts.delaware.gov/Opinions/Download.aspx?id=372930)

Facts

This case concerns whether Leanne Eicoff forfeited her beneficial interest under the Barrington Trust by triggering its No-Contest Clause.

Helene Eicoff ("Decedent") established the Barrington Trust, which became irrevocable upon her death, naming an attorney and The Northern Trust Company of Delaware as co-trustees. The trust contains a strict no-contest clause providing that any beneficiary who challenges the trust (or related estate documents) forfeits both their own interest and the interests of such beneficiary's descendants.

On May 29, 2020, shortly after Helene's death, Leanne—one of the Decedent's granddaughters—filed multiple actions in Florida challenging the Will, the Irrevocable Trust, the Living Trust, and the Barrington Trust. She also interfered with the distribution of life insurance proceeds. In response, the Trustees—attorney Steven Felsenthal and The Northern Trust Company of Delaware—filed a Verified Petition in Delaware seeking a declaration that Leanne's conduct violated the No-Contest Clause and disqualified her as a beneficiary. Parallel proceedings followed in Florida and Delaware, and the Delaware actions were stayed in 2021.

In 2024, Leanne voluntarily dismissed the Florida Barrington Trust Action without prejudice. In response, the Trustees moved to lift the stay in the Delaware Barrington Trust Action and the Instruction Action. The Delaware court granted the motion, allowing the Trustees to proceed with a motion for summary judgment.

Issues

(1) Did Leanne Eicoff forfeit her interest as a beneficiary of the Barrington Trust by triggering the No-Contest Clause?

(2) Is summary judgment in favor of the Trustees proper?

Analysis

(1) Did Leanne Eicoff forfeit her interest as a beneficiary of the Barrington Trust by triggering the No-Contest Clause?

The court first determined that Leanne qualified as a beneficiary of the Barrington Trust. It then analyzed the plain language of the No-Contest Clause and found that "[t]he undisputed record establishes that Leanne's conduct falls within the scope of the No-Contest Clause."

Because Leanne contested the validity of the Will and the Living Trust on grounds of undue influence, her actions sought to "impair or invalidate" the provisions of those instruments and, by extension, the Barrington Trust. As a result, her actions triggered the express terms of the No-Contest Clause.

Leanne argued that this motion for summary judgment was premature on three grounds: (1) she had not yet filed a responsive pleading, (2) there were genuine issues of material fact regarding whether she had "prevailed substantially" in her challenge to the trust because she dismissed her claims in the Florida Barrington Trust Action without prejudice, and (3) she could still prevail substantially in the Delaware Trust Action.

First, the court rejected Leanne's responsive pleading argument, ruling that Rule 56 allows for summary judgment without any responsive pleading. Importantly, the court cites the fact that Leanne failed to file a Rule 56(e) affidavit or identify any actual disputed facts or valid defenses. This further supports the contention that no responsive pleading is required prior to summary judgment. Ultimately, the court does not find this argument persuasive.

Second, the court rejected Leanne's argument that there was a genuine issue of material fact regarding the enforceability of the No-Contest Clause because she could reassert her claims challenging the validity of the Barrington Trust in Florida, and therefore, could still substantially prevail on said claims, which would render the No-Contest Clause unenforceable. Reading the applicable law plainly, which "generally enforces no-contest clauses absent certain exceptions," the court found that "Leanne undisputably triggered the No-Contest Clause by challenging the validity of the Barrington Trust Agreement in the Florida Barrington Trust Action." Therefore, the clause would apply, absent an exception. The only exception at issue was 12 *Del. C.* § 3329(b)(2), which states that a no-contest clause is unenforceable when a "beneficiary is determined by the court to have prevailed substantially." However, Leanne could not have prevailed substantially because, at the time of the instant case, "Leanne obtained none of the relief she sought, and the Florida court made no findings regarding the validity of the Barrington Trust." Therefore, she voluntarily dismissed the Florida Barrington Trust Action without any relief or court findings—thus Leanne did not substantially prevail, and the exception could not apply—further supporting the court's finding that the No-Contest Clause was enforceable.

Third, the court rejected Leanne's argument that she could still substantially prevail in the Delaware Barrington Trust Action, thus triggering the safe harbor under Section 3329(b)(2). Leanne previously told the Delaware court she filed the Delaware Barrington Trust Action only as a placeholder out of an "abundance of caution" to preserve statutory rights under Section 3546, and that Florida was the "real battleground." The court relied on this representation in staying the Delaware cases. The court therefore estopped Leanne from arguing that the Delaware Barrington Trust Action was her vehicle to "substantially prevail" after dismissing her claims in the Florida Barrington Trust Action.

(2) Is summary judgment in favor of the Trustees proper?

Ultimately, the court held that summary judgment was proper for the Trustees because there was no genuine issue of material fact as to the No-Contest Clause, and the Trustees' petition for instruction could be decided as a matter of law. Further, Leanne dismissed her claims in the Florida Trust Action, in which she failed to substantially prevail. Finally, the court found the Section 3546 safe harbor to be inapplicable. Overall, the court held that the No-Contest Clause was enforceable, Leanne forfeited her interest in the Barrington Trust, and summary judgment for the Trustees was proper.

Conclusion

The court here held that Leanne undisputedly triggered the No-Contest Clause and had not substantially prevailed in any contesting action. Her procedural objections and statutory defenses failed under Delaware law. The Trustees were entitled to summary judgment as a matter of law. Leanne forfeited her beneficiary status under the Barrington Trust.

