

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

**SELENA E. MOLINA**  
MASTER IN CHANCERY

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Final Report: August 25, 2021  
Draft Report: June 29, 2021  
Date Submitted: March 31, 2021

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RE: *Timothy S. Ferry, Esquire v. Kathleen E. Eide and Linda M. Stevenson, Executrix of the Estate of Bernice M. Barnes*,  
C.A. No. 2020-0585-SEM

Dear Ms. Eide and Counsel:

This is an interpleader action to resolve a dispute over who is entitled to funds being held in escrow in connection with a settlement agreement. The defendants cannot agree on who breached their agreement and what the appropriate remedy is for such breach(es). After a trial on the merits of the underlying contract dispute, I

recommend that the escrow agent continue to hold the funds and that the parties be required to specifically perform their agreement. This is my final report.<sup>1</sup>

## **I. Background<sup>2</sup>**

This dispute arises from the estate of Bernice M. Barnes (the “Decedent”) who died on January 2, 2019.<sup>3</sup> The Decedent was survived by three daughters, Linda M. Stevenson, Anne Thomas, and Cathy Lancaster.<sup>4</sup> The Decedent was predeceased by

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<sup>1</sup> This report makes the same substantive findings and recommendations as my June 29, 2021 draft report to which exceptions were filed on July 9, 2021 by the Executrix. Docket Item (“D.I.”) 37. The Executrix contests the award of fees to the Plaintiff, indicated that she would personally appear to retrieve the items as directed herein but “requests the presence of a third party as witness to the item pick up[,]” and offered to present the testimony of the courier, Mr. Dufaj. Beginning with the latter, I find it is not appropriate to supplement the trial record with Mr. Dufaj’s testimony. Going in reverse order, there is nothing in my ruling that precludes the Executrix from bringing a third party with her to witness the pickup; I agree it may be prudent to do so. And, finally, it appears the fee issue has been resolved. The Plaintiff filed a response on July 16, 2021, explaining that he is not applying for any fees in connection with this action and simply requests reimbursement of costs in the amount of \$780.75. D.I. 38. The Executrix has not filed any response, nor has she moved forward with briefing her exceptions; her opening brief was due by July 29, 2021. *See* Ct. Ch. R. 144(d)(1). As explained herein, the Plaintiff shall be entitled to reimbursement of his costs and expenses from the Executrix and the Beneficiary.

<sup>2</sup> The facts in this report reflect my findings based on the record developed at trial on March 31, 2021. *See* D.I. 35. I grant the evidence the weight and credibility I find it deserves. Citations to the hearing transcript are in the form “Tr. #.” Hearing exhibits are cited as “Exec. Ex. \_\_\_” or “Ben. Ex. \_\_\_.”

<sup>3</sup> *See In the Matter of Bernice M. Barnes*, 171276 FC, D.I. 2. “Because the Register of Wills is a Clerk of the Court of Chancery, filings with the Register of Wills are subject to judicial notice.” *Arot v. Lardani*, 2018 WL 5430297, at \*1 n.6 (Del. Ch. Oct. 29, 2018) (citing 12 *Del. C.* § 2501; *Del. R. Evid.* 202(d)(1)(C)).

<sup>4</sup> Tr. 50:10-14.

her daughter Susan Barnes, who had three children, including Kathleen Eide, the Decedent's granddaughter.<sup>5</sup>

Before she passed, the Decedent executed a last will and testament on February 22, 2018 (the "Will").<sup>6</sup> The Will named defendant Linda M. Stevenson, as executrix (the "Executrix") and provided for several specific bequests, including \$15,000.00 to Kathleen Eide (the "Beneficiary").<sup>7</sup> After the specific bequests, the Decedent directed her estate to her three surviving children.<sup>8</sup>

The Executrix was issued letters testamentary on January 16, 2019 and she went about administering the estate.<sup>9</sup> Because the Decedent was living with the Beneficiary before she passed, the Beneficiary had some of the Decedent's personal property in her home after the Decedent died.<sup>10</sup> The Beneficiary and the Executrix disagreed about how that property should be treated; were certain items gifted to the Beneficiary by the Decedent before her death or should all or certain items be provided to the Decedent's estate for probate?

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<sup>5</sup> *See* Tr. 50:18-51:3.

