IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE ESTATE OF E. MURTON DUPONT CARPENTER, Petitioner, v. STEPHEN J. DINNEEN, MARY DONNA HUGHES, BRIAN GROSS AND LAURI GROSS, Respondents, STEPHEN J. DINNEEN and MARY DONNA HUGHES, Counterclaim Plaintiffs, v. ELEUTHERA CARPENTER FIECHTER, Individually, ESTATE OF E. MURTON DUPONT CARPENTER, and WILMINGTON TRUST COMPANY, as trustee of the Supplemental Trust Agreement of E. Murton DuPont Carpenter dated April 2, 2002, Counterclaim Defendants.	)	Civil Action No. 1804-VCP

MEMORANDUM OPINION

Submitted: November 9, 2007
Decided: March 26, 2008

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PARSONS, Vice Chancellor.

This is an action by the estate of E. Murton DuPont Carpenter (the "Estate") to recover $175,500 allegedly taken from an elderly and frail Mrs. Carpenter by two of her longtime financial advisors, Respondents Mary Donna Hughes and Stephen Dinneen, who each filed answers denying any liability. Aside from Dinneen and Hughes, the Estate also seeks to recover funds from Hughes' daughter, Lauri Gross, and her husband, Brian Gross. Hughes and Dinneen also asserted counterclaims against the Estate, Mrs. Carpenter's daughter, Eleuthera Carpenter Fiechter ("Mrs. Fiechter"), and Wilmington Trust Company ("WTC" or the "Bank") in its capacity as trustee of a testamentary trust created by Mrs. Carpenter in 2002. The counterclaims relate to Mrs. Carpenter's testamentary gifts to provide the equivalent of pension or retirement benefits for Hughes and Dinneen, and the Counterclaim Defendants' refusal to honor any such gift under the trust or otherwise, based on Hughes' and Dinneen's alleged misconduct.

For the reasons stated in this post-trial opinion, I hold that Dinneen and Hughes breached their fiduciary duties to Mrs. Carpenter and are therefore jointly and severally liable for the funds Hughes misappropriated from Mrs. Carpenter and for interest thereon at the legal rate until September 7, 2006, when Hughes made a payment to the Estate of $175,500. I also find the Grosses were unjustly enriched by their unwitting receipt from Hughes of $31,000 of misappropriated funds. To the extent Hughes' payment failed to cover the full interest and principal for which she and Dinneen are liable, the Grosses also are jointly and severally liable for that amount plus interest from September 7, 2006.

I further find Hughes' pre-litigation conduct so egregious and unusually deplorable that the Estate is entitled to recover its attorneys' fees and expenses in connection with its pre-suit investigation and the litigation of this action until Hughes repaid the $175,500. Dinneen's pre-litigation conduct does not justify an award of attorneys' fees against him. I also decline the Estate's request for attorneys' fees after Hughes' repayment because during that period the litigation focused on the parties' disagreements over the question of attorneys' fees, Respondents' counterclaims, and interest. Because the Estate did not show the arguments advanced by Hughes and Dinneen on these issues were frivolous or that they conducted the litigation in bad faith or vexatiously, I find no reason to deviate from the American Rule and assess attorneys' fees against them. Thus, Dinneen and the Grosses are not liable for the Estate's attorneys' fees.

Finally, because Dinneen and Hughes breached their fiduciary duties to Mrs. Carpenter, I deny their requested relief under their counterclaims. In particular, I conclude Hughes and Dinneen are not entitled to their testamentary gifts in the nature of a pension, because Mrs. Fiechter had good cause to fire them in October 2005. Thus, they failed to meet the condition precedent to the gifts provided for in Mrs. Carpenter's trust.

I. BACKGROUND

These are the facts as I find them after trial.

A. History

1. Mrs. Carpenter

Mrs. Carpenter was the third oldest daughter of Eugene and Catherine DuPont. Since the death of her husband in 1973, she had lived alone at Brookdale Farms, except for employees who lived at the farm and worked for her.[1] She had three children, Lea, Nanno (Ann), and Mrs. Fiechter.[2] Notable members of Mrs. Carpenter's personal staff were Anne Murray, a cook who lived in the house, and Joseph Flynn, her groom who she employed for more than fifty years.[3]

Mrs. Carpenter had a history of paying for all of her staff's medical expenses. She gave Flynn over $150,000 from 1987 to 2005[4] to pay for various things, such as, for example, his hearing aids.[5] Similarly, Mrs. Carpenter paid approximately $200,000 for post-retirement nursing care for another worker, Elmer Vought, until his passing.[6] She also paid for Murray's dental work. With respect to her family, Mrs. Carpenter gave annual gifts up to the annual gift tax exclusion to her children, grandchildren, and great

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1 Stip. ¶ 2. Citations in the form "Stip." refer to the parties' stipulated facts from the Pre-trial Order ("PTO") § II.

2 JX 56 at 4-5. Citations in the form "JX" refer to the parties' jointly numbered trial exhibits.

3 *See* Stip. ¶¶ 7-8.

4 Tr. at 978 (Hughes). Citations in this form ("Tr.") are to the transcript of the trial held from April 16-May 9, 2007, and indicate the page and, where it is not clear from the text, the witness testifying.

5 JX 48 at 113 (Murray Dep.).

6 *Id.* at 116; Tr. at 234-36 (Mr. Fiechter).

grandchildren, and their spouses.[7] On at least one occasion, she gave much larger gifts to her three daughters, including Mrs. Fiechter.[8]

By all accounts, Mrs. Carpenter was strong-willed and, for most of her life, a very active woman.[9] She kept horses on the farm where she lived, rode in fox hunts, was active in the Wilmington Garden Club, and for a time was the Master of the Vicmead Hunt Club Hunt.[10] Mrs. Carpenter was also a crossword puzzle enthusiast, having done them all her life.[11] She passed away on March 29, 2006 at 89 years of age.[12]

a. The Carpenter-Schutt office

Eugene DuPont established an office to handle his family's financial and tax affairs.[13] The family office would manage the financial affairs of each successive generation and the family's various trusts.[14] In February 1973 Dinneen, a CPA, was hired by C. Porter Schutt and Walter Samuel Carpenter to work in the family office.[15] It was known as the Carpenter Reynolds Schutt office until the mid-1980s, when it became

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7 *See* Tr. at 227 (Mr. Fiechter).

8 *See* Tr. at 424-25 (Mrs. Fiechter).

9 JX 49 at 9 (Flynn Dep.); Tr. at 963 (Hughes); JX 50 at 71 (Hayes Dep.).

10 JX 56 at 3.

11 Tr. at 265-66 (Mr. Fiechter).

12 Stip. ¶ 1.

13 *See* Tr. at 961 (Hughes); Tr. at 84 (Mr. Fiechter).

14 *See* Tr. at 766 (Yarnell).

15 Tr. at 467-68 (Dinneen).

the Carpenter-Schutt office ("the CS Office").[16] Hughes joined the CS Office in 1974.[17] Eventually, while employed there, Dinneen and Hughes began what became a twenty-year romantic relationship that continues to the present day.[18] Carolynn Yarnell also worked in the CS Office.[19]

Hughes and Dinneen "were responsible for protecting the funds of [Mrs. Carpenter]."[20] Dinneen was in charge of the CS Office.[21] He handled mainly the taxes for Mrs. Carpenter, and solved tax and any other financial problems for her. Hughes was the CS Office manager. She handled all of the medical benefits, paid bills, collected mail, made deposits, and generally kept the office running.[22] Yarnell's duties, which were primarily clerical, included collecting the mail, reviewing the brokerage

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16 *Id.* at 467-68; Tr. at 961 (Hughes).

17 Tr. at 469 (Dinneen).

18 Stip. ¶ 5. Hughes and Dinneen shared a beach house, titled to Dinneen, for which she contributed $150 a month to defray the monthly cable and electric expenses. *See* Tr. at 1012-13 (Hughes). She has made these payments for more than ten years. *Id.* at 1013.

19 Tr. at 765 (Yarnell).

20 Stip. ¶ 6.

21 Tr. at 605 (Dinneen); Tr. at 962 (Hughes).

22 *See* Tr. at 473-74 (Dinneen).

statements, and paying bills.[23] The Estate does not question the quality of the CS Office's work before 2005.[24]

b. Mrs. Carpenter's financial affairs

Mrs. Carpenter was a very private person and generally did not discuss her financial matters, even with those in her immediate family.[25] The only individual who Mrs. Carpenter dealt closely with in terms of finances was Dinneen. She made very clear to Dinneen that, "Everything was confidential. Nothing was to be discussed without her."[26]

Mrs. Carpenter had three bank accounts at WTC: the Special Account, the Household Account, and her Regular Account. The Special Account was the account into which her income was deposited,[27] from which the two other accounts were funded,[28] and from which taxes were paid.[29] Balances in the Special Account earned

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23 Tr. at 765 (Yarnell).

24 *See* Opening Post-Trial Br. of Pl. Estate (hereinafter "POB") at 7. Respondents' joint answering brief and the Estate's reply brief are referred to as "RAB" and "PRB," respectively.

25 *See* Tr. at 410 (Mrs. Fiechter); *see also* Tr. at 90 (Mr. Fiechter).

26 Tr. at 544 (Dinneen).

27 *Id.* at 476. The average balance in the account was approximately $50,000. *See* JX 14 (WTC Special Account statements).

28 Tr. at 487-88 (Dinneen).

29 JX 40 at 25 (Hughes Dep.).

interest at the rate of 0.2% per annum.[30] The CS Office used the Household Account to pay Mrs. Carpenter's household bills and employees, and kept the checkbook for that account.[31] Mrs. Carpenter herself managed the Regular Account. She held the checkbook and issued checks without prior notification to Dinneen. It was Dinneen's job to ensure the account had sufficient funds to cover the checks; to that end the Regular Account received a regular monthly deposit and occasional transfers from other accounts.[32] WTC had standing instructions to inform Dinneen if there was an overdraft in any of the accounts so that he could provide sufficient funds immediately.[33] Dinneen also utilized WTC's pay by phone system to transfer funds between Mrs. Carpenter's accounts.[34]

Payments from Mrs. Carpenter's accounts were recorded on a series of ledgers. Checks from the Regular Account generally were recorded on the Miscellaneous Ledger.[35] Aside from checks in the amount of $11,000 each to Respondents Lauri and Brian Gross, most of the payments on the Miscellaneous Ledger were for less than

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30 *See* Tr. at 281 (Mr. Fiechter); JX 14.

31 Tr. at 485 (Dinneen); JX 40 at 25 (Hughes Dep.).

32 Tr. at 478, 485-88 (Dinneen); Tr. at 964-65 (Hughes).

33 Tr. at 486 (Dinneen). There were times when checks written in the Regular Account had to be covered by the Special Account. Tr. at 263 (Mr. Fiechter). Mrs. Carpenter's checks written for the benefit of Flynn, for example, required transfers from the Special Account to the Regular Account. Tr. at 258-62 (Mr. Fiechter).

34 Tr. at 491 (Dinneen).

35 *Id.* at 486.

$2,000.[36] The CS Office also maintained a Cash Gift Ledger or List.[37] Not all gifts were recorded on the Cash Gift Ledger; its purpose "was to accumulate gifts for tax purposes. It did not list contributions."[38] Thus, Mrs. Carpenter's annual $1,000 donations to Flynn's Hockessin softball team were not recorded on the Cash Gift Ledger.[39] Aside from gifts to family members, which were listed only as "annual gift," most other entries on the Cash Gift Ledger disclosed to, or for, whom the gift was made.[40]

On a periodic (at least monthly) basis Dinneen would gather bills sent to the CS Office or to Mrs. Carpenter's home, have checks made out to pay them from the Household Account, deliver the bills and associated checks in person to Mrs. Carpenter for signature and approval, and have the checks sent to the appropriate creditors.[41]

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36 *See* JX 8 (Miscellaneous Ledger). Aside from the checks to the Grosses in 2005, most payments on the Miscellaneous Ledger that year were for less than $100, and none were greater than $2,000. *See id.*

37 *See* JX 7 (Cash Gift Ledger, showing gifts from Dec. 17, 1987 to Oct. 12, 2005).

38 Tr. at 257 (Mr. Fiechter). The Cash Gift Ledger recorded cash gifts for which a gift tax return would be needed. Tr. at 627 (Dinneen).

39 Tr. at 255-57 (Mr. Fiechter).

40 Tr. at 627-28 (Dinneen); *see also* JX 7. Mrs. Carpenter's annual Christmas gifts to her employees did not appear on the Cash Gift Ledger. *See* Tr. at 263 (Mr. Fiechter). Defendants did not present any evidence, however, suggesting the magnitudes or circumstances of those gifts were such that they should have been listed.

41 *See* Tr. at 479-80 (Dinneen); JX 40 at 30-31 (Hughes Dep.). On rare occasions, either Hughes or Yarnell would take the checks to Mrs. Carpenter. JX 40 at 30-31 (Hughes Dep.).

Mrs. Carpenter nearly always signed her own checks,[42] and would sign each of them, unless she had a question about a particular check warranting further investigation.[43] Additionally, Dinneen conducted annual reviews with Mrs. Carpenter of her taxes and disbursements.[44]

c. Mrs. Carpenter's health

The Estate has placed Mrs. Carpenter's health in issue and has demonstrated she had certain significant impairments in 2005. The Estate has not proven, however, that Mrs. Carpenter was physically or mentally incompetent before July 13, 2005, when Dr. Hayes formally certified that she could no longer handle her own personal affairs.

1. Mrs. Carpenter's eyesight

In January 2004, Mrs. Carpenter's eyesight was limited generally to counting fingers at six inches. In her right eye, the vision deteriorated from 20/150 in January to 20/400 by May 2004, staying at that level until at least September 2005.[45] In May 2004, Mrs. Carpenter had trouble recognizing people at the Wilmington Country Club whom she had known for years.[46]

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42 *See* Tr. at 965-66 (Hughes).

43 *See* Tr. at 480-81 (Dinneen).

44 *See id.* at 537-39.

45 JX 47 at 6-7, 11 (Franklin Dep.). Dr. Stephen H. Franklin is certified by the American Board of Ophthalmology, an Assistant Professor of Ophthalmology at Jefferson Medical College, and Senior Attending Ophthalmologist at Wilmington Medical Center. JX 47 Ex. 1 (Franklin C.V.). Dr. Franklin was Mrs. Carpenter's treating ophthalmologist since 1975. *See* JX 47 at 3-4 (Franklin Dep.).

46 Tr. at 76-77 (Mr. Fiechter).

As of March 11, 2005, Mrs. Carpenter would not have been able to read checks presented to her without the benefit of visual aids of "immense magnification and lighting," "with or without the glasses."[47] Mrs. Carpenter's refusal to admit her vision problems to others, however, would have made it difficult for lay persons to know of her failing eyesight.[48] Neither of the Fiechters ever told Dinneen of Mrs. Carpenter's declining vision, and Mrs. Fiechter never expressed any concern about Mrs. Carpenter's ability to read and sign checks.[49] Yarnell credibly testified, however, that sometime in 2004, she, Dinneen, and Hughes had discussed Mrs. Carpenter's failing eyesight.[50]

2. Mrs. Carpenter's cognitive ability

As early as October 2002, Dr. Hayes, who had been Mrs. Carpenter's primary care physician for ten years, began to have "some questions about her ability to manage things."[51] Dr. Hayes never diagnosed Mrs. Carpenter for dementia,[52] and testified that he generally would have made a notation in his notes of any significant problems.[53] The

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47 JX47 at 13-16, 46 (Franklin Dep.).