***2. In re Matter of the CES 2007 Trust*, C.A. No. 2023-0925-SEM, 2025 WL 1354268 (Del. Ch. May 2, 2025) (Magistrate's Opinion)**
(https://courts.delaware.gov/Opinions/Download.aspx?id=378960)
AND (Del. Ch. Oct. 1, 2025) (Opinion on Exceptions - Order Dismissing Case)
(link to 5-page order not available at this time on Delaware Courts website)

Facts

This case involves a creditor's petition to either invalidate a spendthrift provision in an asset protection trust or void the trust in its entirety to enforce a judgment against a debtor.

Can IV Packard Square, LLC (the "Petitioner") alleged the CES 2007 Trust was a "sham" established by Craig Schubiner (the "Respondent") to prevent him from paying a judgment to the Petitioner. In 2019, a Michigan state court entered a $14 million judgment against the Respondent, who was enjoined by the same court from transferring assets in an effort to avoid judgment satisfaction. Since the injunction, the Respondent has insisted he has no assets to satisfy the judgment, leading the Petitioner to pursue collection efforts in various jurisdictions, including Delaware.

The Respondent established the Trust in 2007, before the Petitioner's claims against him arose, for the benefit of himself and his family members. He named the U.S. Trust Company of Delaware as the initial trustee, with First State Trust Company later serving as the successor trustee. However, the Respondent retained the role of "Advisor" for himself and appointed his brother as the "initial Trust Protector." As Advisor of the Trust, the Respondent had the power to manage its assets.

The Trust's primary assets consisted of ninety-nine percent interests in three Delaware LLCs, each managed by the Respondent. The LLCs owned three properties central to the dispute.

In his position as Advisor, the Respondent transferred ownership of the three properties between himself and the LLCs on several different occasions. Based largely on this series of transfers, the Petitioner alleged the Respondent acted as *de facto* trustee because he retained control over all three properties owned by the LLCs.

Thus, the Petitioner argued the Trust could be voided altogether because it did not meet the statutory requirements for an asset protection trust, particularly the mandate of a qualified trustee. Alternatively, the Petitioner claimed the Trust's spendthrift provision should be invalidated, which would also result in the Trust being voided.

Issues in Magistrate's Opinion:

(1) Should the motion to dismiss the petition to invalidate the trust be granted?

(a) Does the trust qualify as an asset protection trust?

(b) Is the Trust's spendthrift provision valid?

Analysis in Magistrate's Opinion:

The Court of Chancery granted the Respondent's motion to dismiss the petition because the Trust qualified as an asset protection trust, a trust of which the settlor is a current permissible beneficiary that bars claims of the settlor's creditors after a period of time.

The court first analyzed whether the Trust met the requirements for an asset protection trust under the Qualified Dispositions in Trust Act and found that it did. For a trust to qualify, it must be irrevocable, governed by Delaware law, and contain a spendthrift provision. The trust must also receive "qualified dispositions" of property from a "qualified trustee." The court focused on this last requirement because the Petitioner alleged that neither the dispositions nor the trustees were qualified. The court found the LLC interests were qualified dispositions, commenting the real property owned by the LLCs should not be confused with the LLC interests themselves. The court also denied the series of real estate transactions between the Respondent and the LLCs were fraudulent, underscoring how the Trust "has no interest in the specific real estate" owned by the LLCs. The court likewise disagreed that the Respondent undermined the qualified trustee's authority by controlling the real property owned by the LLC as a "*de facto*" trustee.

The court evaluated the remaining three requirements for an asset protection trust, focusing on the validity of the Trust's spendthrift provision. The court considered whether either the doctrine of public policy or merger supported voiding the spendthrift Trust under common law. The court found both doctrines inapplicable because there was no evidence the trust was illusory; rather, the court found it was created for the interests of the beneficiaries (public policy), which were not closely enough aligned to those of the Respondent to render them identical (merger).

Conclusion in Magistrate's Opinion

The court granted the motion to dismiss, finding the CES 2007 Trust was a valid Delaware asset protection trust under the Qualified Dispositions in Trust Act. Therefore, the court shielded the Trust's assets from the Petitioner's collection efforts and declined to pierce the corporate veil of the companies or the Trust itself. As this decision was issued by a Magistrate, the Petitioner filed exceptions.

BUT …. Conclusion on Exceptions – Order Dismissing Case

The exceptions proceeding was assigned to Vice Chancellor Laster. Noting first that exceptions proceedings are reviewed *de novo* by the Chancellor or assigned Vice Chancellor, Vice Chancellor Laster held that the Petitioner was a "mere intermeddler" because the Petitioner lacked standing – "the Lender lacks any type of injury that could support standing. The Lender did not loan money to the Trust; the Lender loaned money to one of Schubiner's entities. The Lender complains that Schubiner and the Companies transferred properties back and forth, but that did not affect the Trust, and the Trust's assets did not change. There is no connection between the Trust and any injury that may have resulted from the transfers. Nor is there any connection between the Lender and any of the supposed problems with the Trust that the Lender identifies." So, although the Magistrate's "Report's analysis appears correct," the Report shouldn't have reached the merits of the case and instead the Petitioner's claims should have been dismissed for lack of standing. "The Report's conclusions are technically advisory opinions."

