FILED, Clerk of the Supreme Court, 24 May 2021, **085753**

Supreme Court of New Jersey

IN THE MATTER OF THE ESTATE OF TODD HARRIS APPLEBAUM	**SUPREME COURT OF NEW JERSEY** APPELLATE DIVISION **DOCKET No. A-3948-18** **ON PETITION FOR CERTIFICATION FROM FINAL DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION** Sat Below: Gilson, Moynihan, and Gummer, JJAD

PETITION FOR CERTIFICATION AND APPENDIX

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PRELIMINARY COMMENTS REGARDING APPELLATE DIVISION OPINION

The scrivener of decedent's last will and testament, when asked at his deposition if he "*convinced [decedent] to give [plaintiff] 40 percent of the [family company] stock*", answered "*[y]eah, right or wrong, we did… [decedent] agreed, of course…. he signed the will*." The courts below fallaciously upended decedent's last will, by *summarily* divesting his widow of these shares. They have also permitted the shares to be sold at discount by overlooking, without comment or hearing, her more favorable expert valuation of the shares, thus leaving her insolvent.

Indeed, while cautioning the widow regarding select adjectives dispersed throughout her appellate brief (e.g., "brazen", "inhumane"), the appellate division juxtaposed her *bona fide* endeavors to protect the family company from the executor's schemes to conceal and "recover" his off-the-books financials, with the far-fetched premise that, by filing suit on the heels – *and because of* - a third party bank fraud lawsuit which nearly expunged the entirety of her late husband's estate, this widowed schoolteacher purported to "control" the men who, in the best of cases *only*, "mismanaged" the estate. The appellate division justified this apparently socially-rampant hyper-protectionism of select wrongdoers with the conclusory and factually unsupportable cliche "**sound reasons.**"

In the appellate division's rather compromised vision, the

widow's "disruptive" desire to "control" these untouchables warranted her *permanent* disinheritance - against the clear wishes of her late husband - and also justified the millions of dollars of losses she has suffered in nearly ten years of estate administration which has left her insolvent, while enriching defendant/respondents in satisfaction of *undocumented* and *unprovable* debts.

The widow – a woman of color who *at the behest of defendant/respondents* was escorted from her late husband's company by the local police when her whistleblowing activity threatened the executor's pecuniary interests- sought to "control" defendants no more than a victim of sexual harassment seeks to "control" her transgressors with legal process. She instead became a whistleblower, and the facts bear as much out quite distinctively. Thus, in the affidavits used to support disinheritance, she was explicitly "accused" of "staring" at the men and of "digging for dirt" prior to being fired from her husband's company. As a result of her conspicuous efforts to protect the *family* company from the pernicious aftermath of the defense team's incessant white-collared antics, the widow/petitioner was *penalized* by four judges who relied upon the conclusory cliches "**sound reasons**" and "**control**" to support the "death penalty" last-resort option of permanent disinheritance - while also *warning* the widow for her prior references to more descriptive terminology, e.g. "inhumane".

The widow, however, by filing her lawsuit sought nothing more than *accountability*. Such lawsuit(s), conceptually administered by competent and honorable jurists, cannot form the basis for a *punitive* sentence of last resort, as the court(s) below could have solicitously denied her fraud complaints without invoking the *discretionary* "nuclear option" of *permanent* disinheritance.

The appellate division's eristic opinion of April 22, 2021 thus consists of unstructured and fallacious non-sequiturs, better understood by reference to Justice Clarence Thomas's identically-dated concurring opinion in an unrelated case, *to wit*: "*through a feat of legerdemain,* [the Court] *began by* [setting forth a proposition]… *yet just three sentences later concluded* ..[with a contradictory proposition]…..*These statements cannot be reconciled*." Jones v. Mississippi, 593 US ___ (2021). (Cf. Sotomayor dissent).

SUMMARY OF FACTS

I. Factual Background

Prior to his untimely death in 2012, plaintiff/petitioner was married to decedent for over 22 years, raised their three children, supported him as he built a successful family company from the ground up, and decedent *inter alia* therefore bequeathed to her 40% of said company, *to wit*, the Todd Harris Company (THC). The scrivener of his last will and testament, when asked at his

deposition if "*he convinced [decedent] to give [plaintiff] 40 percent of the stock*", thus answered "*[y]eah, right or wrong, we did… [decedent] agreed, of course…. he signed the will*." [**A1752**]. The Courts below have *summarily* overturned decedent's express will, by permitting a "fire sale" of the widow's 40% inheritance, while glossing over – without comment or articulated reason - the widow's more favorable valuation of the family company shares.

Defendant/respondent Fabian, the executor, is decedent's former "off the books" business partner who, upon decedent's passing, unlawfully placed himself on the payroll of THC to pay himself an unprovable 600K debt *allegedly* stemming from loan interest accrued over 30 years, as well as *un*documented "consulting fees". During the course of the administration of the estate, THC and the estate were sued by Sun National Bank for forgery and fraud exceeding 420K in damages. [**A109**]. As THC was in imminent danger of being liquidated, a "crisis meeting" then ensued, [**A82**], whereupon the executor announced a conspiracy to defraud banks, and *unequivocally* uttered that all of his unprovable "off the books" holdings would be concealed, from everyone. [**A82**]. Two bankers subsequently testified at a deposition that said "off the books" financials - including the pivotal Sun Bank fraud lawsuit - were in *fact* concealed from the banks, and that the concealment was "absolutely," in the banker's own words, material. [**A1004-A1108**]. The executor's counsel then, in an exclusive

unsolicited certification meant to **prevent the removal of the executor for fraud**, brazenly certified *three times* that the Sun Bank fraud lawsuit against his client/executor had "never" been filed. [**A1663**]. The proofs indeed show that defense counsel was *demonstratively* aware of the Sun Bank lawsuit - and that it had a docket number and was nearly catastrophic. [**2T**][**A1004-A1108**].