<sup>6</sup> Exec. Ex. A.

<sup>7</sup> *Id.* at p.2, 7.

<sup>8</sup> *Id.* at p.3.

<sup>9</sup> *In the Matter of Bernice M. Barnes*, 171276 FC, D.I. 3.

<sup>10</sup> *See* Tr. 33:17-21.

To resolve their dispute, the Executrix and the Beneficiary negotiated a return of specific items and a reduced bequest to offset any items retained by the Beneficiary that should have passed through the estate. Timothy S. Ferry, Esquire (the “Plaintiff”) served as counsel to the Beneficiary during these negotiations.<sup>11</sup> On May 18, 2020, the Plaintiff re-sent the Executrix a proposed settlement agreement, providing a short window to respond before the Beneficiary would proceed with legal action to recover her specific bequest.<sup>12</sup>

The Executrix responded to the Plaintiff’s May 18, 2020 letter with a counteroffer.<sup>13</sup> Therein, the Executrix offered to retrieve only the following items from the Beneficiary, if the Beneficiary accepted a reduced bequest of \$9,000.00:

- 5 diamond ring
- Red Chinese cabinet
- Bernice M. Barnes’ wallet
- Miscellaneous jewelry and jewelry boxes
- Circulation boots
- Hurricane walking cane<sup>14</sup>

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<sup>11</sup> *See* Ben. Ex. B.

<sup>12</sup> *Id.*

<sup>13</sup> Ben. Ex. C.

<sup>14</sup> *Id.* The Executrix also sent the Plaintiff handwritten edits to the draft agreement, changing, in pertinent part, two references from “Linda” (the Executrix’s first name) to “the Estate.” *Id.*

The parties ultimately agreed to a \$12,500.00 bequest and the return of the above items. This agreement was memorialized and fully executed on June 3, 2020 (the “Settlement Agreement”).<sup>15</sup>

The Settlement Agreement worked in steps. First, the Executrix would pay \$12,500.00 from the Decedent’s estate to the Plaintiff, representing the Beneficiary’s reduced bequest; the Plaintiff was to hold that payment in escrow until the remaining steps were completed.<sup>16</sup> Step one was completed and the Plaintiff continues to hold the funds in escrow.<sup>17</sup> Second, the Executrix was to retrieve the specified items from the Beneficiary’s home on June 7, 2020, during a two-hour window.<sup>18</sup> Step two failed.

The Executrix did not personally appear at the Beneficiary’s home to retrieve the items; Tony Dufaj attempted to take her place, but the Beneficiary refused to provide the items to Mr. Dufaj. The Executrix testified that she believed, under the Settlement Agreement, she “was to hire someone to get the furniture and things back

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<sup>15</sup> Ben. Ex. A. Interestingly, the Register of Wills docket reflects the estate was closed on June 2, 2020. *In the Matter of Bernice M. Barnes*, 171276 FC, D.I. 16.

<sup>16</sup> Ben. Ex. A at ¶1.

<sup>17</sup> See Ben. Ex. A (including a copy of a June 3, 2020 check from the Decedent’s estate).

<sup>18</sup> Ben. Ex. A. at ¶2.

from” the Beneficiary.<sup>19</sup> Per the Executrix, the estate hired Mr. Dufaj after the initial plan of sending her nephew (Jason Dorian) fell through.<sup>20</sup> The Executrix’s sister, Cathy Lancaster, confirmed that her son, Mr. Dorian, planned to go to the Beneficiary’s home on June 7, 2020, to retrieve the items.<sup>21</sup> But the night before, Mr. Dorian’s son was born and he could no longer make the trip.<sup>22</sup>

Contrary to the Executrix’s testimony that she had hired a courier on behalf of the Decedent’s estate, Ms. Lancaster confirmed that the arrangement was much less formal. When she realized Mr. Dorian would not be able to go to the Beneficiary’s home, Ms. Lancaster called the Executrix and offered to ask her neighbor, a “jack of all trades[,]” to go in Mr. Dorian’s place.<sup>23</sup> The Executrix agreed and Ms. Lancaster got Mr. Dufaj on board.<sup>24</sup> As to payment, the Executrix testified that Ms. Lancaster paid Mr. Dufaj \$100 and was reimbursed by the estate.<sup>25</sup> But Ms.