Thus – same result as before the Magistrate, but the opinion we thought we had on the merits of the QDITA is now viewed by one of the constitutional judges as "technically advisory opinions" that accordingly do not have any precedential value. It may be encouraging, though, that Vice Chancellor Laster stated that the "Report's analysis appears correct."

And Separately…*Can IV Packard Square LLC v. Harbor Real Estate Company LLC and Craig E. Schubiner*, 2025 WL 2696576 (D. Ct. Colorado Sept 22, 2025)

This case focuses on a transfer of real property from Schubiner to Harbor Real Estate Company LLC ("Harbor") in March 2020. The Colorado District Court granted summary judgment in favor of the creditor, Can IV Packard Square LLC (the "plaintiff") based on its claims under the Colorado Unform Fraudulent Transfer Act constructive fraud provision. The undisputed facts were:

- Plaintiff made a construction loan to a company controlled by Schubiner.
- Schubiner entered into a guaranty on behalf of the company that limited the plaintiff's ability to collect against Schubiner personally to specific circumstances.
- A Michigan court held that the circumstances under which the creditor could collect against Schubiner were satisfied and awarded a $14 million judgment in favor of plaintiff against Schubiner.
- In January 2020, the Michigan court further ordered that Schubiner was enjoined from transferring assets outside the normal course of business pending satisfaction of the

judgment against him by plaintiff. The order extended to any person having knowledge of the order.

- Following entry of the order, in March 2020, Schubiner transferred real property located in Colorado to Harbor, a limited liability company controlled by Schubiner.
- Harbor's operating agreement indicated that Schubiner had conveyed the same property to Harbor years earlier (1996).
- The record indicates that in the years after 1996, Schubiner personally borrowed funds secured by the property. For example, in 2013, the same property had been used by Schubiner to secure a personal loan to himself of $1,900,000.
- A resolution by Schubiner on behalf of Harbor issued a day prior to the 2020 transfer of the property to Harbor characterized the transaction as a refinancing of the property and "deeding" of the property to Harbor.

The plaintiff prevailed in its constructive fraud claim. The court found that the undisputed facts demonstrated that [i] the debtor (Schubiner) made a transfer of the property after the Michigan court entered the $14 million judgment against him, [ii] did not receive equivalent value in exchange, and [iii] was insolvent after the transfer. Schubiner's counterargument was that the property had really been transferred by him to Harbor in 1996. The Colorado court held that a transfer does not occur until the deed is recorded. Schubiner never recorded the deed when he purported to transfer the property to Harbor in 1996. As a result of the March 2020 transfer, Schubiner received much less in exchange for the property than the $950,000 market value, and was insolvent.

What will happen in the Delaware case as a result of the Colorado District Court decision? Probably nothing. The remedy for a fraudulent transfer is to void the transfer and return the property to the original owner (Schubiner). Plaintiff moved to "reverse-pierce" the corporate veil of Harbor to facilitate its collection against Schubiner. The court declined stating: "Ultimately, what the plaintiff seeks is to 'finally begin collecting on' the judgment it obtained against Schubiner in Michigan by one of these methods [citation omitted]. The remedy discussed above allows them to do that by avoiding the transfer of the Property; given that remedy, and given that Harbor's sole asset is the Property, deciding further whether a judgment is warranted against it under a reverse corporate veil piercing theory seems unnecessary." *Id*., 2025 WL 2696576 at *8.

(case summaries continue on next page)

3. *Rust v. Rust*, C.A. No. 2020-0762-BWD (Del. Ch. Mar. 10, 2025) (rearg. den., Del. Ch. May 6, 2025)
(note: two decisions on same date—memorandum opinion (2025 WL 752325)
(https://courts.delaware.gov/Opinions/Download.aspx?id=376560)
and letter opinion (2025 WL 747898)
(https://courts.delaware.gov/Opinions/Download.aspx?id=376570))

Facts

Settlor Philip Rust created a revocable trust in 1953 and amended its terms many times between then and 1994. He funded it with real estate interests. When he died in 2010, the trust was divided into three shares for the lifetime benefit of his three brothers, including his brother Richard Rust.

The corporate trustee of the trust for Richard's benefit (the trust at issue in the case) required that an LLC be formed to hold the trust's real property. An LLC was thus formed in 2011 (owned 100% by the trust) and the trust's real property was transferred to it. A new corporate trustee succeeded the old one in 2016.

Richard died in 2019. Because he did not exercise his power of appointment over the trust's assets, the trust instrument's default provisions came into effect, which required distribution of the trust's assets to Richard's then-living issue, per stirpes.

In 2019-2020, the trustee set about distributing the trust's assets to Richard's three daughters. The assets consisted of cash, marketable securities, and the LLC interests. One of the three daughters, Pimpaktra Rust ("Pim"), declined to sign the necessary release, purported to accept the "adviser" role under the trust, and purported to direct the trustee to dissolve the LLC and thus to distribute direct interests in the real property to the three daughters. In other words, Pim didn't want to own a minority interest in an LLC owning real property; she wanted to own a minority interest in the real property—presumably because being a minority owner in the LLC would give her less ability to influence ownership or sale decisions, whereas being a minority owner of real property might entitle her at least to a partition remedy.