The Sun Bank fraud lawsuit prompted plaintiff's comprehensive whistleblower activities, whereupon she discovered that defendants had also misappropriated a 401(K) plan worth 100K which belonged to plaintiff, [**A41-A73**], and that they also prematurely sold a profitable two million dollar commercial property for half of the recently appraised value, for the benefit of the executor. Id.

As a result of these whistleblower activities plaintiff was fired from the company and was inhumanely escorted from her husband's company by local police summoned by defendant/respondents, and she (*and her two daughters*) was further *de facto* disinherited *entirely* during the nearly ten years of estate administration. In the end this widowed, now insolvent, schoolteacher was then *summarily and permanently* disinherited without a plenary hearing, with the approval of the trial and appellate division judges, notwithstanding that the trial judge had explicitly called her certifications "useless" and "fake news", while expressing a clear preference for defendant's observably spurious certifications which brazenly denied prior

recorded admissions and other documented proofs of the **payroll fraud** and the **concealment conspiracy**.

II. The Evidential Record

The extensive record in this case consists of a two thousand-page appendix, and includes certifications by plaintiff/petitioner, certifications by defendant/respondents, and, *inter alia*, various transcripts and minutes of "board meetings" undertaken *during the administration of the estate*, as well as nearly a dozen recordings, all transcribed professionally.

The transcript for the June 2013 "**crisis meeting**", [**A82**], misleadingly referenced as an ordinary "board meeting" by the judges below, is noteworthy, as it depicts the executor's admission of prior bank fraud related to his illicit holdings, and it also shows that, in the presence of all defendants *as he was administering the estate*, the executor set forth a bank fraud conspiracy presumably meant to "save" family company and estate asset THC, the same company which had also been making illicit payroll payments to said executor.

The appendix also includes the August 29, 2013 meeting transcript, *transcribed by a Court reporter present at the meeting*, in which the executor *nonchalantly admitted the 600K payroll fraud and implicated the other defendants*. **[A141-A192].** The appendix further includes sworn answers to interrogatories in which the *executor admitted that the payroll scheme* was not implemented in

2011 *because of an IRS audit*, [**A1152-A1155, A1154**], and it also includes deposition testimony by the purported scrivener of an "employment agreement" (EA), used by the executor to conceal the payroll fraud, which characterized said EA as having indicia of a fraudulent instrument. [**A849**].

The appendix also included *board meeting minutes explicitly memorializing the payroll fraud* [A194-A196], and proofs regarding the misappropriation of a 100K 401(k) plan of which plaintiff was the beneficiary, [**A41-A73**], as well proofs showing that the "fire sale" of the "Toben" commercial property for *half* of the recently appraised amount was used to make **illicit payments to the executor through money laundering and the use of shell company "*Morey LaRue Laundry Company*"**. [**A41-A73**].

The record also includes transcripts of hearings wherein the trial judge explicitly called plaintiff/petitioner's certifications "useless," **[8T:33, 6-7]**, and "fake news", **[8T:51, 9-10]**, while expressing a clear preference for defendant's ex post facto certifications denying the payroll fraud and the concealment conspiracy. The record also contains proceeding transcripts which show that the trial judge denied absolutely all relief sought by the widow, and then during the final account hearing, [**10T**], asked the executor's counsel to re-brief *one single opinion*, In Re Hope, *infra*, for the sole purpose of exercising the wholly discretionary act of permitting the permanent disinheritance of

the widow/petitioner, through the "fire sale" of her 40% stake in the family company, **while also completely glossing over the widow's expert valuation which had valued the shares at 500% the rate offered by defendant/respondents.** [**A1757-A1822**].

More specifically, the extensive record includes:

1. Paul Cavise, scrivener of will, deposition statement. When asked if "*he convinced [decedent] to give [plaintiff] 40 percent of the stock*", he answered "*[y]eah, right or wrong, we did… [Mr. Applebaum] agreed, of course….he signed the will.*" [**A1752**]
2. Statements by the executor made at the "crisis meeting" ("board meeting") while he was administering the estate: "*We're **not reporting anything to anybody at the end of the day.** I don't know why I let you record this, but you better erase that part……..you know how Todd owes me all this money, right? If I put that on the corporate books, then Sun Bank would never have loaned us a dime or Wells Fargo. If I put that on the books now, Wells Fargo won't make the loan. **So I have to keep everything from me off the books,** but if I drop dead, you know, I expect my family to be paid.*" [**A89**]
3. Certifications by defendants claiming that the widow was not acting in the best interests of the team because she refused to go along with the foregoing bank fraud conspiracy, by refusing to provide banks with a personal guarantee. [**A507**].