48 Mrs. Carpenter would respond, "fine," to questions about her eyesight. *See* Tr. at 265 (Mr. Fiechter); Tr. at 412 (Mrs. Fiechter) (further stating, "you'd ask her, did she see something and could she see something and she'd say, of course I can. I don't wear glasses, and you do, [Mrs. Fiechter]. I had no way of knowing.").

49 *See* Tr. at 274 (Mr. Fiechter); Tr. at 414 (Mrs. Fiechter).

50 *See* Tr. at 843-44 (Yarnell).

51 JX 50 at 8, 66 (Hayes Dep.). Dr. Hayes, a physician, is board certified in internal medicine. *Id.* at 4. The bulk of his practice is with geriatric patients. *Id.* at 98.

52 *Id.* at 18.

53 *Id.* at 38.

earliest report describing a problem with Mrs. Carpenter's mental capacity was one written by Dr. Coniglio, filling in for Dr. Hayes, who noted that during a medical examination on June 25, 2005, Mrs. Carpenter was confused and contradicted herself.[54] Dr. Hayes never conducted a mental status exam because he had no "specific reason to do it."[55] The forms he used to record and evaluate Mrs. Carpenter's neurological status had a section entitled, "neuro," but Dr. Hayes never made a notation of any cognitive decline in his records.[56]

By the fall of 2004, Mrs. Carpenter's memory began to falter noticeably -- she had trouble remembering flowers' names and once was confused by what "pizza" meant.[57] Flynn related that in or about 2004 she became confused getting into an elevator, and did not realize she had to step all the way in. At the hairdresser where he took her, she tried to sit in a pail of water or garbage pail rather than a seat. When he took her to an eye doctor appointment, she was unable to fill out the paperwork and forgot her birth date. At another doctor's appointment, she could not recall her medical history.[58]

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54 *Id.* at 20-21.

55 *Id.* at 62.

56 *Id.* at 81. Dr. Hayes further testified he has used those boxes only occasionally, perhaps once or twice over the preceding five years. *Id.*

57 JX 48 at 17 (Murray Dep.); *see also* Tr. at 307-08 (Mrs. Fiechter).

58 JX 49 at 16-21 (Flynn Dep.).

Dr. Hayes saw Mrs. Carpenter on March 11, 2005 and noted she was "oriented times three."[59] Dr. Hayes' finding means Mrs. Carpenter had the "capacity to know her name, date, person; that her affect was appropriate, suggesting that there was nothing unusual about her behavior, and the ability to behave appropriately is a sign of intact cognitive functions . . . ."[60] As to whether Mrs. Carpenter was capable of making gifts, Dr. Mechanick found no "obvious evidence that she was quite impaired on that date and would have lacked that capacity."[61] Furthermore, Dr. Mechanick, after reviewing Dr. Hayes' medical records and Hughes' description of her interactions with Mrs. Carpenter concluded, "Miss Hughes would not have had evidence that Mrs. Carpenter had a serious or significant problem with her cognitive functioning or that she had dementia."[62]

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59 *See* JX 18 (Hayes Med. R.). This is the date on which Mrs. Carpenter signed two checks for the benefit of Lauri and Brian Gross, at Hughes' request.

60 Tr. at 749 (Mechanick). Respondents' medical expert, Dr. Stephen M. Mechanick, received his undergraduate and medical degrees from the University of Pennsylvania and is Chairman of the Department of Psychiatry at the Main Line Health System. *See* JX 52 at 1-2 (Mechanick C.V.).

61 Tr. at 749 (Mechanick). Dr. Mechanick acknowledged it is possible to be "oriented times three" but still lack the capacity to make such a gift. *Id.* at 749-50.

62 *Id.* at 754. Regarding a layperson's ability to recognize impaired cognitive function, Dr. Mechanick stated:

> Many people with dementia . . . can appear quite normal to the lay person, and there are many people out there who are functioning, who continue to work or manage homes or do other tasks, drive, who have more mild degrees of dementia. So with severe dementia, they lose pretty much all of those abilities, but in the more mild range, there are many people out in the community who have that.

Mrs. Carpenter visited Dr. Hayes again on June 10, 2005. While his report notes her diminished physical condition (shortness of breath, need to be oxygenated) and the ordering of routine laboratory work, there was no mention of issues relating to her competency, dementia, alertness, or orientation.[63] Dr. Hayes testified that, "[i]f there was something striking or something that required action, I would have probably noted it. If there was a gradual decline over time in her mental status, I wouldn't note that."[64] Mrs. Carpenter was hospitalized from June 25-27, 2005 for acute lower back pain.[65]

> . . .
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> [T]here were a couple of things that would have made it difficult to assess whether [Mrs. Carpenter] had dementia. One was that she was a proud woman and that she was not somebody who was going to acknowledge her deficits, and actually a lot of people who have any degree of cognitive impairment don't. . . . The other is her vision, so if she was having difficulty with a task, it wasn't always clear what the reason was for that. I think like a lot of people, a lot of our daily behaviors are what we call over-learned. We do them again and again and again, so they're kind of ingrained and built in. So if she was able to go about her daily activities, to sit at the desk to appear to be reading things, or doing crossword puzzles, to the casual observer, there might not be any evidence that there was anything wrong.

Id. at 702-03.

63 JX 50 at 43-45 (Hayes Dep.).

64 *Id.* at 45.

65 *Id.* at 15-16.

By July 2005, Mrs. Carpenter would interject nursery rhymes in the middle of a conversation, and had difficulty remembering her great-grandchildren's names.[66] Yet, Mrs. Carpenter worked on crossword puzzles with the aid of a magnifying glass every day up until she went to the hospital in June 2005.[67] Even after her hospitalization, she continued to do crossword puzzles with the help of the Fiechters' son, Sam. Sam would read her the clue, she would provide the answer, and he would enter it into the puzzle.[68]

In late June to early July 2005, the Fiechters took a trip out of the country. They made no contingency plans for the possibility that Mrs. Carpenter might be unable to sign checks while they were away. In fact, they never even discussed a contingency plan with Dinneen before they left.[69]

Mrs. Carpenter continued to sign checks up until her hospitalization in late June 2005.[70] From that time on, however, she refused to sign checks. After asking for, and obtaining, Mrs. Carpenter's permission to take over as power of attorney, Mrs. Fiechter approached Mrs. Carpenter's attorney, Thomas P. Sweeney.[71] Sweeney spoke to

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66 Tr. at 307 (Mrs. Fiechter).

67 JX 48 at 17-18 (Murray Dep.); JX 49 at 21 (Flynn Dep.). Upon returning from the hospital, she no longer wrote down the answers in the crossword puzzles. JX 48 at 18 (Murray Dep.).

68 Tr. at 265-66 (Mr. Fiechter).

69 *Id.* at 273.

70 *See* JX 48 at 23 (Murray Dep.).

71 Tr. at 306-07 (Mrs. Fiechter). Sweeney was Mrs. Carpenter's attorney from 1967 until her death. JX 46 at 3 (Sweeney Dep.).

Dr. Hayes who, consistent with Mrs. Carpenter's April 2002 directive, was to decide about her competence to continue handling her affairs.[72]

Dr. Hayes, after examining Mrs. Carpenter on July 9, made the formal determination that as of July 13, 2005, Mrs. Carpenter no longer could manage her personal affairs.[73] He then signed an affidavit, which stated in pertinent part, "[Dr. Hayes] believes that [Mrs. Carpenter] is disabled or incapacitated to such an extent that (i) it is in her best interest that she not participate in any business or financial matters, (ii) she is unable to manage financial affairs, and (iii) that she lacks the capacity to manage property . . . ."[74] Mrs. Fiechter then assumed responsibility for her mother's affairs pursuant to a springing power of attorney.[75]

After July 13, 2005, Mrs. Carpenter's financial affairs were handled by the CS Office in much the same way as before except that Mrs. Fiechter, rather than her mother, signed the checks. Before July 2005, Mrs. Fiechter had no involvement in Mrs. Carpenter's affairs.[76]

The Estate, citing Dr. Hayes' testimony, and that of its other medical expert, Dr. Carol A. Tavani, contends that it has met its "burden of showing that Mrs. Carpenter

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72 *See* JX 46 at 11-12 (Sweeney Dep.); JX 50 at 25-29 (Hayes Dep.).

73 JX 50 at 27-30 (Hayes Dep.).

74 JX 50 at P-106 (Hayes Aff., July 13, 2005).

75 Mrs. Fiechter's springing power of attorney is discussed *infra* in Part I.A.3.

76 Tr. at 407 (Mrs. Fiechter).

was cognitively incapacitated from at least March 5, 2005, if not longer."[77] As previously discussed, I find Dr. Hayes' testimony regarding Mrs. Carpenter's cognitive ability before his formal declaration of her incapacity inconclusive.

The Estate's medical expert, Dr. Tavani, examined Mrs. Carpenter on January 23, 2006.[78] Dr. Tavani found, "[a]t the time of the March 2005 events, there is ample evidence in the records and according to those who know her well to indicate a significant cognitive impairment, dating back at least two years . . . ."[79] I find Dr. Tavani's examination of Mrs. Carpenter, and the anecdotal evidence underlying her report, indicative of Mrs. Carpenter's frailty and diminished capacity, but not sufficient to meet the Estate's burden of demonstrating Mrs. Carpenter was incapacitated prior to Dr. Hayes' formal certification to that effect. Although it is true "[t]he degree of dementia that [Dr. Tavani] observed in January 2006 did not happen overnight," Dr. Tavani's examination of Mrs. Carpenter more than six months after she already had been found to be incompetent is too late to be of much probative value as to her condition

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77 POB at 27.

78 Dr. Tavani is medically licensed to practice in Delaware, is a Distinguished Fellow of the American Psychiatric Association, and is a Diplomate of the American College of Forensic Examiners and American Board of Psychiatry & Neurology. *See* JX 55 at 2 (Tavani C.V.).

79 JX 56 at 9 (Tavani's Psychiatric Evaluation of Mrs. Carpenter). Dr. Tavani relied upon her examination of Mrs. Carpenter, a review of Dr. Hayes' medical records, and discussions with Flynn, Murray, and Mrs. Fiechter. *See id.* at 1; Tr. at 862-63 (Tavani).

on or before March 5, 2005.[80] The only other pieces of evidence available to Dr. Tavani, Dr. Hayes' medical records and anecdotal evidence provided by Mrs. Carpenter's family and staff, cut both ways and do not meet the Estate's burden of proof.[81]

2. Mrs. Carpenter's initial payments for the benefit of Hughes and the Grosses

Since 2004, Hughes' daughter, Lauri Gross, and her husband, Brian, were experiencing financial difficulties, at least partially as a result of Lauri's medical problems.[82] Before Hughes' conversation with Mrs. Carpenter in early March 2005, the Grosses were unaware Hughes was going to ask Mrs. Carpenter to help them. The Grosses also were unaware of Hughes' broader financial difficulties until this action was brought and their bank accounts were frozen.[83] Nothing in the record indicates the Grosses were otherwise actively involved in the transfers of funds Hughes arranged.

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80 JX 57 at 5 (Letter from Dr. Tavani to the Estate's Counsel, Oct. 8, 2006). Dr. Tavani's reliance on her January 2006 examination is evident in her response to Dr. Mechanick's finding that the record is inconclusive as to Mrs. Carpenter's incompetence. *See* Tr. at 897-98 (Tavani) ("[I]f Dr. Mechanick had had the opportunity to have a look at Mrs. Carpenter, and he had seen the severity of her dementia, I think his opinion . . . might have been different.").

81 *See also* JX 54 at 4 (Letter from Dr. Mechanick to counsel for Dinneen, Oct. 11, 2006) ("Having reviewed Dr. Tavani's supplemental report, it remains my opinion that there is insufficient information to determine whether or not Mrs. Carpenter had the capacity to make a gift during the spring and summer of 2005.").

82 *See* Tr. at 531-32 (Lauri Gross).

83 *See id.* at 533-34.

On March 11, 2005, Hughes visited Mrs. Carpenter with several checks already made out to the Grosses and Hughes' credit card banks.[84] Mrs. Carpenter was sitting at her desk, doing crossword puzzles, having a glass of wine, and eating goldfish crackers.[85] At Hughes' request, Mrs. Carpenter signed checks for $11,000 each to Lauri and Brian Gross from her Regular Account, and five checks totaling $33,000 to five separate credit card companies for Hughes from the Household Account.[86] Hughes did nothing to make sure Mrs. Carpenter actually could read the checks.[87]

Mrs. Carpenter kept control of the Regular Account and recorded the checks to the Grosses in the check register for it. She wrote the same set of numbers for each of the two checks to the Grosses, but the entries are difficult to read. They say "11,00,00" or "11,00.00."[88] Either way, her intent is indecipherable. She may have understood she was giving the Grosses $11,000.00 each (*i.e.*, she forgot to add a zero), or alternatively, she may have thought she was giving them only $1,100.00 each (*i.e.*, she placed the comma incorrectly).[89]

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84 *See* Tr. at 1041 (Hughes).

85 *See id.* at 979-80.

86 Stip. ¶¶ 21-22.

87 JX 40 at 153 (Hughes Dep.).

88 *See* JX 6 (Regular Account check register).

89 In that regard, Mrs. Carpenter later told Mrs. Fiechter that she had given around $1,000 to the Grosses, and told Dr. Tavani that she could not remember how much she had given, but that it was "not a lot" of money. *See* Tr. at 350 (Mrs. Fiechter); Tr. at 817-19 (Tavani).

With respect to the checks to Hughes' credit card companies, Hughes never told Mrs. Carpenter how much each check was for; instead, she told her to which bank each check was written and testified Mrs. Carpenter could read the amount herself.[90] As to the amount, Hughes merely told Mrs. Carpenter, "it was a lot of money."[91] Mrs. Carpenter never asked how much money Hughes was requesting and Hughes never told her.[92]

On the way out after visiting Mrs. Carpenter, Hughes told Murray, "[p]lease don't tell anyone I was here."[93] Dinneen did not know about Hughes' request for financial assistance on March 11 until after Mrs. Carpenter signed the checks and Hughes told him.[94] On that same day, Mrs. Carpenter signed two checks to the Division of Revenue

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90 Tr. at 1042 (Hughes). *But see* JX 40 at 153 (Hughes Dep.) (Hughes stated she told Mrs. Carpenter how much each check was for). Having observed Hughes on the witness stand at trial and considering her testimony in the context of the other evidence presented, I accept Hughes' trial testimony that she did not tell Mrs. Carpenter the amount of each check.

91 JX 40 at 152 (Hughes Dep.).

92 *See id.*; Tr. at 1043 (Hughes).

93 *See* JX 40 at 147 (Hughes Dep.); JX 48 at 38 (Murray Dep.); Tr. at 1028, 1030 (Hughes). Hughes testified that, while she did not make it clear to Murray, the purpose of her statement was to keep Hughes' financial situation private and not share it with the other members of Mrs. Carpenter's staff. *See* JX 40 at 147 (Hughes Dep.); Tr. at 1028, 1030.

94 *See* Tr. at 569 (Dinneen). The Estate implies Dinneen knew about Hughes' request before she met with Mrs. Carpenter. *See* POB at 12 (citing JX 40 at 33, 37 (Hughes Dep.)). The evidence cited by the Estate, however, only shows Hughes discussed these gifts with Dinneen *afterward*.