In any event, because Pim declined to sign the release, the trustee sent Pim a 120-day letter under 12 *Del. C.* § 3585, notifying her that if she wished to contest any aspect of the trust's administration and the resulting distribution of the trust's assets "in kind, without liquidation or reorganization." Pim filed suit on the 119th day, requesting (among other things) that the LLC should be dissolved. The other two sisters held a meeting of the LLC's managers (which by then were all three sisters) and purported to approve the transfer of a one-third interest in the LLC to each sister. Shortly afterwards, the Court of Chancery held a status conference at which the Court instructed that the interests could be distributed, but that there would be a "cloud on that ownership interest" pending the action's resolution. The trustee sent assignment/assumption agreements to the sisters, which the other two sisters signed but which Pim did not. The trustee then distributed a one-third interest in the LLC to each of the other two sisters. After that occurred, the trust's only remaining asset was Pim's one-third interest in the LLC.

Meanwhile, procedurally, the trustee sought dismissal of the action in late 2021 because although it had been named as a defendant, no specific claims were directed against it. The parties then stipulated (and the Court approved) the trustee's dismissal "without prejudice," meaning that Pim could later file claims against the trustee. In late 2022, Pim filed a motion to allow her to file an amended complaint that would include claims against the trustee. In May 2023, the Court granted Pim's motion to file that amended complaint, but also held that the trustee could file a motion to dismiss that complaint (*Rust v. Rust*, 2023 WL 3476501 (Del. Ch. May 16, 2023 - https://courts.delaware.gov/Opinions/Download.aspx?id=347650).

Pim filed her amended complaint in August 2024, including counts against the trustee for aiding and abetting the alleged breaches of the LLC agreement by her two sisters, and for breach of its fiduciary duty as trustee of the trust. The trustee moved to dismiss these claims against it.

Meanwhile, after a January 2022 mediation regarding various other disputes between them concerning the trust and the administration and distribution of their father's estate, Pim and the other two sisters had entered into a "memorandum of settlement." In April 2023, the Court had granted the two sisters' motion to enforce that memorandum as a settlement agreement—an enforceable contract, in other words. In July 2024, the Court had issued supplemental rulings to interpret and address various non-material terms of that settlement agreement. But two final issues remained for a hearing in February 2025.

Issues

In the Memorandum Opinion: Should the claims against the trustee (for aiding and abetting the alleged breaches of the LLC agreement by the two sisters, and for breach of its fiduciary duty as trustee of the trust) be dismissed?

In the Letter Opinion:

(1) Was North Carolina real property known as "Grimshawes" subject to the settlement agreement?

(2) Did certain tangible items constitute "tangible personal property" under the settlement agreement?

Analysis

In the Memorandum Opinion:

Should the claims against the trustee (for aiding and abetting the alleged breaches of the LLC agreement by the two sisters, and for breach of its fiduciary duty as trustee of the trust) be dismissed?

The Court first addressed the breach of fiduciary duty claim. Pim's main argument about breach was her claim that the trustee breached its duties by failing to implement the intent of the settlor (her uncle Philip) because the trustee didn't distribute direct interests in real property to the sisters (instead asking them each to accept a one-third interest in the LLC). The Court held

that Pim had failed to cite any provisions of the governing instrument that the trustee had failed to follow, and therefore had failed to explain how the trustee hadn't acted carefully or loyally in carrying out its duties. Pim also alleged that the trustee: (1) shouldn't have recognized the sisters as co-managers of the LLC; (2) shouldn't have allowed them to violate the LLC agreement; (3) withheld information about why the LLC was formed; and (4) made no effort to dissolve the LLC. The Court similarly held these arguments to be conclusory or that Pim had failed to address them in her briefs. The Court therefore dismissed the breach of fiduciary duty claims.

The Court then addressed the "aiding and abetting" claim (that the trustee aided and abetted the sisters' alleged breaches of the LLC agreement). The Court related that an element of an aiding and abetting claim (as to an alleged breach of fiduciary duty) is that the aiding/abetting party must know that the breaching party's conduct was a breach of duty. But the Court held that Pim's amended complaint didn't include allegations from which the Court could reasonably find that the trustee knowingly participated in the supposed breaches. The alleged breaches were distributing the LLC interests to the other two sisters and recognizing them as co-managers, but the Court held that distributing the LLC interests was done just as the "plain language" of the trust instrument required and that Pim hadn't explained how recognizing her sisters as co-managers of the LLC helped them supposedly breach their fiduciary duties.

In the Letter Opinion:

(1) Was North Carolina real property known as "Grimshawes" subject to the settlement agreement?

The Court held that the settlement agreement spoke of resolving all disputes between the parties, and communications between the parties indicated that, although all interests in Grimshawes were not necessarily the subject of any claims filed in the lawsuit, it was clear there could be disputes about all interests in Grimshawes. The lawsuit involved the LLC (which owned 50% of Grimshawes), while Richard's estate owned the other 50%. So although the estate's half wasn't necessarily the subject of the lawsuit, the settlement communications made it clear the parties were discussing how it should be dealt with, and the settlement agreement said it would resolve "all issues" between the parties.

(2) Did certain tangible items constitute "tangible personal property" under the settlement agreement?

The Court held that the plain language of the settlement agreement indicated that the disputed items were tangible personal property for purposes of that agreement. The Court also held that Pim's assertions that certain items didn't constitute "tangible personal property" for purposes of the settlement agreement was based only on Richard's will and on the language governing a special trust that held certain assets—while ignoring a 2020 agreement among the trustees of Richard's revocable trust that was much more specific (and indicated clearly that the disputed items were tangible personal property under the settlement agreement). For both reasons, the Court held that the disputed tangible personal property items were indeed subject to the settlement agreement.