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<sup>19</sup> Tr. 47:12-13.

<sup>20</sup> Tr. 48:18-49:13.

<sup>21</sup> Tr. 66:21-23.

<sup>22</sup> Tr. 66:8-23.

<sup>23</sup> *See* Tr. 71:3-23.

<sup>24</sup> *See* Tr. 70:19-71:23.

<sup>25</sup> *See* Tr. 59:4-12.

Lancaster did not confirm such payments nor has the Executrix provided any documentation in support.

On the morning of June 7, 2020, Eric Eide, the Beneficiary's husband, was cutting his grass with his son when a minivan pulled up.<sup>26</sup> Inside was Mr. Dufaj with a handwritten note of items to retrieve.<sup>27</sup> Mr. Eide explained that he was initially inclined to give Mr. Dufaj the items but the Beneficiary was reluctant and, after reviewing the Settlement Agreement, they decided not to give anything to Mr. Dufaj because they believed the Executrix was required to retrieve the items herself.<sup>28</sup> Anne Thomas, the Executrix's sister and the Beneficiary's aunt, also believed that the Executrix would be personally retrieving the items on June 7, 2020.<sup>29</sup> She explained she was at the Beneficiary's home that day to "keep the peace" but the Executrix never appeared.<sup>30</sup> Mr. Dufaj came instead, and he left empty handed.<sup>31</sup>

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<sup>26</sup> Tr. 14:9-13.

<sup>27</sup> *Id.*

<sup>28</sup> Tr. 14:16-24.

<sup>29</sup> Tr. 18:20-21.

<sup>30</sup> Tr. 18:15-20:10.

<sup>31</sup> Although Mr. Dufaj was identified as a witness by the Executrix, he did not appear and testify at trial. *See* D.I. 31. I decline to attribute any hearsay comments offered by the other witnesses to him, in his absence. Specifically, I give no weight to the testimony from the Beneficiary, Mr. Eide, and Ms. Thomas that Mr. Dufaj did not know who the Executrix

After the failed transfer, both parties accused the other of breaching the Settlement Agreement. The Plaintiff wrote to the parties on June 15, 2020, explaining that he was “unable to release the funds to either party” and would, instead, “send the funds to the Delaware Court of Chancery by virtue of an Interpleader.”<sup>32</sup> The Executrix responded on June 26, 2020, that she was not required to personally appear at the Beneficiary’s home, “the estate hired a private courier[,]” and the Beneficiary breached the Settlement Agreement by failing to return the items.<sup>33</sup> The Executrix offered to renegotiate the Settlement Agreement to include a grandfather clock on the list of items to be returned and to require the Beneficiary to provide the Decedent’s estate with the username and password for the Decedent’s Facebook page.<sup>34</sup> If the Beneficiary did not agree to return the grandfather clock, the Executrix proposed that the Beneficiary buy it from the estate by reducing her bequest.<sup>35</sup> The Executrix offered to exchange all items (including the grandfather clock) at Ms. Lancaster’s home on June 28, 2020 or July 5, 2020.<sup>36</sup>

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was when asked, nor do I give any weight to the testimony from the Executrix that Mr. Dufaj was treated with hostility at the Beneficiary’s home.

<sup>32</sup> Ben. Ex. D.

<sup>33</sup> Ben. Ex. E.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* See also Tr. 67:11-68:2.



The Plaintiff responded to the Executrix’s letter on the Beneficiary’s behalf, on July 1, 2020.<sup>37</sup> The Plaintiff disputed much of the Executrix’s letter but did offer to have the Beneficiary deliver the original items to Ms. Lancaster’s home on July 5, 2020.<sup>38</sup> The Plaintiff’s letter made clear that the Beneficiary would not be renegotiating the Settlement Agreement to add any items or to reduce the agreed \$12,500 bequest.<sup>39</sup> The Plaintiff concluded with a direction to the Executrix to “respond with [her] position as soon as possible.”<sup>40</sup>

On July 2, 2020, the Executrix responded, rejecting the counteroffer, and making it clear that she would only agree to delivery if the grandfather clock was included.<sup>41</sup> The Beneficiary did not agree to return the grandfather clock. Nonetheless, Ms. Lancaster testified that on July 5, 2020, she expected the Beneficiary to return the items and “waited in [her] house for two hours.”<sup>42</sup>

The Executrix demanded the Plaintiff return the escrowed funds to the Decedent’s estate while the Beneficiary sought to keep the Settlement Agreement in

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<sup>37</sup> Ben. Ex. F.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Ben. Ex. G.