Upon learning of the checks, Dinneen merely asked Yarnell to inform him of any canceled checks made for Hughes' benefit. *See* Tr. at 570 (Dinneen).

of the State of Delaware and another one to Murray.[95] The CS Office recorded the checks written to Lauri and Brian Gross, $11,000 each, on the Miscellaneous, not the Cash Gift, Ledger.[96] The payments to Hughes' credit cards, on the other hand, were listed on the Cash Gift Ledger. Those entries, however, do not identify the checks as payments made on Hughes' behalf, but rather simply list them by the sixteen digit credit card account number to which each check was written.[97] The presentation of the two Gross checks from the Regular Account caused an overdraft of approximately $20,000. Dinneen received notice of that overdraft on March 11, 2005 and authorized a transfer of funds from Mrs. Carpenter's Special Account to her Regular Account to cure the overdraft.[98]

Hughes prepared nine other checks for Mrs. Carpenter's signature. Mrs. Carpenter signed five checks dated April 29, 2005 from the Household Account totaling $45,000 and made payable to five credit card companies for accounts of Hughes.[99] Mrs. Carpenter signed an additional check dated May 30 for $9,000 and three checks dated May 31, 2005, totaling $23,500 from the Household Account made payable to four

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95 *See* Tr. at 664-65 (Dinneen).

96 *See* JX 8 (Miscellaneous Ledger).

97 *See* JX 7 (Cash Gift Ledger). Other gifts to CS Office employees made in August 1993, for example, indicated the recipient's name. *See id.*

98 *See* Stip. ¶¶ 29-30.

99 Stip. ¶ 23.

credit card companies for accounts of Hughes.[100] The total amount paid from Mrs. Carpenter's Household Account to Hughes' credit card accounts was $110,500.[101]

Respondents deny that Dinneen received any money from Mrs. Carpenter's transfers to Hughes.[102] In April or May, after some of the checks had cleared, Dinneen took the canceled checks for Mrs. Carpenter to examine. Dinneen asked her if she wanted to assist Hughes, and she said "yes." Dinneen did not, however, verify the amount or degree to which Mrs. Carpenter wanted to assist Hughes; nor is there any evidence Mrs. Carpenter asked for such verification. Dinneen did not review the checks individually with Mrs. Carpenter, and only placed them in front of her for a few seconds. Despite there having been several rounds of checks, Dinneen asked Mrs. Carpenter only once during the relevant time period whether she assented to provide such assistance, explaining that Mrs. Carpenter only liked to be asked once about matters.[103] Dinneen simply "assumed the assistance was going to go forward."[104]

As late as January 23, 2006, Mrs. Carpenter demonstrated some awareness of her gift to Hughes in her conversation with the Estate's expert, Dr. Tavani. In response to a

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100 *See* Stip. ¶ 24; JX 10 (Household Account Ledger).

101 Putting those transactions in some context, between January 1, 2005 and June 30, 2005, Mrs. Carpenter signed thirty checks from her Regular Account and more than 200 checks from her Household Account. *See* JX 8 (Miscellaneous Ledger)**;** JX 9 (Household Account Ledger).

102 *See* Tr. at 1052 (Hughes).

103 *See* Tr. at 570-73, 652-53 (Dinneen).

104 *Id.* at 571.

question about the nature of this lawsuit, Mrs. Carpenter said, "I gave somebody's daughter some money once, and the family is all upset."[105] Mrs. Carpenter could not remember whom she gave the money to, or the exact amount of money given, but did recall the money was used for medical bills, was only given once, and in any case was not for a substantial amount.[106]

3. Springing Power of Attorney

In 2002, Mrs. Carpenter executed a Durable Power of Attorney (the "POA"), naming Mrs. Fiechter as her attorney-in-fact such that, if a condition or disability rendered Mrs. Carpenter incapable of managing her financial affairs, Mrs. Fiechter would then have springing authority to act on her behalf. The POA states in pertinent part:

> This power of attorney and the powers hereinbefore conferred upon my said attorney [Mrs. Fiechter] shall become effective only if and at the time I incur any condition or disability or incapacity that renders me unable properly to manage my own financial affairs. Any person to whom this power of attorney is presented may conclusively rely upon a certificate executed by a duly licensed physician attesting that I am disabled or incapacitated to such an extent that I am unable properly to manage my own financial affairs.[107]

Dr. Hayes signed the certification concerning Mrs. Carpenter's condition on July 13, 2005; Mrs. Fiechter assumed responsibility for Mrs. Carpenter that same day.[108]

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105 Tr. at 872 (Tavani).

106 *Id.* at 873-74. In the same interview, Mrs. Carpenter had trouble recalling other aspects of this litigation.

107 JX 1 at 5 (POA).

108 Stip. ¶¶ 11, 13. Dr. Hayes' certification is replicated *supra* at Part A.1.c.2.

On July 13, 2005, the CS Office received notification that Mrs. Fiechter's springing durable Power of Attorney had become effective.[109]

As I held in the summary judgment opinion, the POA:

> [E]xplicitly grants Mrs. Fiechter, as attorney in fact, the ability to engage (e.g., hire) and dismiss (e.g., fire) agents and employees, which would include Hughes and Dinneen no matter how the parties characterize their relationship to Mrs. Carpenter. . . . Consequently, as of July 13, 2005, Mrs. Fiechter had the legal authority to act on behalf of Mrs. Carpenter to engage and dismiss agents, brokers, employees and counsel, subject to her obligation to do so only in good faith and in the interests of Mrs. Carpenter.[110]

4. Hughes' telephone transfers

By July 18, 2005, Hughes knew about Mrs. Fiechter's status as attorney-in-fact for Mrs. Carpenter.[111] Hughes testified that on July 19, 2005, she saw Mrs. Fiechter at Dr. Hayes' office and they discussed the assistance Mrs. Carpenter had been providing her. As they both were leaving Dr. Hayes' office, Hughes casually mentioned to Mrs. Fiechter in the parking lot, "I just wanted you to know that your mother has been helping me out financially."[112] Mrs. Fiechter allegedly responded, "Thank you for telling me. That's very nice. My mother does that a lot, and that I will tell my sisters and we

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109 Stip. ¶ 12; Dinneen and Hughes personally may not have received word until July 18, 2005 when they returned from a two-week vacation. *See* Stip. ¶ 14; Tr. at 1011 (Hughes).

110 *Estate of Carpenter v. Dinneen*, 2007 Del. Ch. LEXIS 45, at *29 (Apr. 11, 2007).

111 Stip. ¶ 14; *see also* Tr. at 1011 (Hughes).

112 Tr. at 982 (Hughes).

will just have it continue."[113] Mrs. Fiechter did not ask for, and Hughes did not offer, any additional detail on the nature of the assistance.[114] Later, Mrs. Fiechter spoke to Mrs. Carpenter regarding the financial assistance provided to Hughes. Mrs. Carpenter acknowledged having provided assistance to Hughes' daughter, but said the total amount was only in the range of a thousand dollars.[115]

On July 29, 2005, Hughes instructed WTC to add an account, titled to Hughes and Lauri Gross, to the accounts to which Mrs. Carpenter's funds could be transferred without a writing.[116] Over the next few months, Hughes made four separate telephone

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113 *Id.* at 983.

114 *See id.* Mrs. Fiechter disputes the location where this conversation took place, but not its general content. *See* Tr. at 339-40 (Mrs. Fiechter). According to Mrs. Fiechter it occurred in the CS Office where Hughes and Dinneen worked, rather than outside Dr. Hayes' office. I consider it immaterial where the conversation took place.

Separately, but perhaps relatedly, Dinneen testified that Mrs. Fiechter, after having talked to Hughes at Dr. Hayes' office, had come to the CS Office and, in front of Yarnell, stated, "that she was aware that her mother was giving financial assistance to Mrs. Hughes, and she wanted it to continue." Tr. at 584 (Dinneen). Yarnell corroborated Dinneen's testimony, quoting Mrs. Fiechter as saying, "[w]ell if this was my mother's idea and she wanted to do this, then I'd like things to continue that way." Tr. at 802 (Yarnell).

At trial, Mrs. Fiechter stated that she *had* asked for further detail on the assistance Hughes was requesting; however, upon being shown her earlier deposition testimony, however, she recanted that statement. *See* Tr. at 348-49.

115 *See* Tr. at 350 (Mrs. Fiechter).

116 Stip. ¶¶ 12, 15. Lauri Gross denies any knowledge of the account until after this litigation commenced; the Estate presented no evidence to the contrary. *See* Tr. at 535 (Lauri Gross). This was in addition to the Regular, Special, and Household Accounts, previously discussed.

transfers of Mrs. Carpenter's funds to the Hughes and Lauri account: $12,000 on August 3, $11,000 on August 26, $10,000 on September 30, and $10,000 on October 12.[117] On August 9, 2005, six days after the transfer on August 3, Hughes deposited $2,000 into an account of the Grosses; on August 26, the same day she transferred $11,000 of Mrs. Carpenter's money, Hughes deposited $7,000 into an account of the Grosses.[118]

The total amount Hughes transferred by telephone to her own account from Mrs. Carpenter's account is $43,000. The total amount of disputed funds received by Hughes and the Grosses is the sum of $22,000 (checks to the Grosses), $110,500 (checks to Hughes' credit card companies), and $43,000 (Hughes' telephone transfers), which equates to $175,500.

Until Dinneen received a letter from Mrs. Fiechter on October 20, 2005, he was unaware of Hughes' telephone transfers.[119] Hughes confirmed she did not tell Dinneen

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Judy Colonna, a WTC employee, assumed Hughes had proper authorization and added Hughes' account as one for which the pay-by-phone transfer mechanism was available. *See* Tr. at 113 (Colonna). Colonna had worked with the CS Office for years, and dealt personally with Hughes twice a week. *Id.* at 124. Hughes had the authority to add additional accounts which could receive Mrs. Carpenter's funds. *See id.* at 127. Moreover, Hughes did not tell Colonna the recipient account belonged to Hughes. *Id.* at 115, 118. There is no evidence Dinneen was made aware of the establishment of the new account or the later transfers to it; notification would not have been automatically provided to either Mrs. Fiechter or Dinneen. *See id.* at 133.

117 *See* Stip. ¶¶ 16, 18-19, 19a.

118 *See id.* ¶¶ 17-18.

119 *Compare* RAB at 9 (citing JX 23 (Letter from Mrs. Fiechter to Dinneen, Oct. 20, 2005)), *with* Tr. at 604 (Dinneen) (referring to correspondence from the Estate's counsel). Mrs. Fiechter's letter both informed Dinneen of the telephone transfers

about the telephone transfers.[120] The only place the telephone transfers appeared on the books maintained by the CS Office was on the Cash Gift Ledger.[121] There the relevant entries stated only "Trfs [Transfers] from Special."[122] The uninformative nature of this entry in terms of the identity of the recipient supports an inference of intentional concealment.[123]

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and terminated him "as an employee of [Mrs. Carpenter] as of 5:00 p.m. [that day]." JX 23. There is no separate letter from Mrs. Fiechter's counsel in evidence predating Mrs. Fiechter's correspondence regarding the telephone transfers. I assume Dinneen misspoke at trial and meant to refer to Mrs. Fiechter's letter.

120 *See* Tr. at 1003 (Hughes).

Dinneen admitted that, as manager of the CS Office, he thought the telephone transfers were improper. After hearing of them, however, he did not terminate Hughes. *See* Tr. at 605-06 (Dinneen). Instead, he said that because of his romantic relationship with Hughes, he asked Carolyn Brown, Sara Harris, and Chip Schutt for their recommendation as to what to do. *Id.* at 607. The Schutt family did not terminate Hughes. *Id.*

121 *See* Tr. at 628-32 (Dinneen).

122 *See* JX 7 (Cash Gift Ledger). The Estate accuses Dinneen of having made those entries for the telephone transfers in the ledger, but provides no persuasive proof. *See* POB at 14. Dinneen denied having made the entries. *See* Tr. at 628-29.

123 Dinneen admitted the only way one could determine that Hughes was the recipient of the telephone transfers was to "go back to the bank statement, . . . see the account number, and find out where it came from or went to." *Id.* at 631. No other ledger disclosed the transfer. *Id.* at 632.

5. Discovery of the transfers, and the Carpenters departure from the CS Office

In August or September of 2005, the Fiechters began to contemplate leaving the CS Office,[124] and by the beginning of October, had decided they would leave.[125] On October 12, 2005, Mr. Fiechter and Jeff Nielsen went to the CS Office to tell Dinneen the Carpenters would be leaving the CS Office.[126] The purpose of the move was to limit Mrs. Carpenter's expenses because Mr. Fiechter understood many of the Schutts were planning on leaving the CS Office, which would shift much of the Office's expense to the Carpenters.[127] The Fiechters planned to transition out of the CS Office by the end of the year.[128]

In preparation for the move, the Fiechters obtained Mrs. Carpenter's financial records from the Bank. Upon reviewing those records, the Fiechters first noticed Hughes' telephone transfers on October 14.[129] Their initial investigation resulted in

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124 *See* Tr. at 41-42 (Mr. Fiechter). The Fiechters were prompted by notification from members of the Schutt family that they were contemplating leaving the CS Office and wanted to coordinate with the Fiechters "to come up with a number of what we were going to do as a severance package for the people in the office." *Id.* at 41.

125 *See id.* at 42.

126 Tr. at 984 (Hughes); Tr. at 42 (Mr. Fiechter). Jeff Nielsen is Lea Carpenter's son.

127 *See* Tr. at 43-44 (Mr. Fiechter). Mr. Fiechter denied his office would benefit from the transfer of services from the CS Office to it. *See id.* at 44.

128 *Id.* at 43, 224.

129 *See id.* at 35-36. On October 18, they discovered additional, earlier telephone transfers. *Id.* at 38.

discovery of more than $40,000 in transfers effected after Mrs. Fiechter had become Mrs. Carpenter's attorney-in-fact but without any notice to her. After extensive discussion with counsel, the Fiechters decided to terminate immediately the services of the CS Office, *i.e.*, Dinneen, Hughes, and Yarnell.[130] Mrs. Fiechter did so on October 20, 2005.[131]

After the termination, Mrs. Fiechter continued her investigation of Mrs. Carpenter's finances. Although the CS Office, and thus Dinneen, no longer worked for Mrs. Carpenter, he continued to provide the Fiechters with the necessary records.[132] In fact, Mrs. Fiechter admitted Dinneen was very helpful in providing the Fiechters with Office records throughout their investigation.[133]

6. Return of the money

After Hughes' termination on October 20, 2005, her attorney, John Malik, spoke with the Estate's attorney, Victor Battaglia, and offered to repay all disputed monies in exchange for Battaglia's help in getting the pending criminal charges against Hughes dropped.[134]

Initially, Battagalia and the Estate focused on Hughes' telephone transfers, but when their investigation uncovered the earlier checks signed by Mrs. Carpenter, the total

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130 *Id.* at 45.

131 Stip. ¶ 20.

132 *See* Tr. at 373-74 (Malik).

133 *See* Tr. at 444.