Conclusions

Memorandum Opinion:

1. It's a very low bar for claims to survive a motion to dismiss. Here, the Court found that Pim's claims against the trustee were too thin to clear that low bar. That's the good news.

2. Pim nonetheless held up distribution for quite some time (five and a half years passed between Richard's death and this decision). That's the bad news. But as we lawyers often tell people, "You can never prevent someone from filing a lawsuit; you can only do things to try to minimize the effects of a lawsuit or increase the odds that a lawsuit can be dismissed as early as possible."

3. For planners: forming closely-held entities for the trust to own "messy" assets (real property, tangible personal property, etc.) is of course a common practice (often being required by trustees, for understandable reasons). But planners may want to consider what to add to the trust instrument or the entity documents to deal with the sorts of issues and potential concerns of beneficiaries that arose in this case. For example, if there are three children, does the grantor/parent want them each to inherit a one-third interest in the entity or instead to inherit direct interests in the assets that the entity would otherwise own?

Letter Opinion:

A court will fill in gaps in barebones settlement agreements (which are often somewhat-hasty products of mediations) by using both the full record before it (all documents that might have a bearing, not just some of them) and plain old common sense.

4. *Burd v. Elliman*, C.A. No. 2023-1172-LM, 2025 WL 1591972 (Del. Ch. June 5, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=380670)

Facts

In 2001, Richard and Barbara Burd executed estate planning documents providing that, upon the death of the survivor of them, their estate would be divided 70% to their daughter Tracy and 15% each to Scott Burd and Melanie Burd, Richard's two children by a previous marriage. In 2016, they revised their documents (wills and a joint revocable trust instrument) to disinherit Scott and Melanie completely. In 2023 (by which time Melanie had died without children), Richard and Barbara reviewed their estate plan with the lawyer who had drafted their 2016 documents. Their lawyer now advised that it was now his firm's usual practice to recommend that in situations where heirs were (or might otherwise be considered to be) disinherited or treated differently from one another in an estate plan, the testators/grantors should consider

Delaware's pre-mortem validation procedures – in other words, a 120-day letter under 12 *Del. C.* §§ 1311 and/or 3546. Richard and Barbara decided to have such a letter sent to Scott. Scott filed suit.

Issues

(1) Should Scott's undue influence claim against Tracy be upheld?

(2) Should Scott's allegations of financial elder abuse against Tracy be upheld?

(3) Should attorneys' fees be shifted against Scott?

Analysis

(1) Should Scott's undue influence claim against Tracy be upheld?

The *Melson* test (711 A.2d 783 (Del. 1998)) for undue influence is well-known:

- A plaintiff claiming undue influence over testators/grantors by some other person must establish: (1) the testators/grantors are susceptible to undue influence; (2) the alleged wrongdoer had the opportunity to exert undue influence; (3) the wrongdoer had a disposition to exert the influence for an improper purpose; (4) the wrongdoer actually exerted undue influence; and (5) there must be a result demonstrating the effect of the undue influence.

- Additionally, three other factors could result in shifting the burden of proof from the plaintiff to the defendant: (1) if the testators/grantors were of weakened intellect; (2) the will was drafted by a person in a confidential relationship with the testators/grantors; and (3) the drafter received a substantial benefit under the will/trust instrument.

- If the plaintiff proves those three factors by clear and convincing evidence, then the burden of proof shifts to the defendant (the proponent of the challenged documents) that there was no undue influence and (by a preponderance of the evidence) that the testators/grantors had capacity.

- Lastly, if the testators/grantors have independent counsel, then *Melson*'s burden-shifting analysis is not implicated, and the plaintiff would have to prove the five overall factors without the aid of the burden-shift.

The Court, with the benefit of live testimony from Richard and Barbara (this is *pre-mortem validation*, after all), held that their mere age didn't show that they were susceptible to undue influence. Thus Scott failed to establish the first *Melson* factor. The Court also held that

because Tracy didn't even know about the 2016 disinheritance of Scott until 2023, she neither had opportunity to, nor did, exert undue influence. Thus Scott failed to establish the second and fourth *Melson* factors. Given that Tracy couldn't have exerted undue influence when the documents were signed in 2016, the 2016 documents could not be results demonstrating the effect of undue influence. Thus Scott failed to establish the fifth *Melson* factor. The Court also declined to burden-shift because Richard and Barbara had their own independent attorney for their 2016 estate planning, which negated Scott's attempts to put the burden on Tracy to show that there was not undue influence.

The Court then held that there was no confidential relationship (again, Richard and Barbara were fully competent and lived independently) and thus no fiduciary duties that Tracy could have that she could breach—she had not yet assumed fiduciary roles under her parents' estate planning documents because they were living and competent.

(2) Should Scott's allegations of financial elder abuse against Tracy be upheld?

The Court rejected Scott's allegations of financial elder abuse because Scott failed to show specific evidence or testimony at trial to this effect. The Court did not credit Scott's claims that certain allegations leveled by Scott in the past had any effect on Richard and Barbara's estate planning decisions; the couple had not interacted with Scott in years, and this general estrangement (plus Richard's previous financial support for Scott) more than explained their estate planning choices.

(3) Should attorneys' fees be shifted against Scott?