4. Banker Kevin Harvey's sworn statement. When asked if he, when defendants solicited a commercial loan after the "crisis" meeting, was "*aware that the Todd Harris Company had been sued by Sun National Bank*", he replied, "*No, I was not*". Further asked if it "*would that have been something that you would be interested in knowing*", he answered "***absolutely… It would have made a difference if they had told me that Sun forced terminated the line and forced them to leave the bank. Absolutely.***" [**A1004-A1108**]

5. Proceeding transcript dated May 22, 2014 in which defense counsel Thomas S. Howard claimed that the Sun Bank Fraud Lawsuit against the estate was "*such a big problem*" that the company could have "*not exist[ed]*", [**2T**], deposition transcripts showing counsel's attendance at the Kevin Harvey deposition, **[A1004-A1108]**, followed by Mr. Howard's certification falsely claiming – three times - that said Sun Bank fraud lawsuit referenced by banker Harvey had "never" been filed, thus avoiding removal of the executor. **[A1663]**.

6. The executor's statement at an August 2013 meeting, wherein a Court reporter was present, admitting his 600K payroll scheme, *to wit*, when asked "*for what period of time.. what is amount that has been [sic] to be paid off*", he answered "*until it's paid off. Approximately $500,000.*" Then he was asked, "*why are you being* ***paid as salary***", and he replied

"*because Frank and I and Larry agreed that that would be the best way to take it*." He was then asked, if "*it's* ***not on the books and the records of the company***", and he replied, "*that is correct*." [A141-A192].

7. Certifications by defendant in which he claimed he was not engaging in the foregoing payroll fraud. [**A233, 467, 501**].

QUESTIONS PRESENTED

1. May a personal representative, in lieu of a co-beneficiary of a devise, **object** to in-kind distribution pursuant N.J.S.A. 3B:23-3 [**Subsection 3**] in light of NJSA 3B:23-4, which when read *in pari materia* limits Subsection 3's "objection" to distributees only, and in view of the fact pattern of In Re Hope, *infra*, which was premised on an objection by a *co-beneficiary* of the same asset?

2. Does Subsection 3, permitting in-cash distribution pursuant to two enumerated instances *only*, also contain a broader "special reasons" component not found within the statute, but only inferred as per the *comments* to the model *Uniform Probate Code*?

3. Did *In-Re Hazeltine's* 90-year old *dictum*, requiring "clear and definite" proof of fraud for removal of a fiduciary, survive the passage of a **new removal statute**, N.J.S.A 3B:14-21, **decades latter**? Moreover, **what is the scope of the "clear and definite proof" of fraud standard**?

❹ Was it error for the judges below to *summarily* dispose of all of the widow's comprehensive fraud claims, and to deny removal, although the widow's formidable proofs were disputed, if not dispositive?

❺ If a trial judge *inter alia* calls a litigant's proofs "**fake news**" and "**useless**", is he within his discretion to deny recusal without offering a specific statement of reasons?

❻ Is the trial Judge required to recuse himself if he asked the executor's counsel, during the final account hearing, to *re-brief* one single published opinion, In Re Hope, for the sole purpose of considering the **discretionary** act of permitting the permanent disinheritance of the widow, in the form of the "fire sale" of her shares, while also ignoring the widow's more favorable valuation?

ERRORS COMPLAINED OF

① It was error for the judges below to deny **plenary hearings** for removal, disinheritance, and/or plaintiff's fraud complaints, thereby *summarily* disinheriting her and leaving her insolvent.

② To the extent the amorphous opinion below can be read to have been premised on the *executor's* objection to in-kind distribution, in lieu of a co-beneficiary's objection, it was error for the judges to so conclude, given that the statutory scheme and controlling case law does not support this holding.

③ If premised on the "special reason" of plaintiff's whistleblower activities, or her purported "control" over defendants or her

"disruptive" behavior of "staring" at the family company men, it was error for the judges below to disinherit plaintiff premised on these reasons, particularly in light of more recent testimony by the executor stating that the widow was *as of recent* "welcomed" at the company, despite the outdated years-old staring-at-the-men affidavits which purportedly set forth the widow's "disruptive" demeanor.

④ It was error for the trial Judge to refuse to recuse himself, and it was error for the appellate division to fail to acknowledge the facts underlying the recusal claims **(e.g. calling plaintiff's proofs "fake news" and "useless")**, the Court instead misleadingly concluding that the plaintiff filed the recusal motion, which was **filed three months prior** to the Judge's final decision, because of her dissatisfaction with his rulings.

⑤ To the extent the appellate division's opinion can be read to prohibit a plenary hearing for valuation of plaintiff's 40% shares in THC, which was explicitly disputed with an expert report and acknowledged by the appellate division, such an interpretation defies all reason as plaintiff's expert valued the shares at 500% of the defendant's valuation.

In *In re Estate of Hazeltine*, 119 N.J. Eq. 308, 314 (1936 Prerog. Ct.), the Court ***in dicta*** set forth the **standard for removal of a personal representative on the basis of fraud**. *To wit*:

> *The pertinent sections of the Orphans Court act which provide for the removal of executors are sections 149 and 150. The former sets forth the grounds for removal: …**(b) embezzle, waste or misapply any part of the estate; (c) or abuse the trust and confidence reposed in him.***
>
> **Courts are reluctant to remove an executor or trustee without clear and definite proof of fraud**, gross carelessness or indifference. … So long as an executor acts in good faith, .. and with ordinary discretion, and within the scope of his powers, his acts cannot be successfully assailed.. the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment, **and do not proceed from fraud, gross carelessness or indifference to duty.** * *

Id. At 314. (emphasis supplied)

This holding does not define "fraud", and sets forth **no criteria** for Judges to determine which acts constitute "fraud", or what proofs constitute "clear and definite" proof of fraud.