<sup>42</sup> Tr. 67:23-68:2.

place by rescheduling a retrieval of the original list of items. The Plaintiff filed his complaint in interpleader on July 16, 2020, both parties responded, and trial was held on March 31, 2021.<sup>43</sup>

## II. Analysis

This case presents classic issues of contract law. Namely, what did the Settlement Agreement require of each party, who breached, did that breach excuse performance by the other party, and what is the appropriate remedy. Before I turn to these issues, I pause to address subject matter jurisdiction. I conclude with a brief section on the Plaintiff's request for expenses incurred in connection with this action.

### A. This Court has subject matter jurisdiction.

“The issue of subject matter jurisdiction is ‘crucial,’ and the Court is obligated to ensure it exists, even if it must raise the issue *sua sponte*.”<sup>44</sup> I do so here, appreciating that this Court's jurisdiction over interpleader actions is limited. Although interpleader actions have equitable roots, the Superior Court can “provide an adequate remedy and this court no longer has jurisdiction over interpleader actions” when the basis for that jurisdiction is the lack of an adequate remedy at

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<sup>43</sup> D.I. 1, 6, 14, 24, 34-35.

<sup>44</sup> *Critchfield v. Engfer*, 2016 WL 2755933, at \*1 (Del. Ch. May 9, 2016) (citations omitted).

law.<sup>45</sup> This Court has, however, continued to exercise jurisdiction over interpleader actions where there is an underlying equitable claim or request for relief.<sup>46</sup> This Court also entertains interpleader actions that arise out of or relate to Delaware estates.<sup>47</sup> In both situations, this Court, having jurisdiction over the underlying dispute between the parties, can hear the entire controversy.<sup>48</sup>

This is one such case. The underlying dispute relates to an agreement between an executrix of a Delaware estate (the Executrix) regarding the probate assets and specific bequest to a beneficiary of the estate (the Beneficiary). The Beneficiary

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<sup>45</sup> *Poppiti v. Newport Garden Apartment Assoc.*, 1990 WL 102442, at \*1 (Del. Ch. June 20, 1990) (citing 10 *Del. C.* § 342). *Cf. Hastings v. Cropper*, 3 Del. Ch. 165, 165 (Del. Ch. 1867) (“A bill of interpleader is an appropriate remedy in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty or thing, and where *a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant.*”) (emphasis in original).

<sup>46</sup> *See, e.g., Symetra Life Ins. Co. v. King*, C.A. No. 10912-CB (Del. Ch.); *Dentsply Intern., Inc. v. Vaughn*, 1996 WL 757288, at \*1 (Del. Ch. Sept. 27, 1996) (ruling on an interpleader action that “was incidental to” adult guardianship issues); *Kimmel, Carter & Roman, P.A. v. Herald*, 1997 WL 33177181, at \*1-\*2 (Del. Ch. May 23, 1997) (issuing a ruling in an interpleader action that involved an underlying claim for an equitable lien to prevent unjust enrichment).

<sup>47</sup> *See, e.g., Farm Family Cas. Ins. Co. v. Noble*, 2001 WL 765460, at \*1 (Del. Ch. June 7, 2001).

<sup>48</sup> *See Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 974 (Del. Ch. 2016) (“The Court of Chancery also can obtain subject matter jurisdiction over purely legal claims through its clean-up doctrine. That doctrine, also known as ancillary jurisdiction, provides the Court of Chancery with jurisdiction to resolve purely legal causes of action that are before it as part of the same controversy over which the Court originally had subject matter jurisdiction in order to avoid piecemeal litigation.”) (citations omitted).

also seeks specific performance of the Settlement Agreement, an equitable remedy only available in this Court.<sup>49</sup> Because this Court has exclusive jurisdiction over estate matters and the equitable remedy of specific performance, I find I can hear the entire dispute.<sup>50</sup> Having found subject matter jurisdiction exists, I now turn to the underlying claims.