The Court declined to shift attorneys' fees against Scott, finding that the high burden to go against the traditional American rule was not satisfied here—among other reasons, because it was not *per se* unreasonable for Scott to file the suit once he received the 120-day letter.

Conclusion

This case is interesting because it's the first one known to your presenters where a pre-mortem validation matter went to trial—with live testimony from the supposedly incompetent or unduly influenced testators/grantors! Previous decisions that we're aware of (such as *Ravet*, the 2014 Court of Chancery decision that was the first one to deal with a pre-mortem trust validation claim by dismissing it as untimely, later affirmed without opinion by the Delaware Supreme Court) have, to our knowledge, dealt with such matters only before trial.

Also interesting is that the Court used the very origin of the case—the 120-day notice, and Scott's reaction to it—as a reason why Scott's litigation was not in bad faith, thereby declining to fee-shift. In other words, the Court found it significant that embarking on a 120-day letter procedure inherently involves the risk that the recipient will indeed file a lawsuit, militating against finding that the recipient would be acting in bad faith by filing that lawsuit. The Court even found specific evidence in the record that the family had known of the risk of lawsuit; there was testimony that the 120-day notice was sent to "keep Scott from going after Tracy" later on.

Other cases of interest:

1. *IMO Campo Irrevocable Trust*, C.A. No. 2023-1021-LM, 2024 WL 4601301 (Del. Ch. Oct. 29, 2024) (https://courts.delaware.gov/Opinions/Download.aspx?id=371370)

The decedent's revocable trust named her two children, or the survivor of them, as co-trustees. The trust was to be distributed to the decedent's children in stirpital shares. One of the children died shortly after the decedent, leaving the decedent's son and decedent's grandchild as beneficiaries. The son and grandchild were uncle/niece vis a vis each other. The uncle became the sole trustee, but he failed to distribute the trust property to the niece. The niece successfully petitioned the court to remove her uncle as trustee. Then the niece proceeded to administer the trust. Upon her conclusion of the period of administration, the niece sought court approval of the final accounting and an order to distribute the trust property. The proposed distribution would reduce the uncle's share of the trust fund to make up for the assets he failed to distribute to the niece when he was serving as trustee. The trust primarily consisted of 3 separate real properties located in Wildwood, Wilmington, and Williamstown. It seems that the crux of the problem was that the uncle was living at the Wilmington and Wildwood properties. This led to a dispute over whether the uncle ousted the niece from the Wilmington and Wildwood properties. An ouster occurs where one cotenant prevents the other from using the property. Merely having possession of the property is not an ouster. If an ouster is found then the person doing the ousting must pay rent to the other cotenant. Both parties complained that the other ousted them. The uncle claimed that the niece ousted him by changing the locks and selling the property once she became trustee. The court held that neither party proved ouster by the other party.

The court allowed attorneys' fees to be paid from the trust but did not permit fee shifting as between the parties.

2. *Pepper v. Dunton*, C.A. No. 2022-0639-LM, 2024 WL 4655622 (Del. Ch. Nov. 4, 2024) (https://courts.delaware.gov/Opinions/Download.aspx?id=371570)

The Court of Chancery held in this post-trial opinion that a Virginia property was properly part of a trust, but otherwise mainly denied the claims of the Plaintiff (a former trustee, but also a beneficiary) – finding no breaches by the Defendant, declining to remove Defendant as trustee, and declining to terminate the trust and distribute it to the Plaintiff and Defendant (the two beneficiaries), finding that the grantor seems to have intended to have funds available to the two beneficiaries for the duration of their lives. Defendant, however, was ordered to account for potential income that may have been due to Plaintiff.

3. *Matter of Est. of Kennedy*, New Castle Co. ROW Estate Folio No. 162046 DM-MLM, 2024 WL 5245655 (Del. Ch. Dec. 30, 2024)
(https://courts.delaware.gov/Opinions/Download.aspx?id=373500)

This estate's executrix was one of eight siblings inheriting from a parent. The executrix missed some deadlines in filing the inventory and accountings (including for the second and final accounting). Two of the siblings filed exceptions to her second and final accounting, alleging that the executrix shouldn't have taken a commission and/or allocated a higher share of the estate's assets to herself, and that certain attorneys' fees should have been allocated to the estate at large rather than against one of the two objecting siblings. The court essentially upheld the exceptions (finding that certain administrative expenses should have been couched as reimbursements to the executrix rather than increasing the inheritance of the executrix, and also finding that the attorneys' fees shouldn't have been assessed against just one sibling), but also agreed with the executrix that it was reasonable for her to take a $2,000 commission.

4. *Hall v. Mundy*, C.A. No. 2023-0253-BWD, 2025 WL 48157 (Del. Ch. Jan. 8, 2025) (rearg. den., Del. Ch., Mar. 11, 2025)
(https://courts.delaware.gov/Opinions/Download.aspx?id=373800)

This case involves an effort to prove paternity of a decedent, Joshua H. Walters, 40 years after he died. Plaintiffs are this man's children. Their action is to quiet title to real property. Joshua H. Walters predeceased his mother, Mariah Jane Walters. When Mariah died, real property that she owned passed by intestacy. A question involved how to prove a family relationship. An out of wedlock child can establish paternity of a late father by a "preponderance of the evidence" if the child was not legitimated, and the parents did not marry (those being two other ways to prove paternity). The plaintiffs provided documents and testimony to prove that Joshua H. Walters was their father. Such evidence included the testimony of the plaintiffs that they lived with their mother, but spent time at Mariah's house growing up and were treated by both Joshua and Mariah as Joshua's children. They testified that they spent time with Mariah's sister and the sister's children and grandchildren. They were introduced as cousins of the sister's grandchildren. Although most of the testimony was self-serving; apparently no one testified in opposition.