The fragmented **statutory scheme** defining a fiduciary's "discretion" to **distribute in-cash**, can be summarized as follows. In In Re the Estate of Howard C. Hope, 390 N.J. Super. 533 (App. Div. 2007), the court found that that N.J.S.A. 3B:23-1 ["Subsection 1"], applies only to *"specific devisees"*, and not to "property devised as part of the residuary estate", as in the case *sub judice*. Id. At 536. The Court then found that the applicable statute was N.J.S.A. 3B:23-3 ["Subsection 3"]. Id. This subsection permits distribution in-cash if there is an "**objection** to the proposed [in-kind] distribution" *or* if it is impracticable "to distribute undivided interests" in-kind. Id.

The *In Re Estate of Hope* court then cited *a comment* the Uniform Probate Code (UPC) for the proposition that "**special reasons**" will allow distribution *in-cash*, and then nonetheless concluded that "New Jersey has a preference for in-kind distributions." Id. **The court did not, however, say whether it was specifically reading an additional "special reasons" component into Subsection 3.** *In Re Hope*, however, was factually premised on an objection by a co-beneficiary, not a fiduciary. Thus, *In Re Hope* **does not properly resolve the issue of whether Subsection 3 includes a "special reasons" component, and/or whether a *fiduciary* may object to in-kind distribution.** More specifically:

> *We conclude that [Subsection 1] does not apply in the given circumstances..... as* ***it only applies to specific devisees;*** *[yet]* ***the subject property was devised as part of the residuary estate.*** *... The statutory language [of* ***SUBSECTION 3****] is, however, substantially similar to § 3-906 of the Uniform Probate Code (UPC) ….. Because [UPC §3-906]is almost identical to the language of [****SUBSECTION 3****], the Comment to the UPC is instructive.. The Comment indicates that "a personal representative [should] make distribution in kind whenever feasible and ... convert assets to cash only where there is a* ***special reason*** *for doing so." Comment to Unif. Probate Code § 3-906, 8 U.L.A. 273 (1998).*

In Re the Estate of Howard C. Hope, 390 N.J. Super. 533 (App. Div. 2007).

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

In *In Re Estate of Howard C. Hope*, *supra*, the court cautioned that "*no published decision in this State has addressed when in-kind distribution is warranted under N.J.S.A. 3B:23-3…..How this*

statute is applied in any given factual setting has not previously been addressed by our courts, and it has no pertinent legislative history ." *Id*.

Moreover, it is not clear whether the century-old standard for removal of a fiduciary for fraud in *In Re Estate of Hazeltine*, *supra*, is *dicta* or the court's holding, and the proper *scope* of that standard has not been defined, leaving Judges without guidance in its applicability and, even worse, allowing judges to substitute their own subjective and potentially short-sighted visions of what constitutes fraud, or "clear and definite proof of fraud," for more reasoned analyses guided by more specific criteria.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

1. **Payroll Fraud**. The Appellate Division ("court") identified the fundamentals of the payroll fraud in determining that there was no proof of fraud, *whatsoever*. *To wit*:

   1.1. As per the Court, "*Fabian represented that the salary 'was effectively the only way he was being repaid for the **loans** and previous consulting fees he was owed by THC.'*" [Opinion at 5]. See also Board Meeting Minutes, [A194-A196].

   1.2. As per the Court, the **employment agreement (EA)**, signed two years prior to the foregoing quoted statement, "*retained Fabian for ten years as a 'Business Manager and Consultant' for THC at an annual salary of $104,000*." [Opinion at 5].

   1.3. The purported scrivener of the EA did not recognize the

EA. [A849].

1.4. As per the Court, there was **no written agreement** memorializing the "loans" being indisputably repaid on the payroll. [Opinion at 5].

1.5. The executor **admitted the on-going payroll fraud** in August of 2013, in the presence of a court reporter, [A141-A192], and in interrogatory answers, he claimed he did not engage in the payroll fraud in 2011 because of an IRS audit. [**A1152-A1155, A1154**].

1.6. In his ex-post-facto certifications, he nonetheless claimed that there was no payroll fraud committed, relying on the fraudulent EA to launder the payroll payments. [**A233, 467, 501**].

1.7. Notwithstanding, the Court ***summarily*** **found no proof of fraud. Whatsoever.**

2. **Conspiracy to Conceal Financials.** The Court quoted the executor's admission of the concealment conspiracy, yet concluded that there was proof of fraud, whatsoever. The proofs disagree, *to wit*:

2.1. **June 27, 2013 "Crisis Meeting" Admission:** *"We're not reporting anything to anybody at the end of the day. I don't know why I let you record this, but you better erase that part. You understand what I'm saying?"* Seconds later, the executor uttered that "*[Y]ou know how [Applebaum] owes me*

all this money, right? If I put that on the corporate books, then Sun Bank would never have loaned us a dime or Wells Fargo. If I put that on the books now, Wells Fargo won't make the loan. ***So I have to keep everything from me off the books,*** *but if I drop dead, you know, I expect my family to be paid."* [Opinion at 8], [**A89**].

2.2. One banker testified at a deposition that the FBI would have been called had they known about the prior concealment, while another banker testified that the concealment conspiracy set forth at the crisis meeting did take place – and that defendants did in fact conceal the executor's financials, including the Sun Bank Fraud lawsuit. **The banker characterized this concealment as "absolutely" material.** [**A1004-A1108**].