B. The Executrix was required to personally retrieve the items.

This Court follows the objective theory of contracts which requires that the Settlement Agreement be interpreted “in a manner that satisfies the ‘reasonable expectations of the parties at the time they entered into the contract.’”<sup>51</sup> To do so, I must “give priority to the parties’ intentions as reflected in the four corners of the agreement.”<sup>52</sup> I must also “interpret clear and unambiguous terms according to their

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<sup>49</sup> See, e.g., *FirstString Research, Inc. v. JSS Med. Research Inc.*, 2021 WL 2182829, at \*6 (Del. Ch. May 28, 2021) (finding “[b]ecause the Superior Court is incapable of ordering specific performance, this court is uniquely situated to do full justice and afford complete relief”).

<sup>50</sup> *In re Estate of Farren*, 131 A.3d 817, 831 (Del. Ch. 2016) (“[T]his court has constitutional jurisdiction over matters falling within the domain of equity, including the administration of estates, wills and trusts, and the conduct of fiduciaries.”)

<sup>51</sup> *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 83 (Del. Ch. 2013) (quoting *The Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 2694912, at \*2 (Del. Ch. Nov. 16, 2004)).

<sup>52</sup> *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779–80 (Del. 2012) (citations omitted).

ordinary meaning.”<sup>53</sup> Further, I “will read [the Settlement Agreement] as a whole and [I] will give each provision and term effect, so as not to render any part of the [Settlement Agreement] mere surplusage.”<sup>54</sup> Ambiguity exists “[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.”<sup>55</sup> If there is ambiguity, this Court “must look beyond the language of the contract to ascertain the parties’ intentions.”<sup>56</sup>

Confined to the four corners of the Settlement Agreement and giving all terms their ordinary meaning, I find that the Settlement Agreement contemplated that the Executrix would be the individual responsible for retrieving the items from the Beneficiary’s home. The Settlement Agreement provides:

Katie [(the Beneficiary)] agrees to return to the Estate all of the items of personal property listed on Exhibit “A” attached hereto. Linda [(the Executrix)] shall bear her own costs, if any, incurred in connection with the transfer of the aforesaid items of personal property. The Parties agree that Linda [(the Executrix)] shall retrieve the aforesaid items of personal property from Katie’s [(the Beneficiary’s)] home on June 7, 2020 between the hours of 10:00a.m. and 12:00p.m. Katie [(the Beneficiary)] shall have the aforesaid items of personal property readily available for pickup by the Estate. The date and time stated in this

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<sup>53</sup> *Id.*

<sup>54</sup> *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010).

<sup>55</sup> *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

<sup>56</sup> *Id.*

paragraph may be changed by a written instrument signed by the Parties hereto.<sup>57</sup>

After explaining that the identified items will be returned to “the Estate,” the Settlement Agreement clarifies that the Executrix is the individual responsible for retrieving the items from the Beneficiary’s home on behalf of “the Estate.” In an effort to give every word effect, I find the use of “Linda” (the Executrix’s first name) was intentional and reflects the parties’ intent and expectation that the Executrix was to personally retrieve the items from the Beneficiary’s home.

The Executrix argues that the Settlement Agreement is ambiguous and that extrinsic evidence should be considered in my interpretation. I disagree. I find the Settlement Agreement is clear and unambiguous.<sup>58</sup> The only reasonable

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<sup>57</sup> Ben. Ex. A at ¶2.

<sup>58</sup> The Executrix did attempt to build a record of extrinsic evidence at trial. I find, were I to consider such, I would still interpret the Settlement Agreement as requiring a personal appearance by the Executrix. Although the Executrix testified that she believed the Settlement Agreement meant that she “was to hire someone to get the furniture and things back from” the Beneficiary, to say that the Executrix “hired a private courier” on behalf of the Decedent’s estate is a stretch on the current record. *See* Tr. 47:12-13; Ben. Exs. E, G. Rather, the Executrix appears to have taken a back seat while Ms. Lancaster worked to ensure someone retrieved the items. Further, the Executrix was not consistent in her testimony regarding payment to Mr. Dufaj and provided no documentation in support; I, likewise, cannot find any reference to such payment on the Register of Wills docket. *Compare* Tr. 48:13-14 (“I paid the courier \$100 to do down and – and pick that up.”) *with* Tr. 59:4-12. Further, if the payment was reimbursed by the Decedent’s estate, as the Executrix testified, it would have been made after the estate was closed. *Compare* Tr. 59:10-12 *with In the Matter of Bernice M. Barnes*, 171276 FC (closed June 2, 2020). And a payment by the estate conflicts with the Settlement Agreement, which requires that the