A second issue was whether the claims were time barred. Mariah died in 1975, and Mariah's only living child, Chester, Jr., continued to live at the property. The Sussex County recorder of deeds lists the property as belonging to Mariah's sister's heirs. The Magistrate held that laches did not bar the suit. Because Sussex County recorder of deeds listed the property as owned by heirs of their aunt Frances (and plaintiffs reasonably believed they were in that group), they were not on notice that they needed to assert their rights. The Court also found that Frances's heirs could not establish they had been prejudiced in any way, which is another element required to establish laches.

5. *Buck v. Estate of McCaffery*, C.A. No. 2021-0405-SEM, 2025 WL 354970 (Del. Ch. Jan. 31, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=374820)

This action centered around the administration of the estate of a decedent who was estranged from three of her four children when she died, such that her estate planning documents left all her assets to her son James, the child from whom she wasn't estranged. One of the other three children, John, brought claims against James for: (1) undue influence, (2) incapacity, (3) attempting to enforce an alleged contract to make a will, and (4) imposing a constructive trust. In 2022, the Court dismissed all but the contract claim, which was tried and then briefed in mid-2024.

The Court held that the John hadn't met his high burden (requiring clear and convincing evidence of partial performance of a services contract in reliance on an oral contract); he hadn't identified essential details (such as "who made an offer, for what, or when") and also found John's evidence to be inconsistent, vague, and uncorroborated. John's promissory estoppel and constructive trust claims also failed because his underlying claim failed. Though finding that the John's conduct did not rise to the level necessary to shift attorneys' fees against John, the Court did find that John had to pay the costs of James because James was the prevailing party.

6. *In re Estate of Solberg*, Sussex Co. ROW Estate Folio No. 26236-SEM, 2024 WL 5379574 (Del. Ch. Feb. 5, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=375050)

This case involves a dispute between the decedent's grandchildren versus their uncle in his capacity as administrator of the decedent's estate. The grandchildren filed eight exceptions to the final accounting, as well as a motion to compel. The standard of care of a personal representative of an estate is ordinary prudence. The personal representative must use good judgment in the administration of the estate; act in good faith and use ordinary care, skill, prudence and diligence, but is not an insurer of the assets. Exceptions to an accounting must relate to the financial administration of the estate, and will not be permitted to challenge the validity of the will or events that occurred prior to the decedent's death. The petitioners bear the burden of proof with respect to exceptions raised. Here, the court found that the grandchildren failed to meet their burden of proof regarding the financial administration of the estate. Once the uncle testified on his own behalf, the children had no countervailing evidence against him. They were also unrepresented. A notable passage involved the grandchildren's allegation that the administrator failed to list every item of tangible personal property on the accounting. The court disagreed, finding that it is not necessary to "list every scrap of garbage" on the inventory.

The administrator's commission of $8000 was found to be reasonable. The administrator testified that he had spent over 154 hours on the estate administration. He did not keep a log of his time. That was an estimate.

The only surviving claim concerned 3 checks written against the decedent's account prior to her death. Two were payable to the uncle in the total amount of $20,000. The third was payable to the uncle's son (cousin to the grandchildren). The uncle's two checks cleared the bank on the decedent's date of death but the third check did not clear before or on her date of

death. As such, the check was estate property. The court imposed a surcharge on the personal representative to recover the third check for the estate.

Under Delaware law a completed gift is made when there is intent to make a gift and delivery. When a check is issued, it is not delivered until it is cleared by the bank (i.e., the bank issues payment thereon). Otherwise, it is capable of being revoked.

7. *In the Matter of J.H.C., III*, C.M. #1514-K-SEM, 2025 WL 819864 (Del. Ch. Feb. 21, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=376890)

This case involves a guardianship. The Court of Chancery found at the hearing on the merits of this matter, that one co-guardian consented to her own removal, but the Court found that it would have removed her anyway "based on the years that have passed without any participation or connection" between that co-guardian and the person with a disability. The Court also found that the co-guardians had sold the 1/3 interest of the person with a disability in a certain parcel of real estate without Court authorization, and therefore voided the sale as to the 1/3 interest—"[b]ecause the Co-Guardians lacked the authority to sell J.H.C., III's interest in the Property without the statutorily required Court approval, *the act is void as a matter of law and cannot be rectified through the bona fide purchase doctrine*" (emphasis supplied). The Court also found the co-guardians liable for waste, and ordered that the equivalent of 1/3 of the proceeds they received for their own portions of the real estate should be added to the guardianship estate.

8. *In re the Matter of Estate of Kalisty*, C.A. No. 2021-0755-LWW, 2025 WL 974672 (Del. Ch. Mar. 27, 2025) ((https://courts.delaware.gov/Opinions/Download.aspx?id=377430)

The Court of Chancery denied a petition to admit to probate an unsigned draft of a joint will between a wife and husband, finding that the proponent (a family friend, named executor, who was not the heir) did not meet his burden of proof under well-settled Delaware precedent. In this case, the Court felt that there was evidence that the wife (the survivor of the two) may have intentionally destroyed the will (even if it had been signed) because she feared interference by her husband's children. The Court also found that the proponent had failed to meet the high burden required to prove an oral contract to make a will. Because the wife survived the husband, the proceeds from the sale of the marital home belonged to her intestate heirs. Although there may be other facts not disclosed in the record, it seems that the Court did not order an heir search for the wife, instead finding that the remaining proceeds of sale should escheat to the State of Delaware.