134 *See* Tr. at 372-73 (Malik).

amount the Estate was requesting increased. Malik and Hughes did not provide the Estate with their own estimate of the monies owed.[135] Moreover, during subsequent discussions between Malik and Battaglia, it became evident the Estate would require any monetary settlement to include its attorneys' fees, which even at that early stage of the litigation were estimated to be in six figures.[136]

On September 7, 2006, pursuant to a "No Contest" plea agreement between Hughes and the State of Delaware, Hughes paid the Estate $175,500.[137] The letter from Malik to Battaglia, counsel for the Estate, which enclosed Hughes' check for $175,500, stated in its entirety:

> Pursuant to the terms and conditions of the "No Contest" plea agreement entered between my client and the State of Delaware, enclosed please find Commerce Bank Check No. 199-04540 made payable to the estate of Murton Carpenter in the amount of $175,500, dated September 1, 2006.[138]

Neither Malik's letter, nor Hughes' Plea Agreement with the State of Delaware,[139] indicated that the $175,500 was a repayment of principal only.

7. Supplementary trust

In 2002, Mrs. Carpenter executed a Supplemental Trust Agreement (the "Trust"). When discussing the provisions of the Trust, Sweeney, Mrs. Carpenter's attorney,

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135 *See id.* at 378, 380.

136 *Id.* at 382.

137 Stip. ¶ 34.

138 JX 58 at 1 (Letter from Malik to Battaglia, Sept. 6, 2006) (enclosing check).

139 *See id.* at 3 (Hughes' Plea Agreement, Sept. 14, 2006).

testified that she "wanted to provide for certain amounts for [Hughes] and [Dinneen], ... And she wanted to specifically provide that in order for them to receive them, they had to be employed by her at the time of her death."[140]

Under the heading, "Gifts to Other Employees of Trustor," the Trust states in pertinent part:

> With respect to the employees of Trustor [Mrs. Carpenter], . . . who are in the employ of Trustor at the time of her death, including, without limitation, her present office employees, Carolynn S. Yarnell, Mary Donna Hughes and Stephen J. Dinneen, . . . Trustee is directed to transfer and deliver to each such employee, free from trust, an amount equal to one month's pay for each such employee, at the time of Trustor's death, multiplied by the number of full years of employment.[141]

Respondents' counterclaims center on that bequest under the Trust. The parties dispute whether Dinneen and Hughes were employees of Mrs. Carpenter, as opposed to the CS Office. In that regard, Sweeney testified Mrs. Carpenter referred to Dinneen and Hughes as "her office employees."[142] Furthermore, this Court has previously held, "for the limited purpose of any gift or anticipated gift from Mrs. Carpenter to Hughes and Dinneen, I find that they can be considered her employees."[143]

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140 JX 46 at 37 (Sweeney Dep.).

141 JX 2 at 12 (Trust).

142 JX 46 at 70 (Sweeney Dep.).

143 *Estate of Carpenter v. Dinneen*, 2007 Del. Ch. LEXIS 45, at *43 (Apr. 11, 2007).

B. Procedural History

On November 28, 2005, Mrs. Fiechter, on behalf of Mrs. Carpenter, commenced this action against Dinneen and Hughes by filing a verified complaint seeking, among other things, an accounting and imposition of a constructive trust based on a series of improper monetary transfers from Mrs. Carpenter's accounts to accounts for the direct or indirect benefit of Hughes.

Hughes and Dinneen filed their separate answers and counterclaims on December 21, 2005, requesting a declaratory judgment against the Estate that the transfers were lawful and asserting, among other things, a claim against Mrs. Fiechter individually for tortious interference with contractual relations.

On March 29, 2006, Mrs. Carpenter passed away. Shortly thereafter, this Court granted a motion to substitute the Estate for Mrs. Carpenter and Mrs. Fiechter, as Petitioner. On May 12, 2006, the Estate filed an Amended Verified Complaint, adding Hughes' daughter and son-in-law, Lauri and Brian Gross, as Respondents. I later granted a motion filed by Dinneen and Hughes on September 27, 2006, to amend their counterclaims.

On February 7, 2007, the Estate filed its Second Amended Verified Complaint (the "Complaint"), further alleging Dinneen and Hughes breached their fiduciary duties to Mrs. Carpenter. Respondents Hughes and Dinneen filed their separate answers to the Complaint and renewed their counterclaims on February 15.

On April 11, 2007, I denied the Estate's Motion for Summary Judgment on three of Respondents' counterclaims. With respect to Hughes' and Dinneen's claims against

Mrs. Fiechter for tortious interference with contract (Count II), I found that although they had failed to show they had an employment agreement with Mrs. Carpenter, there was sufficient evidence of a possible contractual relationship between them pertaining to the expectancy of a gift in lieu of a pension to support a claim for tortious interference.[144] I further found that Mrs. Fiechter had the authority under the POA to engage and dismiss agents, but that whether her firing of Dinneen and Hughes violated her duty of loyalty to Mrs. Carpenter presented a genuine issue of material fact.[145] With respect to the counterclaims to compel WTC to distribute Hughes' and Dinneen's testamentary gift under the Trust, I found it was Mrs. Carpenter's intent that they would not receive the gifts if they were terminated for good cause, but that genuine issues of material fact existed as to the reasons for their termination.[146] Finally, and for similar reasons, I also denied Hughes' and Dinneen's counterclaims for enforcement of an alleged oral agreement between Mrs. Carpenter and each of them under which they would receive a testamentary disposition in lieu of a pension.[147]

Trial commenced on April 16, 2007 and proceeded intermittently until May 9. After extensive briefing, I heard post-trial argument on November 9, 2007.

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144 *See id.* at *18-19.

145 *See id.* at *29, 34-35.

146 *See id.* at *36-37, 39-40.

147 *See id.* at *47-48.

C. The Parties' Contentions

Petitioner, the Estate, essentially seeks a judgment against Hughes and Dinneen, jointly and severally, for: (1) all of the funds allegedly taken from Mrs. Carpenter; (2) interest, at the legal rate, on all of those funds; and (3) its attorneys' fees and costs in connection with its pretrial investigation and the prosecution of this action.[148] The Estate also seeks judgment against Brian and Lauri Gross for all funds and benefits they received or enjoyed resulting from the misappropriation of Mrs. Carpenter's funds.[149]

Respondents deny they have any liability to the Estate. In addition, Hughes and Dinneen separately assert the same four counterclaims.[150] Count I of the counterclaims asks the Court for the following relief: (a) a declaration the transfers to Hughes were valid and binding; (b) a declaration Hughes and Dinneen did not breach their fiduciary duties to Mrs. Carpenter; (c) dismissal of the Estate's Complaint with prejudice; and (d) an award to Respondents of their court costs. In Counts II and III, Dinneen and Hughes advance alternative claims for receiving their testamentary gifts as provided for in the Trust. Count II asserts a claim for tortious interference against Mrs. Fiechter based on her firing of Hughes and Dinneen; Count III asserts a claim against WTC to compel

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148 In pursuing recovery of those funds, the Estate's pleadings invoke various legal and equitable remedies, including without limitation restitution and imposition of a constructive trust.

149 PTO at 22-23.

150 *See* Dinneen's Amend. Answer and Countercl.; Hughes' Answer to 2d Amend. Verified Compl. and Countercls.

distribution of the testamentary gifts.[151] With respect to the testamentary gifts under the Trust, Respondents seek pre-judgment interest at the legal rate. Lauri and Brian Gross deny all liability and seek judgment in their favor and an award of their attorneys' fees and costs.[152]

II. ANALYSIS

A. Have Dinneen and Hughes Breached Their Fiduciary Duty as Agents to Mrs. Carpenter?

While this action is now primarily about interest and attorneys' fees, most of the parties' claims, counterclaims, and defenses involve the threshold question of whether Hughes and Dinneen breached their fiduciary duty to Mrs. Carpenter as her agents through the appropriation of $175,500 of Mrs. Carpenter's money.

1. Respondents' fiduciary duty to Mrs. Carpenter

The Estate asserts, "Defendants Hughes and Dinneen were charged with the fiduciary duty of handling the financial affairs of Mrs. Carpenter as employees of the Carpenter Schutt office."[153] Dinneen and Hughes do not deny the existence of such a relationship. They acknowledge they were agents entrusted with the responsibility of

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151 After trial Hughes and Dinneen withdrew Count IV of their counterclaims, which asserted a breach of an oral agreement to make a testamentary disposition. *See* Resp'ts' J. Opening Post-trial Br. in Supp. of Countercls. ("CC ROB") at 16 n.1. Petitioner's answering brief and Hughes and Dinneen's reply brief relating to Respondents' counterclaims are referred to as "CC PAB" and "CC RRB," respectively.

152 *See* PTO at 24.

153 PTO at 1.

managing Mrs. Carpenter's financial affairs.[154] In that capacity, they owed Mrs. Carpenter duties of loyalty and care.[155] Thus, for example, as fiduciaries, Hughes and Dinneen had a duty to Mrs. Carpenter "to act with the care, competence, and diligence normally exercised by agents in similar circumstances."[156]

"Fiduciaries are not prohibited from having direct dealings by way of conveyance or contract with their principals, but such transactions are not readily approved by

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154 They "were responsible for protecting the funds of [Mrs. Carpenter]." Stip. ¶ 6.

155 *See Science Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980).

156 RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006); *see also* GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES § 541 (2007) (noting that a "trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man . . . .").

The fiduciary relationship for a durable power of attorney is comparable to that which arises under trust law. *See Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999) (citing 3 AM. JUR. 2d *Agency* § 210 (1986) ("The fiduciary relationship existing between an agent and his principal has been compared to that which arises upon the creation of a trust, and the rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer . . . .")). In that regard, Hughes and Dinneen's responsibility, as employees of the CS Office, to protect the funds of Mrs. Carpenter imposed on them duties similar to that of a trustee.

Thus, unlike a corporate director, Hughes and Dinneen would breach their duty of care with mere negligence, not gross negligence. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1148 (Del. Ch. 1994) (discussing different standards of care for a corporate director and a trustee). Similarly, Delaware courts have found the fiduciary duty of loyalty to be stricter in trust law than in corporate law. *See Stegemeier v. Magness*, 728 A.2d 557, 562 n.22 (Del. 1999) (citing *Eberhardt v. Christiana Window Glass Co.*, 81 A. 774, 778 (Del. Ch. 1911)).

equity."[157] As Mrs. Carpenter's fiduciaries, Dinneen and Hughes had the obligation to act in her best interest unless she voluntarily consented to an interested transaction after full disclosure.[158] When the fiduciary is also in a close confidential relationship with the principal, such consent requires impartial advice from a competent and disinterested third person.[159]

Furthermore, under Delaware law, interested transactions violating the duty of loyalty are voidable at the behest of the principal; if the transaction is challenged, the burden of persuasion to justify upholding the transaction is on the fiduciary.[160] "That

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157 LAW OF TRUSTS AND TRUSTEES § 544. "By reason of the intimate knowledge which the fiduciary has with respect to the financial affairs of the principal, the superiority of his position, his usual influence with the principal, and the latter's trust and confidence in the fiduciary, there is great opportunity for the exercise of fraud and undue influence." *Id.*

158 *See Schock*, 732 A.2d at 225; RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

159 *See Coleman v. Newborn*, 2007 WL 4225408, at *6 (Del. Ch. Nov. 27, 2007); *Dorman v. Plummer*, 2001 WL 32645, at *6 (Del. Ch. Jan. 9, 2001) (citing *Schock*, 732 A.2d at 229). In *Schock*, the court stated that if "the agent is one upon whom the principal naturally would rely for advice," mere disclosure he is acting as an adverse party is insufficient; he must give the principal impartial advice based upon the principal's interests, otherwise "he has a duty to see that the principal secures the advice of a competent and disinterested third person." 732 A.2d at 229 n.56 (quoting RESTATEMENT (SECOND) OF AGENCY § 390 cmt. c (1958)). "The purpose of the rule is not so much to protect the *cestui* against the consequences of undue influence as it is to safeguard him against the results of his own voluntary acts induced by the confidential relation between him and his fiduciary the effect of which with respect to his own interests he may not fully comprehend." *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 747 (Del. 1939).

160 *See Schock*, 732 A.2d at 225-26; *Swain v. Moore*, 71 A.2d 264, 267 (Del. Ch. 1950); *see also* 3 AM. JUR. 2d *Agency* § 205 (2007) ("In a transaction between

burden is even greater where the transfer of property is made without consideration."[161] The courts also apply heightened scrutiny to interested transactions when the agent is a fiduciary to an impaired person.[162] With these standards in mind, I address Hughes' and Dinneen's alleged breaches of their fiduciary duty to Mrs. Carpenter.

2. Hughes breached her fiduciary duty

Hughes breached her fiduciary duty to Mrs. Carpenter when she obtained the checks from Mrs. Carpenter and when she arranged for the telephone transfers of Mrs. Carpenter's funds into her own account. These were self-interested transactions where Hughes or her kin, the Grosses, were the beneficiaries. As self-interested transactions, they are presumptively voidable unless Hughes can demonstrate their entire fairness. Hughes, however, has not overcome the presumption that these transactions are invalid.

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principal and agent in which an agent obtains a benefit, such as a gift, a presumption arises against its validity which the agent must overcome.").

161 In re *Estate of Surian*, 1990 WL 100794, at *4 (Del. Ch. July 12, 1990) (citing *Swain*, 71 A.2d at 267); *Faraone v. Kenyon*, 2004 WL 550745, at *9 (Del. Ch. Mar. 15, 2004).

162 *See* In re *Lamborn*, 1998 WL 293998, at *4 (Del. Ch. May 6, 1998) (a fiduciary to an impaired person has a duty not to accept a gift from that person); *Swain*, 71 A.2d at 268.

"[E]quity seeks to protect the aged and infirm from the designs of others and from their own improvidence. It therefore has the power to set aside deeds improvidently entered into, and to require the repayment of loans made by the aged to those in a fiduciary relationship to him." *Heston v. Miller*, 1979 WL 174446, at *2 (Del. Ch. Oct. 11, 1979) (citing *Atkins v. Foreaker*, 114 A. 173, 176 (Del. Ch. 1921)).

Regarding the checks Mrs. Carpenter signed to Hughes' credit card companies and to the Grosses between March 11 and May 31, 2005, Hughes' main defense is that she was reasonably unaware of Mrs. Carpenter's ill health. In that respect, I find the Estate has shown Mrs. Carpenter suffered from diminished capacity, but not that she was so infirm she could not make personal financial decisions. The following factors all militate against a conclusive finding she was incompetent before July 2005: the lack of contemporaneous medical documentation of her incapacity;[163] the time the Fiechters spent abroad in June 2005 without making arrangements for Mrs. Carpenter; Mrs. Carpenter's subsequent (albeit vague) remembrances of the gift to Hughes' daughter; the fact that of the hundreds of checks Mrs. Carpenter signed in 2005; the Fiechters only challenge those checks made for Hughes' benefit;[164] and Mrs. Carpenter's apparent ability to pursue her crossword puzzle pastime.

Even if Mrs. Carpenter was legally competent to make the challenged gifts, Hughes, as Mrs. Carpenter's fiduciary, still must overcome the presumption of invalidity. Yet, Hughes made no showing Mrs. Carpenter was even aware of the total amount of

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163 On March 11, 2005, when some of the checks were written, Mrs. Carpenter had an appointment with her physician. In his notes from that visit, Dr. Hayes did not indicate any concern about Mrs. Carpenter's competency and stated she was "oriented times three." She also paid her federal taxes on March 11.