2.3. In response, the executor's counsel a frivolous unsolicited certification contending *three times* that the Sun Bank lawsuit had "never" been filed, while defendant/respondent Gold filed a certification claiming he was unaware of this Sun Bank lawsuit, despite his presence at the crisis meeting and other proofs. [**A1663**].

2.4. In fact, the proofs show that defense counsel attended the banker depositions, [**A1004-A1108**], that he previously cited the Sun Bank lawsuit as being nearly-fatal, [**2T**], his receipt of subpoenas with the lawsuit docket number, certified

billing statements [A1373], and other proofs which demonstratively show he was aware of the lawsuit, and of its significance in the within litigation.

2.5. Notwithstanding, the Court found no proof of fraud. Whatsoever.

3. **In-Cash Distribution**: The Court highlighted the widow's purported desire to "control" defendants and, presumably at least as the opinion was amorphous and unstructured, found this act of "control", as well as her "disruptive" whistleblowing and "man staring" activity, as warranting a "sound reason" **requiring** the Court to upend decedent's express will that his wife inherit 40% of the family company. The facts do not fit this anecdote:

3.1. The Sun Bank lawsuit nearly caused the demise of THC, as per the crisis meeting. [**A82**]

3.2. As a result, plaintiff started her whistleblowing activity by recording all meetings. [**A41-A73**].

3.3. This led to her discovery of 401K fraud, the payroll fraud, and "Toben" sale fraud involving the sale of a lucrative commercial property for one-half of the recently appraised amount of nearly two million dollars. [**A41-A73**].

3.4. Defendants then took steps to make sure the widow did not handle the company's finances.[**A193**]("*no one is to see copies of financial statements, this includes [petitioner]*")

3.5. Defendants eventually summoned the police, and had the widow escorted from the family company premises, having fired her for her whistleblowing activity. [**A505**],[**A41-A73**].

3.6. Affidavits prepared after the firing show that she was fired because she "was digging for dirt", [A511-A548], because she stared at the men, [A511-A548], and because she took steps to prevent fraudulent activity, e.g., the "gas receipts" issue. [A511-A548].

3.7. **The affidavits were made to fire plaintiff – they did NOT refence her ownership of 40% of the company.** [A511-A548]

3.8. Yet, defendants cited these affidavits in their pleadings to disinherit the widow, notwithstanding that the affidavits were meant to justify the firing only - not the inhumane divestiture of the widow's shares.

3.9. In addition, the executor nearly five years after the affidavits were created testified that the men at the company *no longer objected to her presence*. [**A1730**].

3.10. Notwithstanding a clear lack of an "objection" to in-kind distribution, the Court summarily divested the widow of the shares, upended decedent's express will, and completely overlooked the widow's substantially more favorable valuation of the shares, thus leaving her insolvent.

4. **Recusal**. The Court noted that the recusal motion was filed in January of 2019, months before the trial judge's April 2019

final ruling, yet it paradoxically "found" that the widow filed the recusal motion because she was in disagreement with the judge's rulings. In doing so, the Court also bypassed facts which show bias, e.g., the trial judge's calling the widow's proofs "fake news" and "useless" - while relying on defendants' clearly frivolous *ex-post facto* certifications. In addition, the "Hope Second Bite at the Apple" incident, wherein the judge at the final hearing asked defendant to re-brief one single clear case, *In Re Estate of Howard Hope*, *supra*, for the sole purpose of exercising "discretion" with regards to in-cash distribution he could have simply readily denied, depicts not only bias, but also deliberate intention.

5. **Deposition of Company Accountant Gold** – The deposition of accountant Gold had been sought for years, and not ruled upon. [A2004-A2029][A1742-A1745]. After *repeated* filings, it was finally denied as "untimely" (a further fact warranting recusal). The Court below misleadingly characterized the deposition as not having taken place "**for some reason**", without disclosing that the trial Judge avoided the motion for years and then improperly denied it as "untimely" after *repeated* filings. [Opinion at 28].

DATED: May 24, 2021

Santos A. Perez, Esq.
Attorney for Plaintiff/Petitioner

CERTIFICATION PURSUANT TO R. 2:12-7(a)

I, Santos A. Perez, as Petitioner's counsel, certify as follows:

This petition for certification presents a substantial question and is filed in good faith and not for the purposes of delay.

I certify that the foregoing statements made by me are true. I am aware that if same are willfully false, I may be subject to punishment.

Santos A. Perez, Esq.
Attorney for Plaintiff/Petitioner

Dated: May 24, 2021

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[1] This "Exhibit A" brief is dispositive as regards plaintiff's "particular" objections raised during the final accounting hearings. As the plaintiff/appellant's September 30, 2019 brief shows, this "Exhibit A" interlocutory-appeal brief was certified by plaintiff/appellant at *page 1* of her certification as containing factual assertions she would rely upon at the final accounting hearing - factual assertions which unequivocally weren't *in support of* the final accounting, *ergo* they were clear, detailed objections to the final account. As such, this "brief" is essentially a certification, submitted to the Court below as "Exhibit A,"

[2] This brief was attached as a bona fide exhibit to the recusal motion of Judge Bergman, as it depicts that the executor and/or his counsel *did not* have a factual or *legal* basis for their "death penalty" pleadings to disinherit on the day of the final account hearing - they created a new reason for this drastic remedy *ex post facto* (the "Hope" briefs). The Judge's rather conspicuous support for the "nuclear option" of disinheritance at said final account hearing, wherein *inter alia* he uttered "sure there is" a grounds for disinheritance, was therefore erroneous, in bad faith, and depicted clear bias. See pages 48-50 and 62-63, 9/30/2019 brief, for an overview of the "Hope" second-bite-at-the-apple incident, wherein the Judge gave the executor a second chance to rebrief one single case in furtherance of the "nuclear" option.