9. *Thompson v. Barrow*, C.A. No. 2023-0410-LM, 2025 WL 1277048 (Del. Ch. May 2, 2025) (Magistrate's Opinion) AND opinion on exceptions (Del. Ch. Sept. 26, 2025)
Magistrate's Opinion: (https://courts.delaware.gov/Opinions/Download.aspx?id=378910)
Opinion on Exceptions: (https://courts.delaware.gov/Opinions/Download.aspx?id=385150)

In this power of attorney dispute, the Court of Chancery (Magistrate in Chancery) found that Petitioner had not met her burden of proof as to her claim of breach of fiduciary duty regarding the Respondent's having designated himself as the primary beneficiary of an account of his father's (finding that Petitioner had failed to show that Respondent was not already the secondary beneficiary of that account when their mother—who had died before their father—was the primary beneficiary). But the Magistrate found the Petitioner had met her burden of proof regarding other breach claims, such as the transfer of a low digit license plate to himself and his personal use of his father's assets. The Magistrate also found that the power of attorney required periodic accountings but that the Respondent hadn't provided them. Thus, the Magistrate found in favor of Petitioner on her unjust enrichment claims and ordered Respondent to account, but declined to impose a constructive trust and also declined to fee-shift against the Respondent.

Both sides filed exceptions. Vice Chancellor Zurn was assigned to the exceptions proceeding. Vice Chancellor Zurn upheld the Magistrate's rulings in favor of the Respondent (regarding the beneficiary designation on the account) but reversed the Magistrate's rulings against the Respondent (in other words, found in favor of the Respondent regarding the accountings and the alleged personal use of the father's assets). The Vice Chancellor set one issue for remand, though – namely, whether the Petitioner already knew about and had acquiesced in the license plate transfer before raising the license plate claim for the first time at trial (such that the first time Respondent could respond about it was during the exceptions proceeding). "Acquiescence" is a specific recognized equitable defense in the Court of Chancery.

10. *IMO Last Will and Testament of Grooms*, C.A. No. 2022-0602-CDW, 2025 WL 1587960 (Del. Ch. June 5, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=380680)

A plaintiff who filed a will contest then died herself, and her estate was substituted and permitted to proceed in forma pauperis. The Court denied the (now-substituted) plaintiff's claims after trial. This opinion addressed the respondent's motion for attorneys' fees and costs. By court rule, costs are usually shifted against the losing party unless significant hardship would occur. Here, although the substituted plaintiff had proceeded in forma pauperis, the Court found it could deduct the costs from the inheritance that the deceased plaintiff's estate would be receiving from the estate at issue in the matter. But the Court declined to shift attorneys' fees, citing the "American rule" and the high burden to establish the "bad faith exception" to the American rule. The Court also discounted the argument that fees could be shifted because of the benefits provided by Respondent's defense – the Court noted that the Respondent, as the administrator, already had a duty to defend the will.

11. *Traitel v. The Northern Trust Company of Delaware*, C.A. No. 2025-0125-CDW (Del. Ch. July 3, 2025) (no decision issued)

In our 2022 presentation, we covered a case, *In re David & Joan Traitel Fam. Tr.*, C.A. No. 2021-0729-PWG, 2022 WL 2570793 (Del. Ch. July 8, 2022) in which the Magistrate in Chancery recommended that the Court of Chancery: (1) accept a petition to construe an ambiguous trust provision concerning an individual trustee's incompetency; (2) construe the trust under Delaware law even though it originated under California law; and (3) allow the corporate trustee's attorney's fees to be paid from the trust. A beneficiary of that trust apparently later sued the trustee, thereby commencing this separate action. The trustee invoked the trust's arbitration provision. For a time we thought we would see a decision about the enforceability of such a provision, but in July 2025, these parties stipulated to arbitrate the action and thus stayed the action in the Court of Chancery.

12. *Kelley v. Procino-Wells & Woodland, LLC*, C.A. No. 2021-0959-SEM, 2025 WL 2235805 (Del. Ch. Aug. 6, 2025) (https://courts.delaware.gov/Opinions/Download.aspx?id=383280)

Vice Chancellor Will of the Court of Chancery considered exceptions to Senior Magistrate Molina's decision after trial, which found that the Plaintiff had failed to meet his burden of challenging the will and had also failed to burden-shift under *Melson* because an attorney had represented the decedent and drafted the estate plan. The Vice Chancellor also upheld the Magistrate's ruling that the Plaintiff had not shown "exceptional circumstances" justifying an award of attorneys' fees from the estate in favor of an unsuccessful litigant. Will challenges, burden-shifting under *Melson*, and fee-shifting continue to be difficult propositions for a Plaintiff. Lastly, the Vice Chancellor upheld the Magistrate's ruling that the Plaintiff's claims had triggered the will's no-contest clause (noting as an aside that such clauses are generally enforceable in Delaware), such that Plaintiff forfeited his $10,000 bequest.