164 *See* RAB at 30-31. The Estate attributes Mrs. Carpenter's continued checkwriting to the family's reluctance to "come forward and finally say she's incompetent." Tr. of Post-trial Argument ("Post-trial Tr.") at 11 (Nov. 9, 2007).

money she had given to Hughes and her daughter.[165] Merely telling Mrs. Carpenter it was "a lot of money" is grossly insufficient to meet Hughes' burden of proving she made a fully informed decision.[166] Indeed, I find Hughes' behavior particularly troublesome in that the evidence showed that, although she had at least some awareness Mrs. Carpenter's eyesight was failing, she made no attempt to ensure Mrs. Carpenter knew to whom and for how much several of the disputed checks were written.

Furthermore, inherent within Hughes' duty to fully inform Mrs. Carpenter is to keep a transparent set of financial records by which Mrs. Carpenter or her agents easily could ascertain the amount of financial assistance she was providing Hughes. The questionable bookkeeping in the CS Office whereby the checks written to the Grosses were not recorded in the Cash Gift Ledger, and the payments to Hughes' credit card accounts were listed in a way that provided no indication they were for Hughes' benefit, exemplify the lack of transparency. Based on Mrs. Carpenter's advanced age, poor eyesight, and generally declining health, it was incumbent on Hughes as her fiduciary to take affirmative steps to ensure Mrs. Carpenter understood and could approve the self interested transactions Hughes proposed to her. Instead, Hughes, at best, turned a blind eye to Mrs. Carpenter's frailties and diminished capacity.

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165 The Estate contends that when Hughes asked for the gifts, she had an obligation to see that Mrs. Carpenter had independent advice on that subject. *See* Post-trial Tr. at 15-16. I need not decide that issue in the circumstances of this case, because I conclude Hughes breached her fiduciary duty whether or not she had an obligation to arrange for independent advice.

166 JX 40 at 152 (Hughes Dep.).

Hughes' telephone transfers of Mrs. Carpenter's money to a new account Hughes established in her own and her daughter's names, after Mrs. Fiechter had become Mrs. Carpenter's attorney-in-fact and without any notice to Mrs. Fiechter, constitute a shockingly brazen breach of her fiduciary duty. Neither Hughes nor her counsel could provide *any* reasonable justification for those transfers.[167]

As of July 13, 2005, Dr. Hayes had certified Mrs. Carpenter was disabled or incapacitated to such an extent she could no longer manage her financial affairs or property. As a result, pursuant to the springing POA, Mrs. Fiechter became Mrs. Carpenter's attorney-in-fact. The CS Office was put on notice of these facts on July 13, 2005, and Hughes herself became aware of them by at least July 18. Thus, Hughes knew Mrs. Fiechter would have to consent to and sign any further checks from Mrs. Carpenter's account for the benefit of Hughes.

I find that, to avoid the need for obtaining Mrs. Fiechter's signature, on July 29, 2005, Hughes fraudulently obtained authorization from WTC to transfer funds directly from one of Mrs. Carpenter's existing accounts into the new account Hughes established in the name of herself and her daughter.[168] Hughes effected four telephone transfers to

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167 *See* Post-trial Tr. at 86-92.

168 Colonna, the WTC employee Hughes dealt with, knew Hughes and assumed she had Mrs. Carpenter's authorization to make the arrangements for transfers to the new account. Colonna later testified that Hughes' addition of an account for her own personal benefit that could receive telephone payments from Mrs. Carpenter's accounts was inappropriate. *See* Tr. at 119 (Colonna).

that account on August 3, August 26, September 30, and October 12 in a total amount of $43,000. Hughes did not tell Mrs. Fiechter or Dinneen about any of these transfers.

The only excuse Hughes offered for what appears to be outright theft is that Mrs. Fiechter approved these expenditures as a continuation of her mother's financial assistance to Hughes. According to Hughes, she obtained that approval in a brief conversation she had with Mrs. Fiechter in a parking lot, as she remembers it, where Hughes informed Mrs. Fiechter that Mrs. Carpenter's was giving Hughes financial assistance, and Mrs. Fiechter replied, "we will just have it continue."[169] Such a general conversation in passing is not sufficient to constitute informed consent to an agent's self-interested transaction. Hughes did not, for example, disclose the amount of money she had received as of that time, the expected scope of future payments, the method for making such transfers and their amounts, or any justification for the payments.[170] Furthermore, Hughes' offhand disclosure to Mrs. Fiechter when they met by chance in a parking lot failed to convey sufficient information to Mrs. Fiechter to enable her to

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169 Tr. at 983 (Hughes).

170 The only other evidence Hughes cites as supporting her allegation that Mrs. Fiechter indirectly approved the telephone transfers is a conversation Mrs. Fiechter allegedly had with Dinneen in the CS Office within earshot of Yarnell. Although the witnesses dispute whether the conversations took place and, if so, exactly what was said, I need not resolve those disputes. Even if I credit Dinneen's and Yarnell's accounts of the conversation over Mrs. Fiechter's recollection, I am convinced Mrs. Fiechter never approved any particular gift to Hughes after she took over as attorney-in-fact in July 2005 and certainly never gave Hughes what amounts to a blank check to do as she did in arranging the ability unilaterally to withdraw whatever she wanted, whenever she wanted, from Mrs. Carpenter's account.

provide informed consent to any gift. Based on all the evidence, I hold Mrs. Fiechter never consented to or authorized any of the four telephone transfers Hughes effected for her own benefit.

A fiduciary who acts in a manner as secretive, misleading, and self-interested as Hughes did in this instance is acting disloyally and in bad faith. Hughes had *no* reasonable basis for arranging for the separate bank account at WTC, or for directly depositing Mrs. Carpenter's funds into that account without Mrs. Fiechter's informed and express approval. I therefore hold Hughes violated her fiduciary duty.

3. Dinneen breached his fiduciary duty

As head of the CS Office, Dinneen had a much closer working relationship with Mrs. Carpenter than either Hughes or Yarnell. Dinneen met with Mrs. Carpenter approximately once each month to have her sign checks for her bills and other payments and to go over them with her. Once a year, Dinneen would meet with Mrs. Carpenter to review the expenditures for the preceding year and answer any questions she might have. When Mrs. Carpenter consulted with her lawyer Sweeney in or around 2002 to revise her estate planning papers, Dinneen was copied on all the correspondence, including letters enclosing drafts of the various documents related to that assignment.[171] Dinneen was also present when she signed the trust agreement.[172]

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171 *See* JX 3 (Letter from Sweeney to Mrs. Carpenter, Apr. 2, 2002) (enclosing Trust); JX 26 (Letter from Sweeney to Mrs. Carpenter, Dec. 1, 2001) (discussing draft of a new will and trust agreement); JX 27 (Letter from Sweeney to Mrs. Carpenter, Jan. 21, 2002) (discussing revised draft of a new will and trust agreement).

172 *See* Tr. at 565 (Dinneen).

Mrs. Carpenter's relationship with Dinneen regarding her financial affairs also was confidential. She frequently emphasized to Dinneen the importance of his keeping her finances confidential, even with respect to her daughters and other family members. Dinneen understood the importance of confidentiality to Mrs. Carpenter and to the performance of his responsibilities. Nobody else had the detailed knowledge and responsibility over her personal finances that Dinneen had.

These and several other factors require me to subject the transactions at issue here, and Dinneen's role in them, to careful scrutiny. First, I note Dinneen's involvement in a romantic relationship with his subordinate Hughes for over twenty years. For example, the two of them shared a beach house that Dinneen owned and to which Hughes contributed on a monthly basis to help defray the costs. Thus, in terms of the multiple alleged gifts Mrs. Carpenter made to Hughes without any consideration, Dinneen had a conflict of interest, even if he never directly received any of that money. These facts alone support imposing a greater burden on Dinneen to prove that the gifts were knowingly approved by Mrs. Carpenter based on a full understanding of the relevant facts.[173]

Second, I find Dinneen had at least some appreciation of Mrs. Carpenter's poor eyesight and her diminished capacity. Regarding her eyesight, Yarnell, Dinneen, and Hughes discussed Mrs. Carpenter's worsening eyesight in 2004. Further, based on the testimony of several witnesses about Mrs. Carpenter's mental and physical state in the

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[173] *See* In re *Estate of Surian*, 1990 WL 100794, at *4 (Del. Ch. July 12, 1990); *Faraone v. Kenyon*, 2004 WL 550745, at *9 (Del. Ch. Mar. 15, 2004).

first half of 2005, I find that, even if Dinneen believed she was competent to handle her affairs, he knew or should have known her health was failing and her capacity diminishing. To the extent Dinneen testified to the contrary, I find his testimony unreliable.[174] Thus, I conclude Dinneen had a duty to exercise special care in seeking the fully informed consent of Mrs. Carpenter to the gifts she allegedly made to Hughes. In the circumstances of this case, that means Dinneen should have obtained independent advice from a competent and disinterested third party, such as Sweeney.[175] In failing to press the issue of whether Mrs. Carpenter knowingly and voluntarily intended to make such large cash gifts for the benefit of his girlfriend Hughes, Dinneen plainly violated his fiduciary duty to Mrs. Carpenter.

Dinneen avers he "received absolutely nothing from Mrs. Carpenter other than his salary nor did he commit any wrongdoing; but instead, he verified that it was

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174 In this regard, Dinneen's implausible testimony on an unrelated issue makes me reluctant to rely on his observations as to the hotly disputed issue of Mrs. Carpenter's mental and physical condition. The other testimony to which I refer is Dinneen's denial that he knew before Mrs. Carpenter's death the testamentary gift to him in the Trust was conditioned on his continuing to be in her employ at the time of her death. *See* Tr. at 564-65. Dinneen received a copy of at least one draft of the trust containing that condition, as well as a copy of the executed version of the trust agreement. *See* JX 3 (Letter from Sweeney to Mrs. Carpenter, Apr. 2, 2002) ("By providing a copy of this letter to [Dinneen], we are also sending him the original of your Trust Agreement, and a copy of your Will. As we discussed, [Dinneen] will keep these documents at the [CS Office]."). The relevant provision affected Dinneen personally and is easily located in the Trust document. In addition, I accept the testimony of both Hughes and Yarnell that the Trust document was in the CS Office files, that they each looked at the disputed provision, and that Dinneen did also. *See* Tr. at 972-75 (Hughes); Tr. at 804-06, 843 (Yarnell).

175 *See* notes 157-162, *supra*.

Mrs. Carpenter's own decision to provide financial assistance to Hughes."[176] To evaluate Dinneen's argument, I first examine the circumstances surrounding the checks Mrs. Carpenter signed to the Grosses and to Hughes' credit card companies. I then turn to Dinneen's actions vis-à-vis the telephone transfers.

The only action Dinneen took to ensure Mrs. Carpenter knowingly and voluntarily consented to the gifts to the Grosses and the initial batch of checks to Hughes' credit card companies was to meet with Mrs. Carpenter at her home, put a group of cancelled checks down in front of her, and ask if she approved them. Dinneen did not go over each check individually to make sure Mrs. Carpenter understood the amount of it and to whom it was written, although that was his normal practice when he personally presented checks to Mrs. Carpenter for signing. Instead, he apparently relied on her ability to read the checks, which the record establishes she could not have done without magnifying aids. The evidence also showed Mrs. Carpenter was a proud woman who was reluctant to acknowledge her infirmities, including her extremely poor vision.

Dinneen's meager actions fail to provide any assurance that Mrs. Carpenter fully understood the extent of the "gifts" Hughes was having her sign or voluntarily consented to them. Had Hughes simply been another employee in the CS Office, Dinneen's conduct still would have been negligent. Dinneen's longstanding romantic relationship with Hughes, however, renders him interested in those gifts and compounds his dereliction of duty. Dinneen did nothing to require Hughes to notify him before (or even

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[176] RAB at 31.

after) she attempted to have Mrs. Carpenter make any further payments for Hughes' benefit. He failed to implement any reasonable internal controls to monitor the CS Office records for any indication of further payments of that sort.[177] Likewise, Dinneen made no attempt to have a meaningful conversation himself with Mrs. Carpenter about what she understood the purpose of the gifts was, whether the need would be ongoing, what amount she intended to give, and so on, let alone arranging for a disinterested third party, such as Sweeney, to discuss the matter with her. I therefore find Dinneen's conduct regarding the checks for the benefit of Hughes and her family to constitute negligence and a breach of his duties of loyalty and care to Mrs. Carpenter.

Furthermore, Dinneen managed the CS Office for Mrs. Carpenter. He therefore bears responsibility for the recordkeeping performed by the Office. The Estate accuses Hughes and Dinneen of deliberately concealing the payments to the Grosses and to Hughes by entering them on the wrong ledgers or, if on the correct ledger, in a way that failed to identify the beneficiaries of the payments. The checks to Lauri and Brian Gross were entered on the Miscellaneous Ledger; the entries stated, "Lauri Gross" and "Brian Gross."[178] These gifts, as such, should have been listed on the Cash Gift Ledger. The fourteen checks to various credit card companies of Hughes were entered on the Cash Gift Ledger simply by credit card number, for example, "9342 3345 9876 0323."[179]

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177 Instead, Dinneen merely asked Yarnell to provide him with any checks relating to financial assistance to Hughes that she came across.

178 JX 8 (Miscellaneous Ledger).

179 JX 7 (Cash Gift Ledger). For privacy reasons, the numbers are fictitious.

Because the listing showed only an account number, it was not even clear the payment was of a credit card bill. More importantly, the ledger entry provided no indication of whose credit card bill it was. Because the payments were being made from Mrs. Carpenter's Household Account, one reasonably might infer they related to bills she had incurred. In any case, the relevant records failed to provide any transparency as to what the payments were for and why they were made.

The testimony and other evidence regarding who within the CS Office made these entries and why they used the format they did is hopelessly conflicting. The Estate, in my opinion, failed to prove Dinneen engaged in deliberate concealment of the payments or had an intent to defraud Mrs. Carpenter. At the same time, however, I find Dinneen responsible in his capacity as CS Office manager for the inadequate and misleading recordkeeping as to the payments and transfers to Hughes and her family. In that regard, even if Dinneen had no intent to conceal the payments, he still acted negligently.

As to Dinneen's role in the telephone transfers, he asserts he did not know about them until after Mrs. Fiechter brought them to his attention in late October, when she notified him he was being fired. The Estate accuses Dinneen of concealing the telephone transfers by causing them to be listed on the Cash Gift Ledger in the following singularly uninformative way: "Trfs from Special." Petitioner bears the burden of proof on this issue, however, and I am unable to determine from the evidence who made the entries in question. Thus, the Estate has not shown Dinneen intentionally concealed those transfers.

Nevertheless, I hold that Dinneen's conduct regarding the telephone transfers violated his fiduciary duties to Mrs. Carpenter. Although Dinneen claims ignorance of the transfers,[180] he testified he was present in the CS Office when Mrs. Fiechter allegedly stated that she knew her mother had been assisting Hughes financially and that she intended to continue that assistance. Dinneen never did anything, however, upon learning that there might be more payments to Hughes after Mrs. Fiechter took over check signing authority under the POA to make sure that he and Mrs. Fiechter understood all the circumstances of such assistance and that Mrs. Fiechter could make a fully informed decision on any further requests for assistance. In view of his conflicted position by virtue of his relationship with Hughes, Dinneen had a duty to do more. In addition, as the person ultimately responsible for the recordkeeping in the CS Office, Dinneen was at least negligent in allowing the clearly inadequate entries to be made as to the telephone transfers and in failing to discover and correct them in a timely fashion. In both of these failures, he breached his fiduciary duty to Mrs. Carpenter.