[3] This brief was submitted by the executor's counsel to the trial court - and he is likely to submit same in his own appendix - in support of his opposition to the recusal motion and specifically to buttress his argument that plaintiff/appellant, and her attorneys, are engaging in unlawful collateral litigation in order to advance her illicit goals. The brief is thus essential on appeal as it presumably constitutes "proof" that plaintiff/appellant is litigious for no objectively acceptable reason, and that her recusal motion therefore lacks merit - regardless of her proofs.

[4] See footnote 3.

ATTACHMENTS

1. Notice of Petition for Certification.

2. Written Opinion of the Courts Below: Opinion filed in the Appellate Division, April 22, 2021

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for respondent Efraim (Frank) Rajs

TAKE NOTICE that Plaintiff/Appellant Edita Applebaum shall petition the Supreme Court for an Order certifying the entire judgment entered by the Appellate Division in the above matter on April 22, 2021. The filing fee of $250 is enclosed herewith.

Santos A. Perez, Esq. Dated: May 1, 2021
www.NJLawCounsel.Com
Attorney for Appellant/Plaintiff

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3948-18

IN THE MATTER OF THE ESTATE OF TODD HARRIS APPLEBAUM, deceased.

Argued January 26, 2021 – Decided April 22, 2021

Before Judges Gilson, Moynihan, and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. 238799.

Santos A. Perez argued the cause for appellant Edita Applebaum.

Thomas S. Howard argued the cause for respondent William P. Fabian (Howard Law, LLP, attorneys; Thomas S. Howard and Andrew Bellwoar, on the brief).

Ronald L. Israel argued the cause for respondent Efraim (Frank) Rajs (Chiesa Shahinian & Giantomasi, PC, attorneys; Ronald L. Israel, on the brief).

PER CURIAM

Plaintiff Edita Applebaum appeals from numerous orders entered in connection with the administration of her deceased husband's estate

(Applebaum's estate or the Estate). She challenges orders denying her applications (1) for temporary restraints and injunctive relief; (2) to remove the executor; (3) for an in-kind distribution to her of the stock held by the residuary Estate; (4) to compel a deposition; and (5) to recuse a judge. Plaintiff also appeals from the final order approving the Estate's final accounting and, in connection with that argument, she contends that she was entitled to file counterclaims.

Having reviewed the extensive record developed during the more than six years of litigation concerning the Estate, we affirm all the orders except the April 30, 2019 order approving the final accounting. We remand that one order with direction that the Chancery court conduct a limited evidentiary hearing to consider certain objections to the executor's final accounting.

I.

Todd Harris Applebaum (Applebaum) died testate on November 4, 2012. He was survived by plaintiff and their three children, including their adult son, Benjamin Applebaum (Ben).[1] The primary assets of Applebaum's estate were a 100% interest in the Todd Harris Company, Inc. (THC), a 51% interest in Toben

[1] To avoid confusion, we refer to Todd Harris Applebaum as "Applebaum," to Edita Applebaum as "plaintiff," and to Benjamin Applebaum as "Ben." We mean no disrespect by using these names.

Investments, Inc. (Toben), and a three-bedroom condominium in New Brunswick. The remaining 49% of Toben was owned by Ben.

THC, which employs approximately fifty-five people, operates a retail spa and pool store and has chemical, fitness, aquatic, and repair divisions that provide materials, equipment, and furnishings. Toben owned a commercial property in Linden.

Applebaum's will, which was executed on March 15, 2010, bequeathed 60% of the stock in THC to the "Trustees of the Todd Harris Co., Inc. Trust." Ben and defendants Frank Rajs and William P. Fabian were appointed as the trustees of the Todd Harris Co., Inc. Trust (Trust). Rajs was a close friend of Applebaum for more than fifty years and was a long-time employee of THC who managed the company's retail store. Fabian considered Applebaum to be "one of [his] best friends" and provided "consulting services and advice to THC and to [Applebaum] personally."

The will directed the trustees to manage the Trust for the benefit of plaintiff and Applebaum's living descendants and to disburse to them "or apply for [their] benefit . . . so much of the net income and principal of the Trust as my Trustee[s] shall from time to time deem advisable[.]" Upon plaintiff's death, the Trust's principal is to be distributed to Applebaum's three children and their

heirs per stirpes. The remainder of Applebaum's estate was bequeathed to plaintiff.

Applebaum appointed Fabian as the executor of his will. The will authorized the executor "without authorization of the [c]ourt, to sell, convey, mortgage, lease, invest, reinvest, exchange, manage, control, retain or otherwise deal with any and all property, real or personal, comprising [Applebaum's] estate, . . . and to make distribution under [the] Will wholly or partly in kind or money." On December 4, 2012, the Middlesex County Surrogate admitted Applebaum's will to probate and issued letters testamentary authorizing Fabian to administer the Estate.

At a special meeting of the THC shareholders on December 8, 2012, Fabian and Rajs were elected as the directors of the company on a motion made by plaintiff and seconded by Ben. Rajs was unanimously appointed as president and chief executive officer (CEO).