interpretation of the Settlement Agreement is that the Executrix agreed to retrieve the items from the Beneficiary's home on June 7, 2020 during the two-hour window provided.<sup>59</sup> The Executrix failed to do so.

C. The Executrix breached the Settlement Agreement and the Beneficiary's concurrent performance was excused.

“In a contract where both parties are bound to render performance at the same time, each party's performance is a ‘concurrent condition’ to the other party's performance.”<sup>60</sup> As such, “each party's duty to perform is conditioned on the other party's performance, or manifested, present ability to perform, under the contract.”<sup>61</sup> To demonstrate a breach, the complaining party needs to prove “that the agreed upon exchange would be carried out immediately if the other party performs.”<sup>62</sup>

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Executrix “shall bear her own costs, if any, incurred in connection with the” retrieval. Ben. Ex. A ¶2. Finally, I note that the drafting history of the Settlement Agreement shows that the Executrix appreciated the difference between the estate and herself, personally, and she chose to change certain references from “Linda” to “the Estate;” she did not, however, change “Linda” to “the Estate” in the provision setting forth who shall retrieve the items from the Beneficiary's home. *See* Ben. Ex. C.

<sup>59</sup> The Executrix argues that the language about costs for retrieval undermines this construction. I disagree. Although the Executrix was to personally appear, there is nothing that would bar her from arranging for the necessary equipment or hiring couriers to assist her as she personally retrieved the items.

<sup>60</sup> *Lewes Inv. Co. v. Estate of Graves*, 2013 WL 508486, at \*12 (Del. Ch. Feb. 12, 2013) (quoting Restatement of Contracts § 251).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting 15 Williston on Contracts § 47:5) (quotations omitted).

Under the Settlement Agreement the Executrix was to retrieve the specified items at the Beneficiary's home on June 7, 2020, during a two-hour window. The Executrix failed to do so. To prove this failure to perform was a breach, the Beneficiary needed to demonstrate that she was able to perform her side (to have the items "readily available for pickup"). The Beneficiary testified credibly that the items were ready and available for pickup by the Executrix.<sup>63</sup> This is supported by the Beneficiary's conduct after June 7, 2020, as she has consistently sought to rearrange the pickup window to follow through on the agreed-upon exchange.<sup>64</sup>

I find the Beneficiary has met her burden to prove that the Executrix breached the agreement and, as such, the Beneficiary's concurrent duty to return the items on June 7, 2020, was excused.<sup>65</sup>

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<sup>63</sup> *See* Tr. 23:17-18. Despite the opportunity to do so, the Executrix did not present any evidence to the contrary, such as the testimony of Mr. Dufaj, who may have had a different recollection of the events that day.

<sup>64</sup> *See, e.g.*, Ben. Ex. F.

<sup>65</sup> I have difficulty understanding the Executrix's argument that the Beneficiary breached the Settlement Agreement by failing to appear at Ms. Lancaster's home on July 5, 2020. *See* Ben. Ex. G. There was no agreement to do so and the Executrix was not permitted to unilaterally expand the scope of the Settlement Agreement after she failed to perform her duties thereunder.



D. Specific performance is the most appropriate remedy.

Having found that the Executrix breached the Settlement Agreement, I turn to the appropriate remedy to make the Beneficiary, the injured party, whole. I find specific performance is necessary.

“A party must prove by clear and convincing evidence that he or she is entitled to specific performance and that he or she has no adequate legal remedy. A party seeking specific performance must establish that (1) a valid contract exists, (2) [s]he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance.”<sup>66</sup>

There is no dispute that the Settlement Agreement is a valid contract. The Beneficiary has also demonstrated that she is ready, willing, and able to turn over the items identified in the Settlement Agreement to the Executrix.