In summary, I find both Hughes and Dinneen violated their fiduciary duties to Mrs. Carpenter with respect to the monies appropriated from Mrs. Carpenter through the checks she signed and Hughes' telephone transfers of Mrs. Carpenter's funds.

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[180] Dinneen offered no explanation as to how Hughes' telephone transfers of more than $40,000 between August 3 and October 12, 2005 could have gone unnoticed by a reasonably prudent office manager properly doing his job.

B. The Estate's Attorneys' Fees and Costs

1. Standard and exceptions to the American Rule

Although this Court has discretion to award attorneys' and expert witness' fees, [181] under the "American Rule," Delaware courts do not award attorneys' fees absent some special circumstance.[182] Delaware courts recognize four exceptions: (1) when litigation creates a common fund or a nonmonetary benefit which inures to the benefit of others; (2) where fees are authorized by statute; (3) where the litigation was brought in bad faith or a party's bad faith conduct increased the costs of litigation; and (4) where the pre-litigation conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages.[183]

The Estate seeks its attorneys' fees against both Respondents Hughes and Dinneen on two of these grounds. First, the Estate contends Respondents' conduct was "so reprehensible," their attorneys' fees are an appropriate part of damages. Second, the Estate argues Hughes and Dinneen conducted this litigation vexatiously and in bad faith.[184]

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181 *See* 10 *Del. C.* § 5106.

182 *See, e.g.*, *Slawik v. State*, 480 A.2d 636, 639 (Del. 1984) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)); *Barrows v. Bowen*, 1994 Del. Ch. LEXIS 164, at *1 (Sept. 7, 1994).

183 *See Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997); s*ee also Slawik*, 480 A.2d at 639 n.5.

184 *See* POB at 27-28.

2. Were Hughes' and Dinneen's pre-litigation conduct sufficiently egregious to justify an award of the Estate's attorneys' fees as an element of damages?

"The mere fact that a [fiduciary] has breached his [fiduciary duty] . . . does not justify an award of attorneys' fees and expenses . . . . This exception to the American rule is narrow and should be applied in only the most egregious instances of fraud or overreaching. Otherwise, every adjudicated breach of fiduciary duty would automatically result in a fee award."[185] To warrant departing from the traditional rule against awarding attorneys' fees on the basis of pre-litigation conduct, that conduct must be shown to have been in "bad faith, . . . totally unjustified, or the like."[186]

The Estate contends Hughes' and Dinneen's breaches of fiduciary duty were sufficiently egregious because "the misappropriations were the end result of significant planning and intentional misuse of confidential information and trust."[187] The Estate cites *no* precedent, however, in Delaware or elsewhere, where a court has granted attorneys' fees in similar circumstances. Respondents answer that even if their conduct

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185 *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 124-25 (Del. Ch. 1999) (internal citation and quotation omitted). *See also Barrows v. Bowen*, 1994 Del. Ch. LEXIS 164, at *5-6 (Sept. 7, 1994) ("While this court can imagine situations which may be so egregious as to warrant an award of attorney's fees on the basis of fraud, the American Rule would be eviscerated if every decision holding defendants liable for fraud or the like also awarded attorney's fees. Even more harmful would be to extend this narrow exception to situations involving less than unusually deplorable behavior.").

186 *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986).

187 POB at 28.

was unjust, it was not "unusually deplorable."[188] In downplaying the blameworthiness of their actions, Hughes and Dinneen contend Mrs. Carpenter wanted confidentiality in her financial affairs, that gifts of the kind she made to Hughes did not represent a sea-change from her past behavior, that Hughes disclosed the transactions to Mrs. Fiechter after she became attorney-in-fact for Mrs. Carpenter's affairs, and that all relevant information was provided to Mrs. Carpenter.

Hughes' and Dinneen's culpability in terms of the transfers and checks differ. Although these two Respondents have a romantic relationship, the Estate failed to prove Dinneen knew about the requests for money Hughes made directly to Mrs. Carpenter or the telephone transfers until after they occurred. There is no direct evidence that Dinneen purposefully tried to hide the transactions, and the circumstantial evidence is not sufficient to prove he did either. Instead, the record demonstrates Dinneen acted negligently and breached his fiduciary duties -- he should have, among other things, ensured the records were kept more precisely and transparently, monitored Mrs. Carpenter's accounts such that he would have noticed Hughes' large transfers, and obtained independent advice for Mrs. Carpenter. Still, Dinneen's laziness and willingness to look the other way rather than diligently performing his duties, are not sufficient under the American Rule to find him liable for the Estate's attorneys' fees and expenses. On the other hand, Dinneen's misfeasance will render him liable for any other losses it caused Mrs. Carpenter's Estate to suffer, including the loss of funds and interest

[188] RAB at 23.

on those amounts to the extent this Court awards such damages and they remain unpaid. Another ramification of Dinneen's breach of fiduciary duty is his loss of the testamentary gift under the Trust, which he calls his pension.

In contrast, Hughes' breach of fiduciary duty is egregious and totally unjustified. As previously discussed, her unauthorized telephone transfers are unconscionable. The checks Hughes induced Mrs. Carpenter to sign for her benefit, while less egregious, compound the wrong she committed. Thus, Hughes' pre-litigation behavior warrants an award to the Estate of at least some of its attorneys' fees.

The question remains how much of the Estate's fees and expenses should be assessed against Hughes. The Estate requests its attorneys' fees expended throughout the *entire* course of its pre-suit investigation and this litigation. Hughes' conduct, however, does not justify so sweeping an award. Rather, I will order Hughes to reimburse the Estate's reasonable attorneys' fees and expenses for investigating Hughes' misappropriation of Mrs. Carpenter's funds and for litigating this action to the point of receiving Hughes' payment on September 7, 2006 of $175,500, the total amount of the claimed improper gifts.

Hughes argues she should not be responsible for the Estate's fees in obtaining repayment of the $175,500, because, through her counsel, she offered in settlement negotiations from the outset to pay back that amount. I find Hughes' argument unpersuasive, however, because in those negotiations she attached additional conditions to her offer which the Estate rejected in good faith. One of those conditions was Hughes'

insistence that she receive her "pension" under Mrs. Carpenter's Trust; another was that she not be required to pay the Estate's attorneys' fees.

Thus, on the basis of Respondents' pre-litigation conduct, I grant the Estate's request for its attorneys' fees and expenses only against Hughes and only as it relates to fees and expenses incurred through September 7, 2006.[189] As to the claims for attorneys' fees and expenses incurred after September 7, 2006, I turn to the Estate's argument that Hughes and Dinneen conducted this litigation vexatiously and in bad faith.

3. Have Hughes and Dinneen conducted this litigation in bad faith?

The Estate's second ground for its request for attorneys' fees is that Hughes and Dinneen have conducted this litigation in bad faith.[190] In that regard, "courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified

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189 The Estate also seeks interest on its attorneys' fees at the legal rate. A colorable argument for such interest could be made here because I have based the award of attorneys' fees on Hughes' pre-litigation conduct and the fees could be considered an element of damages. Based on the circumstances of this case, however, I have decided in the exercise of my discretion not to award interest on the Estate's attorneys' fees. Among the factors I considered in reaching this conclusion are the relative amounts of the telephone transfers ($43,000), in comparison to the significant monetary award against Hughes (return of the misappropriations with interest and the award of the Estate's attorneys' fees) and the related loss of her "pension."

190 "The bad faith exception is not limited to the circumstances where the action is brought in bad faith or where the defendants' bad faith forces the filing of the action. It also includes cases where the litigation process itself is conducted in bad faith. In such cases, the fees typically awarded are the additional fees incurred as a result of the bad faith conduct." *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231-32 (Del. Ch. 1997); *see also* In re *SS & C Techs., Inc.*, 2008 WL 612256, at *7 (Del. Ch. Mar. 6, 2008).

records[,] knowingly asserted frivolous claims,"[191] and when "the defendant's conduct forced the plaintiff to file suit to 'secure a clearly defined and established right.'"[192] To constitute bad faith, Respondents' action *must* rise to a high level of egregiousness,[193] such that their actions extend beyond the realm of zealous advocacy.[194]

This Court does not invoke the bad faith litigation exception lightly and "imposes the stringent evidentiary burden of producing clear evidence of bad faith conduct on the party seeking an award of fees."[195] Attorneys' fees are not awarded "in the absence of intentional misconduct" or where the opposing party "merely acted pursuant to an incorrect perception of its legal rights."[196]

The Estate contends Hughes and Dinneen acted in bad faith when they "forced Plaintiff to file suit to secure clearly defined rights and also acted in bad faith and

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191 *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (internal citations omitted).

192 *McGowan v. Empress Entm't, Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000) (quoting *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 Del. Ch. LEXIS 213, at *61 (Dec. 22, 1994)).

193 *See FGC Holdings Ltd. v. Teltronics, Inc.*, 2007 Del. Ch. LEXIS 14, at *15 (Jan. 22, 2007) (citing *Judge v. City of Rehoboth Beach*, 1994 Del. Ch. LEXIS 55, at *6 (Apr. 29, 1994)).

194 *Id.* at *15-16 (citing *Credit Lyonnaise Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1996 Del. Ch. LEXIS 157, at *13-14 (Dec. 20, 1996)).

195 *Carlson v. Hallinan*, 925 A.2d 506, 545 (Del. Ch. 2006) (quoting *Acierno v. Goldstein*, 2005 Del. Ch. LEXIS 176, at *8-9 (Nov. 16, 2005)).

196 *Huntington Homeowners Ass'n v. 706 Invs.*, 1999 Del. Ch. LEXIS 119, at *18 (May 28, 1999) (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DEL. CT. OF CH. § 13-3(b)).

vexatiously in advancing frivolous counterclaims which were completely unsubstantiated by fact or law."[197] The Estate's argument is strongest with respect to its being forced to file suit to secure clearly defined rights. On the separate issue of Respondents' counterclaims, while the Court ultimately rejects those claims, they were not frivolous to the point where this Court would award the Estate and the other counterclaim defendants their attorneys' fees.[198]

The Estate contends it had a clear right to the return of Mrs. Carpenters' funds because Hughes and Dinneen "committed egregious breaches of their fiduciary obligations."[199] The Estate contends it had a clearly established right to the monies taken by Hughes, and interest on those monies since their misappropriation. The Estate must demonstrate it 1) had to sue to secure 2) a clearly established right, and through 3) clear

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197 POB at 33; *see also* PRB at 19.

198 The Estate implies Hughes and Dinneen's withdrawal after trial of their fourth counterclaim, which asserted an oral agreement between Mrs. Carpenter and themselves for a pension, reflected bad faith and forced the Estate to unnecessarily litigate that claim through trial. *See* PRB at 2; CC PAB at 1; *see also* CC ROB at 16 n.16 (withdrawing Count IV of the counterclaims). The Estate's argument lacks merit. I denied the Estate's motion for summary judgment on that counterclaim because there were genuine issues of material fact regarding it. *See Estate of Carpenter v. Dinneen*, 2007 Del. Ch. LEXIS 45, at *46-48 (Apr. 11, 2007). If this Court were to find for the Estate and award its attorneys' fees simply because Hughes and Dinneen chose to withdraw one of their counterclaims, it would discourage future parties from withdrawing claims when advisable, and waste judicial resources.

199 POB at 32.

evidence 4) demonstrate Respondents in subjective bad faith violated or obstructed that right.[200]

In *Judge v. City of Rehoboth Beach*, the court awarded the plaintiffs their attorneys' fees because although "the record show[ed] . . . defendants were faced with a mountain of evidence, including legal opinions, legal authority and judicial declarations" demonstrating the weakness of their position, they still persisted and forced plaintiffs to take legal action to vindicate their established legal rights.[201] In *Carlson v. Hallinan*, this Court found the defendants' actions in forcing a director to file suit to vindicate his well-known right to inspect the company's books and records to research a potential breach of fiduciary duty evidenced bad faith.[202]

Here, unlike the situations in *Judge* and *Carlson*, the Estate has not shown through clear evidence it had an established right to the monies Hughes obtained from Mrs. Carpenter, except for the telephone transfers. The Estate has not shown Mrs. Carpenter was incompetent before Mrs. Fiechter became her attorney-in-fact, thus her alleged gifts were only *voidable*, not void, transactions.[203] The Estate had no clearly established right to those monies in the sense that a judicial action should have been unnecessary to vindicate its rights. Similarly, the Estate had no clearly established right to interest, especially before the Court ruled on its claims for breach of fiduciary duty.

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200 *See Carlson*, 925 A.2d at 545.

201 1994 Del. Ch. LEXIS 55, at *6-7 (Apr. 29, 1994).

202 *See* 925 A.2d at 545-46.

203 *See Schock v. Nash*, 732 A.2d 217, 225-26 (Del. 1999).

Hughes' telephone transfers pose a closer question, but I need not decide that issue. Having concluded those transfers represent egregious pre-litigation conduct, I have awarded the Estate its attorneys' fees and expenses through September 7, 2006, which includes almost a year of this litigation.[204] I find no basis for any additional award, even assuming Hughes' defense of the telephone transfers forced the Estate to take legal action to enforce a clearly established legal right.

After Hughes' payment of the $175,500 in September 2006, the litigation focused on determining the following issues: whether the Estate was entitled to be reimbursed for all of their attorneys' fees and expenses, which raises questions of "fees on fees," among other things; whether Hughes and Dinneen were entitled to the testamentary gifts specified in Mrs. Carpenter's Trust; and whether any party was entitled to pre-judgment interest. Both sides strenuously advanced their positions on all of these issues. I cannot say Hughes or Dinneen proceeded vexatiously or in bad faith in that regard. In particular, their opposition to the Estate's request for attorneys' fees was not egregious or in bad faith and thus does not justify an award of fees on fees.[205] Similarly, as discussed in more detail in Part II.E., *infra*, I do not consider Hughes' and Dinneen's prosecution of their counterclaims to have been either vexatious or in bad faith.

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204 Without commenting on the reasonableness of the attorneys' fees involved, I note that, as of August 25, 2006, the Estate's counsel reportedly had billed it $ 223,938.95 for services rendered. *See* Letter from the Estate's counsel to the Court, Dec. 20, 2006 at Ex. 2 (schedule of the Estate's attorneys' fees from Oct. 17, 2005 until Nov. 21, 2006).

205 *See Carlson v. Hallinan*, 925 A.2d 506, 546 (Del. Ch. 2006) (citing *Dunlap v. Sunbeam Corp.*, 1999 WL 1261339, at *6 (Del. Ch. July 9, 1999)).

C. To What Extent May the Estate Claim Restitution From the Grosses?

The Estate claims the Grosses were unjustly enriched and are therefore, "jointly and severally liable with Hughes to the Estate for amounts received directly or indirectly from Mrs. Carpenter."[206] The Grosses argue the Estate's claim became moot when Hughes returned the money.

"A person obtains restitution when he has been restored to the position he formerly occupied, either by the return of something which he formerly had or by the receipt of its equivalent in money."[207] "Restitution serves to deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses."[208]

For a court to order restitution it first must find the defendant was unjustly enriched at the expense of the plaintiff.[209] "Unjust enrichment is . . . the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[210] "The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation

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206 POB at 38.

207 66 AM. JUR. 2D, *Restitution and Implied Contracts* § 1 (2007).

208 *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999) (internal quotation omitted).

209 *See Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988).