The next day, a special meeting of the directors of THC was attended by Fabian, Rajs, and Leah E. Capece, who, at the time, was the attorney for THC

and Applebaum's estate.[2] The directors agreed to increase Rajs' salary from $100,000 to $150,000, given his new role as president and CEO of the company.

At that meeting the directors also reviewed an employment agreement dated February 15, 2010, that Fabian and Applebaum executed, and that retained Fabian for ten years as a "Business Manager and Consultant" for THC at an annual salary of $104,000, paid weekly. The agreement provided that if Fabian's employment was terminated for any reason except the sale or liquidation of the business, amounts remaining due under the contract were payable immediately. If the business was sold or liquidated, Fabian was entitled to ten percent of either THC's gross sales price or liquidation value. Fabian started receiving his salary of $2,000 per week in November 2012, after Applebaum died.

Fabian represented that the salary "was effectively the only way he was being repaid for the loans and previous consulting fees he was owed by THC." He also claimed that he had made loans to THC in 1990 and 1993 totaling $150,000 with an interest rate of 8%, but there was no written agreement memorializing the loans. In addition, Fabian asserted that, at the time of Applebaum's death, he was owed $231,700 in unpaid consulting fees from THC.

[2] Fabian later retained Kirsch Gartenberg Howard LLP (Gartenberg Howard) to represent the Estate.

Fabian explained that he and Applebaum "had expressly agreed that no repayment would commence until Fabian retired in 2013, at which time he would draw an annual salary and benefits, the value of which would be used to reduce the amount owed to [him]."

Capece opined that the agreement "appeared to be in full force and effect, and in all regards, legally enforceable." Rajs and Fabian agreed to continue and ratify Fabian's employment agreement.

In June 2013, Sun National Bank (Sun Bank) filed a complaint against THC, Applebaum's estate, Rajs, and Cecilia Keh, THC's controller. Sun Bank alleged that after Applebaum's death, Keh, with Rajs' knowledge, requested and received three separate drawdowns on a line of credit that Applebaum had established at Sun Bank. The line of credit was secured by THC's assets and personally guaranteed by Applebaum. According to Sun Bank, only Applebaum was authorized to request advances from the line of credit and his death was an event of default under the relevant agreements. Sun Bank alleged that the documents requesting the drawdowns contained Applebaum's forged signature.

Keh admitted that she had initiated the withdrawals on behalf of THC "because money was needed to continue to operate THC." In response to a question asking how the withdrawals came about, she replied that "[e]very year

during THC's slow time, [she] would draw down on the line of credit to be able to meet payroll and pay vendors. The line of credit would be paid off once business picked up again." She denied that Fabian, Rajs, or Laurence Gold, THC's accountant, had advised her to make the withdrawals but acknowledged that Rajs was aware of the drawdowns.

A special joint meeting of the boards of directors of THC and Toben was convened on June 27, 2013, attended by plaintiff, Rajs, Fabian, Ben, Gold, Capece, and Eileen Applebaum (Eileen), Applebaum's mother.[3] Capece explained that Sun Bank was demanding full payment of the loan, attorneys' fees, and the appointment of a receiver to liquidate the company. She opined that the chances of prevailing in the litigation were "extremely unlikely" and that the only way to resolve the litigation was to pay the bank. Sun Bank had agreed to dismiss the lawsuit if THC immediately remitted $348,132.89.

Fabian asked plaintiff if she had access to money to pay off the bank. Plaintiff stated that she had a home equity line of credit with $200,000 in available funds. Fabian then stated that Eileen had agreed to contribute $100,000 from the proceeds of Applebaum's life insurance policy when she

[3] This meeting was recorded and transcribed. The record also contains minutes from the meeting. The transcript identifies Eileen as present at the meeting, but the minutes do not.

received it in thirty to sixty days. He agreed to immediately loan THC the money owed to Sun Bank if plaintiff would put up her home equity line of credit.

Capece then asked whether the funds from Eileen were a gift or a loan. Fabian responded that they were a gift. He elaborated that:

> First of all, this is [Applebaum's] life insurance . . . proceeds.
>
> Secondly, Eileen was going to give it to the grandchildren. There's a whole lot of things. Eileen is going to get the check. She's going to sign the back of the check, hand it to me. I'm going to put it in my checking account and that's going to be the end of the day. We're not reporting anything to anybody at the end of the day. I don't know why I let you record this, but you better erase that part.
>
> You understand what I'm saying?
>
> That's what I'm going to do with Eileen, you know, so there's no record nowhere, but just so you know.

Plaintiff then admitted that she did not have an existing home equity line of credit but would apply for one. Fabian said he would lend the money pending the approval of her application but if she was unable to secure the funds, he was "going to take a mortgage against something." He then explained:

> [Y]ou know how [Applebaum] owes me all this money, right? If I put that on the corporate books, then Sun Bank would never have loaned us a dime or Wells Fargo. If I put that on the books now, Wells Fargo

> won't make the loan. So I have to keep everything from me off the books, but if I drop dead, you know, I expect my family to be paid.
>
> . . . .
>
> In other words, I got to do the paperwork. And as long as I have your word that you'll take care of that, I'm good for that.
>
> Okay?

Plaintiff responded affirmatively. She assured Fabian that "You will [get] your money. We will get the money."