Turning to the equities I “must be convinced that ‘specific enforcement of a validly formed contract would [not] cause even greater harm than it would prevent.’”<sup>67</sup> I am convinced. Here, the parties both took steps to effectuate the

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<sup>66</sup> *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (citations omitted).

<sup>67</sup> *Szambelak v. Tsipouras*, 2007 WL 4179315, at \*7 (Del. Ch. Nov.19, 2007) (quoting *Walton v. Beale*, 2006 WL 265489, at \*7 (Del. Ch. Jan. 30, 2006)) (alteration in original). See also *Morabito v. Harris*, 2002 WL 550117, at \*2 (Del. Ch. Mar. 26, 2002) (“The balance of equities issue ‘reflect[s] the traditional concern of a court of equity that its special processes not be used in a way that unjustifiably increases human suffering.’ ”)

Settlement Agreement but the Executrix failed to make a personal appearance at the Beneficiary's home. In an ideal world, the parties would have realized their mutual interest in resolving this matter and made plans for another pickup date and time. The Beneficiary tried to do so, but the Executrix seized what she saw as an opportunity to renegotiate. Cooler heads should have prevailed, and I find the remedy of specific performance is the only way to prevent the harm evident in reopening the estate, returning the escrowed funds, vitiating the parties' amicable resolution, and leaving the Beneficiary without her specific bequest and the estate without all probate assets.<sup>68</sup> Simply put, equity would not be served by taking the parties back to square one.

Having determined that the Beneficiary is entitled to specific performance of the Settlement Agreement as I have construed it, I turn to the precise form of specific performance appropriate in this case. The parties agreed that the Executrix would retrieve the items listed on Exhibit A to the Settlement Agreement from the Beneficiary's home on a date certain, between a two-hour window. The Beneficiary

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(quoting *Bernard Pers. Consultants, Inc. v. Mazarella*, 1990 WL 124969, at \*3 (Del. Ch. Aug. 28, 1990)).

<sup>68</sup> See also *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008) ("Delaware law favors settlements and treats them as binding contracts.").

was required to make that property “readily available for pickup[.]” To get the Settlement Agreement back on track, the parties should agree on a date within the next ninety (90) days when the Executrix will retrieve the items from the Beneficiary’s home during a mutually agreeable two-hour window. Once the pickup occurs, the remaining deadlines in the Settlement Agreement will be triggered.<sup>69</sup>

E. The Plaintiff should be reimbursed for his expenses.

The Plaintiff brought this action to compel a resolution. He has continued to hold funds in escrow under the Settlement Agreement and will continue to hold them under my recommended specific performance remedy. In my draft report, I recommended that the Plaintiff be permitted to apply for reasonable fees incurred in connection with this action should he choose to do so. The Plaintiff has sought only reimbursement of his costs and expenses for a total \$780.75. No objection has been filed to his request. I find the Plaintiff shall be entitled to reimbursement of his costs and expenses and the reimbursement should be split evenly between the Executrix and the Beneficiary. The Executrix and the Beneficiary shall each pay to the Plaintiff \$390.38 within thirty (30) days of this Final Report becoming an order of the Court.

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<sup>69</sup> See Ben. Ex. A ¶¶ 3-7.

### **III. Conclusion**

For the foregoing reasons, I recommend that the parties be required to specifically perform the Settlement Agreement. The parties should agree on a date within the next ninety (90) days when the Executrix will retrieve the items from the Beneficiary's home during a mutually agreeable two-hour window. Once the pickup occurs, the remaining deadlines in the Settlement Agreement will be triggered, allowing the Executrix two (2) calendar days to confirm, in writing, if the condition of the items retrieved is satisfactory; upon such confirmation, the Plaintiff may release the funds in escrow to the Beneficiary. If the Executor is not "reasonably satisfied with the condition of the items" she is required to "immediately return all items" to the Beneficiary, the Plaintiff will return the funds in escrow to the Decedent's estate, and the Settlement Agreement will be null and void.

The Executrix and the Beneficiary shall each pay to the Plaintiff \$390.38 as reimbursement for his costs and expenses within thirty (30) days of this report becoming an order of the Court.

This is my final report and exceptions may be filed under Court of Chancery Rule 144.

Respectfully,  
*/s/ Selena E. Molina*  
Master in Chancery