210 *Id.* (quoting 66 AM. JUR. 2D, *Restitution and Implied Contracts* § 3 (1973)).

between enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law."[211]

There is no real dispute the Grosses were unjustly enriched; they secured a benefit, and it would be unconscionable to allow them to retain that benefit. Thus, they are susceptible to a claim for unjust enrichment.[212] The Grosses argue, however, the Estate's claim is moot, or in the alternative, is limited to the $22,000 given to them directly by Mrs. Carpenter and subject to any pre-judgment interest.

1. Is the Estate's claim moot?

The Grosses contend the Estate's claim is moot because when Hughes returned the $175,500 principal amount in dispute to the Estate, she effectively repaid the $22,000 the Grosses received from Mrs. Carpenter. Otherwise, they assert, the Estate would be receiving its money twice.[213] The Estate responds that the Grosses' claim has no basis in fact or law.[214]

The disputed checks and transfers from the accounts of Mrs. Carpenter totaled $175,500. Hughes paid that amount to the Estate on September 7, 2006 in connection with the resolution of the State of Delaware's criminal proceedings against her. The Grosses argue the $175,500 was intended to cover all amounts allegedly misappropriated

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211 *Nash v. Schock*, 1998 Del. Ch. LEXIS 139, at *5 (July 23, 1998) (citing *Cantor Fitzgerald L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998)).

212 *See Schock*, 732 A.2d at 232.

213 *See* Lauri and Brian Gross' Post Trial Answering Br. ("GAB") at 13-14.

214 PRB at 25.

from Mrs. Carpenter, including any money received by them.[215] There is no evidence of any agreement, however, between Hughes and the Estate or the State as to how her payment would be allocated in terms of the various claims the Estate has asserted against Hughes. Indeed, the Estate contends the payment must be applied first to reimburse it for interest due on the amounts owed and for its attorneys' fees and expenses, before being used to reduce the outstanding principal.[216]

Based on these continuing disputes, I hold the Estate's claim against the Grosses is not moot. The Estate properly may seek the amount to which the Grosses were unjustly enriched, subject to the requirement that it may not recover its funds twice.

2. To what degree have the Grosses been unjustly enriched?

The Estate contends the Grosses have been unjustly enriched by at least $34,700, $22,000 from the checks Mrs. Carpenter signed to the Grosses, and $12,700 given to them by Hughes between March and October 2005. The Grosses deny the existence of any evidence of additional sums paid to them above the $22,000 in checks they received from Mrs. Carpenter.

None of the parties cite precedent directly applicable to this situation. The Estate relies on the Restatement (First) of Restitution for the proposition "that where a person wrongfully mingles money of another with money of his own, the other is entitled to

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215 *See* GAB at 14. The Grosses assert the Estate also understood the $175,500 payment to be a return of principal. *See id.* (citing POB at 17, 23). Their citations, however, do not show the Estate made any such agreement or admission.

216 *See* POB at 34 (citing 70 C.J.S. *Payment* § 61, 65; 28 RICHARD A. LORD, WILLISTON ON CONTRACTS § 72:20).

obtain full restitution out of the mingled funds."[217] That proposition, however, does not address the liability of innocent third parties like the Grosses, who have received money from a wrongdoer after he has commingled ill-gotten funds with his own. The rule allowing a claimant to obtain his funds from a wrongdoer's commingled funds holds the wrongdoer, not the claimant, responsible for the wrongdoer's failure to keep his innocently derived funds separate from those he obtained wrongfully.[218] This principle would apply to Hughes, but not necessarily to the Grosses.

The Estate alleges Hughes indirectly transferred $12,700 of Mrs. Carpenter's funds to the Grosses based on a series of mostly small payments between March and October of 2005.[219] Of the thirty-three transactions listed from March 8 to October 24, 2005, thirty-one are for $250 or less (with the vast majority being around $100). The Estate has failed to prove this plethora of small transactions involved Mrs. Carpenter's funds.

Two of the payments Hughes made to the Grosses, however, are sufficiently large and temporally proximate to Hughes' misappropriations that I find, under the preponderance of the evidence standard, that they did involve Mrs. Carpenter's funds. The first for $2,000 on August 9 occurred only six days after Hughes transferred $12,000

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217 PRB at 26 (citing RESTATEMENT (FIRST) OF RESTITUTION § 209 (1937)).

218 *See* In re *Martin Fein & Co.*, 43 B.R. 623, 628 (Bankr. S.D.N.Y. 1984) (citing 5 SCOTT ON TRUSTS § 515 (3d ed. 1967) in the context of preservation of a trust fund claimant's rights to funds commingled by trustor).

219 *See* JX 20 ¶ 2 (Lauri Gross' Resp. to Pet'r's First Set of Interrogs. Directed to Resp't Lauri Gross).

from Mrs. Carpenter's account. The second transfer of $7,000 on August 26 was made on the same day Hughes transferred $11,000 of Mrs. Carpenter's funds to herself. The Grosses and Hughes have made no persuasive showing that Hughes made either of those transfers from her own funds.

Thus, I conclude the Grosses were unjustly enriched by the two checks totaling $22,000 signed by Mrs. Carpenter on March 11, 2005, the $2,000 Hughes gave to the Grosses on August 9, and the $7,000 Hughes gave to the Grosses on August 26, 2005. Furthermore, the Grosses have been unjustly enriched through having the use of those funds from the time of their receipt. I therefore also hold the Grosses liable for interest on the $31,000 they received in accordance with the rate and method of computation determined in Part II.D, *infra*.

D. Interest

The Estate asserts it is entitled to an award of compound interest, at the legal rate, on the amounts misappropriated by Respondents.[220] Respondents urge the Court to deny interest because Hughes and Dinneen did not breach their respective fiduciary duties to Mrs. Carpenter; in the alternative, they contend the Court should use its discretion to limit any award of interest to the rate earned by Mrs. Carpenter's Special Account (0.2%).[221]

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220 *See* POB at 39.

221 *See* RAB at 30-32. Respondents asserted an alternative rate of 4% that is statutorily set under Delaware law for pecuniary bequests. *See* Post-trial Tr. at 95 (citing 12 *Del. C.* § 2312(c)); CC ROB at 36 n.23. Respondents also suggested that rate for their requested interest on their testamentary gifts in the Trust. *See* CC ROB at 35-36.

As discussed *supra*, Hughes and Dinneen breached their fiduciary duty to Mrs. Carpenter. "A successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues."[222] "The purpose of prejudgment interest is to compensate plaintiffs for losses suffered from the inability to use the money awarded during the time it was not available."[223] Therefore, the Estate is entitled to an award of interest.

The remaining disputes center on the calculation of interest: (1) the applicable rate, (2) whether it is simple or compounded, and (3) the duration of time over which interest is due. With respect to the applicable rate, the Estate seeks to apply Delaware's legal rate of interest under 6 *Del. C.* § 2301.[224] Respondents would limit the rate to 0.2% because that was the rate paid on balances in the Special Account.[225]

"While the legal rate of interest has historically been the benchmark for pre-judgment interest, a court of equity has broad discretion, subject to principles of fairness,

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222 *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) (citing *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del. 1966)).

223 *Trans World Airlines, Inc. v. Summa Corp.*, 1987 Del. Ch. LEXIS 373, at *3 (Jan. 21, 1987) (citing *Felder v. Anderson, Clayton & Co.*, 159 A.2d 278, 287 (Del. Ch. 1960); *Universal City Studios, Inc. v. Francis I. duPont & Co.*, 334 A.2d 216, 222 (Del. 1975)), *aff'd Summa Corp.*, 540 A.2d at 409-10.

224 "Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due . . . ." 6 *Del. C.* § 2301(a).

225 Respondents make no colorable argument for their alternative contention for the application of 4% under 12 *Del. C.* § 2312(c). That section provides interest on pecuniary bequests, Respondents have not shown it applies to the determination of interest for voided transactions resulting from a breach of fiduciary duty.

in fixing the rate to be applied. In the Court of Chancery the legal rate is a mere guide, not an inflexible rule."[226] "In selecting the interest rate the trial court [may] consider[] the nature of the plaintiff, the nature of the wrong to be remedied, and the peculiar facts of the case."[227] The fiduciary must not profit personally from his conduct, and the principal or beneficiary must not be harmed by that conduct.[228] Moreover, "where, as is true here, issues of loyalty are involved, potentially harsher rules come into play. Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly."[229]

The Special Account was essentially a large checking account into which trust income was deposited, and out of which money was withdrawn to fund Mrs. Carpenter's Household and Regular Accounts. I find no equitable basis for limiting an award of interest to the minimal rate attained in the Special Account. As to the interest Mrs. Carpenter lost, the appropriate rate would be that which she was earning in her trust accounts. With respect to the benefit Hughes received, an appropriate rate would be the interest rate on the credit card balances she paid down using Mrs. Carpenter's funds. The

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226 *Summa Corp.*, 540 A.2d at 409.

227 *Id.*

228 *See Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996).

229 *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999) (quoting *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996) (relying on *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939))).

parties, however, did not present evidence on any of those rates. In the absence of record support for a reasonable alternative, I will award interest at the legal rate.[230]

Although Delaware courts traditionally have disfavored compound interest, the Court of Chancery has discretion to award compound interest.[231] Respondents argue "the Court should not compound the interest because the interest that Mrs. Carpenter would have received had the money remained in her account would not have been compounded."[232] Respondents, however, point to nothing in the record indicating Mrs. Carpenter did not receive compound interest. The Court infers the opposite, especially as to Mrs. Carpenter's trust accounts. Based on the nature of Hughes' and Dinneen's fiduciary duty violations, the Court awards pre-judgment interest on the resulting damages, compounded quarterly.[233]

Turning to the time period over which interest should accrue, "[t]he general rule is that interest starts on the date when payment should have been made."[234] Respondents do

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230 In all probability, the legal rate represents an appropriate intermediate point between what Mrs. Carpenter may have earned in her trust accounts and the benefit Hughes received from reducing her credit card debt.

231 *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002).

232 RAB at 32.

233 As the Supreme Court observed in *Gotham Partners*, "the rule or practice of awarding simple interest, in this day and age, has nothing to commend it -- except that it has always been done that way in the past." 817 A.2d at 173 (quoting *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 929 (Del. Ch. 1999)).

234 *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 782 (Del. 1966).

not disagree.[235] Pre-judgment interest therefore accrues from the date each check was written and each transfer was made. Respondents contest, however, the Estate's request for interest up to the date of the judgment.

"[A] court of equity has the power to mold its decrees to deny interest to a plaintiff-wrongdoer . . . ."[236] Respondents first argue the Court should deny interest after the Complaint was filed in November 2005 because Respondents had offered to settle the case and pay all monies due. Respondents accuse the Estate of pursuing this action "purely out of vindictiveness," and "not to secure an established right."[237] As an example of the alleged vindictiveness, Respondents cite the Estate's demand for their attorneys' fees as part of the earlier settlement negotiations. Having decided to award the Estate some of its attorneys' fees, however, I reject the challenge to the Estate's good faith in requesting their fees. Thus, Respondents have not shown the Estate acted wrongfully so as to justify reducing their award of interest.

In the alternative, Respondents request the Court to deny interest after September 7, 2006, arguing Hughes' $175,500 payment was a return of principal. The Estate, in the context of pursuing a judgment against the Grosses, argues that it "allotted"

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235 *See* Post-trial Tr. at 94-95.

236 *Trans World Airlines, Inc. v. Summa Corp.*, 1987 Del. Ch. LEXIS 373, at *13 (Del. Ch. Jan. 21, 1987) (citing *Levien v. Sinclair Oil Corp.*, 314 A.2d 216, 223 (Del. Ch. 1973)), *aff'd*, 540 A.2d 403 (Del. 1988).

237 RAB at 33.

Hughes' payment to "interest and expenses of recovery," not principal.[238] Thus, I must determine how to apply Hughes' payment among the outstanding principal (the sums she misappropriated), interest, and the Estate's attorneys' fees.

"[T]he court, after having focused on the specific nature of the dispute at hand, enjoys substantial discretion to enter an order awarding 'such relief as justice and good conscience may require.'"[239] In that regard, "as with all equitable remedies, the court will look to the effects its order may have on others -- on defendants surely, but on others not present as well, and on the public generally -- before granting such relief. A court of equity will, it is said, balance the equities."[240] Thus, in determining how to allocate Hughes' payment, I must be mindful of the effects the allocation will have on Hughes (who committed an egregious breach of her fiduciary duty), Dinneen (who was sufficiently negligent to have breached his duty, but whose complicity beyond that was not proven), and the Grosses (who were relatively blameless). The Court's award of

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238 *See* POB at 38.

239 *JW Acquisitions, LLC v. Lloyd Shulman & Weinstein Enters.*, 2006 Del. Ch. LEXIS 189, at *10 (Oct. 25, 2006) (quoting *Lichens Co. v. Standard Com. Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944)); *Wright v. Scotton*, 121 A. 69, 72 (Del. 1923) ("A court of equity may adapt its relief to the particular rights and liabilities of each party and determine the interests of all so far as they are legitimately connected with the subject-matter and properly within the scope of the adjudication."); s*ee also* 70 C.J.S. *Payment* § 60 (2007) ("As a general rule, where a payment is not applied by the debtor or the creditor, the application will be made by the court in such a manner, in view of all of the circumstances of the case, as is most in accord with justice and equity and will best protect and maintain the rights of both debtor and creditor . . . .").

240 *Braunschweiger v. Am. Home Shield Corp.*, 1989 Del. Ch. LEXIS 142, at *17-18 (Oct. 26, 1989).

attorneys' fees reflects the Respondents' varying degrees of culpability. Hughes is liable for the attorneys' fees through September 7, 2006; Dinneen is not. No other attorneys' fees are awarded. Furthermore, the Estate did not seek to recover fees from the Grosses.

Against this background, I conclude that balancing the equities in these circumstances requires that no portion of the $175,500 payment by Hughes on September 7, 2006 be allocated to the reimbursement of the Estate's attorneys' fees and expenses. Although I have held Hughes alone bears responsibility for those expenses, allocating her payment to them, as the Estate urges, could eviscerate that ruling. The record suggests Hughes' financial position is sufficiently precarious that she might not be able to satisfy fully a judgment for the attorneys' fees, principal, and accrued interest she owes. In that case, allowing the $175,500 payment to be applied first to the attorneys' fees and expenses due would have the effect of making Dinneen and the Grosses indirectly liable for much of those fees and expenses. I do not consider that equitable, especially in this case, where as discussed in Part II.E, *infra*, Dinneen, based on his breach of fiduciary duty and related termination for cause, effectively has forfeited a testamentary gift from Mrs. Carpenter's Trust of over $300,000, based on his more than thirty years in her employ. The additional fact that Dinneen's loss of that gift will redound to the benefit of the Estate and Mrs. Fiechter, among others, further tilts the balance of the equities against allocating any of Hughes' payment to attorneys' fees.

I accept the Estate's argument, however, that the payment should be applied first to any accrued interest and then used to reduce the outstanding principal. Interest represents a part of the damages suffered by the Estate for which all Respondents are

liable. Moreover, allocating a partial payment of an obligation for which both a principal amount and interest are due to pay off the interest first is consistent with general common law principles.[241]

The practical effect of these rulings is as follows. The total interest due on the funds misappropriated by Hughes as of September 7, 2006 was $21,147.61.[242] Applying her $175,500 payment to satisfy that amount and then to reduce principal, the amount of damages, excluding attorneys' fees and expenses, remaining outstanding as of that date was $21,147.61. Hughes, Dinneen, and Lori and Brian Gross are jointly and severally liable for that amount plus interest from September 7, 2006 to the date of judgment at the

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241 "A voluntary payment will, absent an agreement to the contrary, be applied to the interest rather than to the principal of a debt. . . . [T]he rule thus ensures that the creditor is fully compensated for the loss of use of the principal." 28 RICHARD A. LORD, WILLISTON ON CONTRACTS § 72:20 (2006).

242 For each misappropriation, the quarterly compounded interest owed as of September 7, 2006 is shown in the Table below. This Court takes judicial notice of the Federal Reserve's historical discount rate under D.R.E. 201(b)(2). *See* HISTORICAL DISCOUNT RATES, FEDERAL RESERVE, http://www.frbdiscountwindow.org/ primarysecondary.xls.

Misappropriation Date	Hughes' Total Misappropriations	Federal Discount Rate	Legal Interest Rate	Accrued Interest as of Sept. 7, 2006
Mar. 11, 2005	$ 55,000.00	3.50%	8.50%	$ 7,359.83
Apr. 29, 2005	$ 45,000.00	3.75%	8.75%	$ 5,616.86
May 30, 2005	$ 9,000.00	4.00%	9.00%	$ 1,080.58
May 31, 2005	$ 23,500.00	4.00%	9.00%	$ 2,815.11
Aug. 3, 2005	$ 12,000.00	4.50%	9.50%	$ 1,300.47
Aug. 26, 2005	$ 11,000.00	4.50%	9.50%	$ 1,120.18
Sept. 30, 2005	$ 10,000.00	4.75%	9.75%	$ 944.59
Oct. 12, 2005	$ 10,000.00	4.75%	9.75%	$ 909.99

legal rate of 11.25%, calculated as prescribed in this opinion. In addition, Hughes is liable for the Estate's attorneys' fees and expenses to the extent set forth herein.[243]

E. Respondents' Counterclaims

Respondents Hughes and Dinneen asserted three counterclaims: (I) a request for declaratory relief, (II) a claim against Mrs. Fiechter for tortiously interfering in the testamentary gift, and (III) a claim against WTC to compel distribution of that gift.[244] Count I of the counterclaims seeks a declaratory judgment that the transfers to Hughes were valid and binding, neither Hughes nor Dinneen breached their fiduciary duties to Mrs. Carpenter, and Hughes' repayment of $175,500 mooted the Estate's claims. For the reasons previously discussed, I reject all of these assertions. Accordingly, I deny the declaratory relief requested in Count I.

In Counts II and III of their counterclaims, Hughes and Dinneen assert alternative theories for recovering their testamentary gifts under the Trust. First, Hughes and Dinneen urge the Court to excuse their nonperformance of the condition of the Trust that they be in the employ of Mrs. Carpenter at the time of her death due to impossibility of performance. Alternatively, they claim they are entitled to an award of money damages

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243 As discussed in note 189, *supra*, the Court only awards pre-judgment interest on the misappropriations, not on the award of the Estate's attorneys' fees and expenses.

244 Hughes and Dinneen filed separate answers and counterclaims, but the allegations in the three counts in issue are substantively the same in their respective, operative pleadings. *Compare* Dinneen's Amend. Ans. and Countercls., Countercl. ¶¶ 13, 25, 32, & 37 *with* Hughes' Ans. to 2d Amend. Verified Compl. and Countercls., Countercl. ¶¶ 13, 25, 32, & 37.

against the Estate for breach of the implied covenant of good faith and fair dealing, or against Mrs. Fiechter personally for tortious interference with contract or expectancy.[245] Hughes' and Dinneen's counterclaims also seek their attorneys' fees and pre-judgment interest. The Estate counters that a finding of Hughes and Dinneen's breach of their fiduciary duties to Mrs. Carpenter "disposes of each and every one of the counterclaims."[246]

Hughes and Dinneen contend they should still take under the Trust because the condition precedent to their taking, remaining employees of Mrs. Carpenter until her death, became impossible after they were fired by Mrs. Fiechter. The Estate answers that the Respondents' "breaches of fiduciary obligations, misappropriations and concealments," were the primary cause of the termination of Hughes and Dinneen, rendering the impossibility doctrine inapplicable.[247] In their reply brief, Hughes and Dinneen effectively admit that if they are to blame for their own firing, in the sense of having breached their fiduciary duties, the case law they cited on impossibility is inapplicable.[248] Hughes and Dinneen's other two arguments in favor of receiving their

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245 Hughes and Dinneen do not make clear which of these arguments is made under which count of their counterclaim. The answer is immaterial to the Court's analysis.

246 Post-trial Tr. at 4.

247 CC ROB at 10.

248 Hughes and Dinneen explicitly made this admission with respect to their impossibility of performance argument. *See* CC RRB at 6. As a matter of logic it probably applies to their other theories, as well. *See* CC RRB at 9 (implicitly admitting the Estate would not be liable for breach of the implied covenant of

testamentary gifts from the Trust were that the Fiechters breached the implied covenant of good faith and fair dealing, and that Mrs. Fiechter tortiously interfered with their expectancy under the Trust. The premise of both those arguments is that Mrs. Fiechter fired Hughes and Dinneen to avoid the Estate's having to pay the gifts to them under the Trust. I reject that premise and find Mrs. Fiechter fired Respondents based on the same conduct that caused me to conclude they breached their fiduciary duty to Mrs. Carpenter. In that sense, Mrs. Fiechter had good cause to terminate the relationship with both Hughes and Dinneen.

I further find the evidence does not support Respondents' allegation that Mrs. Fiechter fired them to avoid having to pay them under the Trust. The Fiechters, in cooperation with the Schutts, were considering a potential severance payment to Dinneen, Hughes, and Yarnell, contemporaneously with their decision to transition the handling of Mrs. Carpenter's finances to Mr. Fiechter's office. In that context, it was reasonable for them to look into the provisions made for those employees in the Trust. Hughes and Dinneen failed to show that avoidance of their testamentary gifts motivated their termination. Rather, the evidence demonstrates the Fiechters had a legitimate concern about ongoing, surreptition misappropriation of Mrs. Carpenter's funds by at least Hughes. Accordingly, I conclude that Hughes and Dinneen's arguments that there

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good faith and fair dealing if Mrs. Fiechter, as attorney-in-fact, was found to have terminated Hughes and Dinneen for good cause); *id.* at 12 (implicitly admitting Mrs. Fiechter would not be liable for tortious interference if she was found to have been acting within the scope of her agency).

was a breach of the implied duty of good faith and fair dealing and tortious interference with their expectancy under the Trust both lack merit.

I therefore deny the relief sought in Counts II and III of the counterclaims.[249] By the relatively summary nature of this conclusion, however, I do not mean to imply I found Hughes' and Dinneen's counterclaims to be frivolous, vexatious, or brought in bad faith. For the most part, although they ultimately did not succeed, Hughes and Dinneen advanced colorable defenses for their actions and plausible evidence and arguments of self-interest on the part of the Fiechters and of actions arguably contrary to the wishes and interests of Mrs. Carpenter.

Two things primarily caused this litigation to continue after Hughes repaid the $175,500 she diverted from Mrs. Carpenters' account: (1) the Estate's claim for attorneys' fees and expenses; and (2) the counterclaims of Hughes and Dinneen directed to recovering the testamentary gifts they credibly allege were intended to substitute for their pensions. As mentioned in Part II.B.3, *supra*, I have found that neither Hughes nor Dinneen acted vexatiously or in bad faith in contesting those issues during the post-September 7, 2006 portion of this litigation.[250] To elaborate on the reasons for that

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249 Hughes and Dinneen contend that, if they are found to have breached their fiduciary duties to Mrs. Carpenter, this Court ought to "offset" their liability for that breach against their pensions under the Trust. *See* Post-trial Tr. at 84-85. I find that argument unpersuasive because they cite to no applicable precedent, and do not otherwise sufficiently address the Trust's unambiguous requirement that they be in Mrs. Carpenter's employ at the time of her death in order to receive under the Trust.

250 The legal underpinnings of Hughes and Dinneen's argument for breach of the implied covenant are legitimately open to question. In particular, "the [covenant

conclusion, I offer a few additional comments on the ultimately rejected counterclaims of Hughes and Dinneen.

Respondents correctly assert, "[w]here performance of a condition to a bequest becomes impossible, under certain circumstances equity will excuse the performance and sustain the gift."[251] "If a condition precedent becomes impossible by reason of the act or default of testator, such act or default eliminates the condition."[252] However, "if

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of good faith and fair dealing] limits at-will employment only in very narrowly defined categories." *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 441 (Del. 1996). Courts have been reluctant to recognize a broad application of the covenant out of a concern it could effectively abolish at-will employment. *See id.* at 442. Yet, the claim was at least colorable. *See Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (noting the implied covenant of good faith and fair dealing "attaches to every contract"); *Pressman*, 679 A.2d at 442 (implied covenant "protect[s] an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee . . . ."); *see also Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (court found bad faith where employer terminated employee to avoid payment of bonus commissions).

251 CC ROB at 17.

252 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS (hereinafter "PAGE ON WILLS") § 44.7 (2005). Neither party pointed to any Delaware case applying the doctrine of impossibility to a testamentary grant, and the Court has found none. The doctrine of impossibility, however, has been recognized by Delaware courts in other contexts. *See City of Newark v. NVF Co.*, 1980 Del. Ch. LEXIS 567, at *10 (Jan. 10, 1980) (citing *Martin v. Star Publ'g Co.*, 126 A.2d 238, 243 (Del. 1956)). The Estate made no persuasive argument against the applicability of the impossibility of performance to testamentary bequests. *See* CC PAB at 8.

performance is prevented by the party who claims the benefit of the breach, he cannot take advantage of such breach . . . ."[253]

Hughes and Dinneen cite two principal cases for the application of the doctrine of impossibility of performance in this context. Although both cases are distinguishable, they illustrate the fact intensive nature of Hughes' and Dinneen's counterclaims.

Respondents' first case, *Martin v. Young*,[254] presents facts similar to this case. The testatrix left real property (her home) to the grantee, her personal nurse, on the condition of continued employment till the time of testatrix's death. The testatrix, however, gave a power of attorney to a bank, including the authority to employ or dismiss her employees. Five days before the testatrix's death, the bank moved the testatrix to a nursing home and fired the nurse, ostensibly to lower the testatrix's nursing care costs. There also were allegations the nurse had "extracted monies from the [testatrix's] household utilizing them for her own benefit."[255] The nurse subsequently sued to enforce the gift. Reversing the trial's courts summary judgment decision in favor of the bank, the court declined to apply the "rule at common law that, before a devise of real property made upon a condition precedent could take effect, the condition had to be performed even though performance was rendered impossible through no fault of the devisee."[256] Instead, the court found, the "overwhelming weight of authority . . . seems to recognize the doctrine

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253 PAGE ON WILLS § 44.8 (2005).

254 462 A.2d 77 (Md. Ct. Spec. App. 1983).

255 *Id.* at 78.

256 *Id.* at 80.

of substantial performance."[257] The court remanded for further factual development, in part at least to determine whether the nurse, given the allegations of bad faith conduct, had actually substantially performed. Thus, the *Martin* case provides some support for Respondents' position, but also implicitly supports the proposition that Hughes' and Dinneen's wrongful conduct would preclude application of the doctrine of impossibility in this case.

The second case, In re *Estate of Bridge*,[258] is also instructive. There, the testator, a doctor with a large medical practice, conditioned several testamentary gifts on the legatees' continued employment until the time of his death. A year after he executed his will, his health severely deteriorated to the point he became an invalid and shut down his practice. The court framed the issue as "whether the enforced closing of the testator's business, which rendered impossible a fulfillment of the condition precedent by the employees, *was such an event* as was intended by him to have the effect of cutting off their bequests."[259] Similar to this case, the court in the *Estate of Bridge* found the testator probably intended that his employees not benefit under his will if they were terminated for cause or left voluntarily. Further finding the legatees were not responsible for the termination of their employment, the court found the "condition that they should remain in the employ of the testator until his death was complied with to the full extent of their

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257 *Id.* at 79.

258 253 P.2d 394 (Wash. 1953).

259 *Id.* at 400.

power to do so," and upheld most of the bequests.[260] In contrast, I ultimately found Hughes and Dinneen were responsible for their own termination, and failed to comply with the condition of their continued employment to the full extent of their power to do so.

Hughes and Dinneen also presented evidence of several facts that provided at least some support for their contention Mrs. Carpenter would have wanted them to receive their pension-like gifts under the Trust even in the face of the disputes over the propriety of the transfers for the benefit of Hughes. These facts include Mrs. Carpenter's generous nature, her fondness of Hughes and Dinneen, her cajoling of them to keep working for her, her long and established tradition of making gifts or at least large payments for medical care, and her insistence that her employees strictly maintain confidentiality as to her financial affairs. In addition, Respondents adduced evidence suggesting the Fiechters might have decided to leave the CS Office before they discovered the telephone transfers and used those transfers merely as a pretext for firing the Office employees, to avoid the significant gifts to them provided for in Mrs. Carpenter's Trust. Although Respondents did not prevail on those issues, they fairly contested them on the facts and the law, and the effort expended was commensurate with the amounts in dispute. Therefore, I find Hughes' and Dinneen's pursuit of this litigation after September 7, 2006 does not fall within any exception to the American Rule and that the parties should bear their own attorneys' fees and expenses for that portion of this action.

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260 *Id.* at 404-06.

III. CONCLUSION

For the reasons stated, I hold that Respondents Dinneen and Hughes breached their fiduciary duty to Mrs. Carpenter, and that Respondents Lauri and Brian Gross were unjustly enriched in the amount of $31,000 as a result of their receipt of funds misappropriated by Hughes. The Estate is therefore entitled to recover from Dinneen and Hughes, jointly and severally, $175,500 in funds misappropriated from Mrs. Carpenter with interest at the legal rate compounded quarterly, less the $175,500 paid to the Estate by Hughes on September 7, 2006, such that as of that date the unpaid amount of damages was $21,147.61. Having further determined that the Estate is entitled to apply Hughes' payment first to the repayment of interest and then to the reduction of the outstanding principal, I will enter judgment in favor of the Estate and against Dinneen, Hughes, and the Grosses, jointly and severally, for $21,147.61 with pre-judgment interest at the legal rate compounded quarterly from September 7, 2006 to the date of the judgment.

I further hold the Estate is entitled to recover from Hughes, but not from Dinneen or the Grosses, the reasonable attorneys' fees and expenses it incurred in connection with its pre-litigation investigation of the misappropriation of Mrs. Carpenter's funds and the litigation of this matter from its inception until September 7, 2006. In all other respects, I deny the Estate's claims for attorneys' fees and expenses and for interest on such fees and expenses, except that the Estate is entitled to its costs as the prevailing party under Court of Chancery Rule 54(d). To the extent the Estate's claims for the imposition of a constructive trust and restitution seek any relief beyond what the Court has afforded, those claims are denied as moot.

Finally, all of Respondents Hughes' and Dinneen's counterclaims are dismissed with prejudice.

Within ten days of the date of this Opinion, counsel for the Estate shall: (1) file and serve its application for reasonable attorneys' fees and expenses through September 7, 2007, and any supporting documentation; and (2) prepare and file, on notice to opposing counsel, a proposed form of judgment and order implementing these rulings. Hughes may file any opposition to the Estate's requests for attorneys' fees and expenses within ten days thereafter.

IT IS SO ORDERED.