Fabian then moved that the building owned by Toben, which was its sole asset and was then rented to a commercial laundry, be listed for sale at $899,000. Plaintiff objected to the sale, but Capece explained that the Estate needed cash to pay taxes and administrative expenses and that Fabian had the authority to make decisions regarding the Estate's assets. Ben seconded the motion, which passed unanimously. On October 22, 2013, the directors and shareholders of Toben voted unanimously to sell the property owned by Toben for $800,000 to North East Linen Supply, the property's then-tenant.

On June 27, 2013, a motion was also passed to sign a promissory note in exchange for Fabian's loan. The note, which was for $348,132.89, was executed effective that same day by Rajs on behalf of THC, Fabian as the lender, and

plaintiff and Ben as guarantors of the loan. The note contained a security provision, which stated in a handwritten notation that the debt was secured by a second lien on the Toben property and "A/R & assets on THC."

Following the June 27, 2013 meeting, plaintiff retained a lawyer and began to question various actions taken by Fabian and the other trustees. She also objected to how THC was being operated and sought a larger role in the management of the company. Plaintiff, who was a teacher, had been employed by THC on a part-time basis since January 2013, and began working there full time in June 2013. She was informed that her role at THC would not be expanded, and her objections were rejected.

Plaintiff also inquired about Applebaum's 401k plan and was told that it had been distributed to the Estate and used to pay the Estate's expenses because Applebaum had not listed a beneficiary for the 401k plan. She was advised to contact the company who managed the 401k plan to get copies of the paperwork for Applebaum's account.

On December 4, 2013, Rajs terminated plaintiff's employment at THC, citing as reasons that she was "[c]ausing general dissention and unrest among employees[,]" as well as disorderly conduct, insubordination, and job abandonment.

On March 31, 2014, plaintiff filed a verified complaint and an order to show cause (OTSC). In her eleven-count complaint, she named Fabian, Rajs, Gold, and Keh as defendants. She alleged that Fabian, Rajs, and Keh committed a tort against THC and breached their fiduciary duties by drawing down funds from the Sun Bank line of credit through forgery and fraud. She further alleged that because Fabian was a creditor of THC he had a conflict of interest in his roles as executor and trustee and that he breached his fiduciary duty by accepting $2,000 per week in salary to repay loans he made to the company. Plaintiff claimed that Rajs breached his fiduciary duty to her and THC by taking the $50,000 increase in salary. Fabian and Rajs also allegedly breached their fiduciary duties by mismanaging THC. Additionally, she asserted that Fabian had breached his fiduciary duty by voting to sell the Toben property. Finally, plaintiff alleged malicious or intentional interference with her inheritance and intentional infliction of emotional distress.

In her OTSC, plaintiff sought emergent relief, including, among other things to: (1) remove Fabian as executor of Applebaum's estate; (2) remove Fabian and Rajs as officers and directors of THC and Toben, and trustees of the Trust; (3) appoint plaintiff as executrix of Applebaum's estate, trustee of the Trust, and director of Toben; (4) compel Fabian to distribute 40% of THC's stock

to plaintiff and 60% of the stock to the Trust; and (5) compel Fabian to distribute 51% of Toben's stock to plaintiff.

Plaintiff also sought temporary restraints pending the return date of the OTSC: (1) restraining Fabian and Rajs from signing any contract to sell the Toben property or taking any actions on behalf of the Trust or as directors of THC; (2) restraining Fabian from taking any salary from THC or any money to repay himself from the Estate; (3) restraining Rajs from continuing to receive his $50,000 increase in salary; and (4) restraining Fabian, Rajs, and Keh from using money from THC, the Trust or the Estate to pay legal fees.

Hearings were held on plaintiff's applications for temporary restraints and preliminary injunctive relief. The Chancery court found that there was no showing of a likelihood of success on the merits or irreparable harm. Accordingly, the court denied the request for temporary restraints and preliminary injunctive relief.

Over the next five years, plaintiff filed a series of motions and emergent applications seeking, among other things, (1) to remove Fabian as executor; (2) to compel the distribution of 40% of THC's stock to her; and (3) to compel various discovery, including the deposition of Gold. The executor, on behalf of the Estate, also filed a complaint and OTSC to (1) approve the accountings of

the Estate; (2) approve the sale of 40% of the stock of THC to Ben, while the Estate retained the remaining 60% of stock pending a final accounting and distribution; and (3) authorize the sale of the condominium.

In their numerous submissions, the parties disputed many issues, including the value and management of THC, the sale of the Toben property, and the sale of the condominium. In various interim orders, the Chancery court denied plaintiff's motions and applications, finding that she had not established the grounds for the relief she sought. The court also permitted Fabian to remain executor and to manage the Estate.

The proceedings were complicated by plaintiff changing lawyers twice. Her lawyers filed repetitive and sometimes inconsistent motions and applications. Several issues kept coming up. Those issues included plaintiff's claim that Fabian and Rajs had engaged in fraud in connection with the Sun Bank line of credit and in applying for a line of credit from Wells Fargo Bank.

The parties also disputed the proper management of THC, with plaintiff contending that she should control the company, and Fabian and Rajs arguing that plaintiff lacked the experience and ability to manage the company. In support of their positions, Fabian and Rajs submitted affidavits from numerous THC employees and Applebaum's family members, including Ben and his

nephew, niece, and mother. Those employees and relatives uniformly praised Rajs' management of the company. Many also attested to plaintiff's disruptive behavior while she was employed at THC. Applebaum's relatives explained that Rajs was a close and trusted family friend who had been with THC since its inception and had been transparent with the family since Applebaum's death. Ben pointed out that Fabian had demonstrated his loyalty to THC by lending money to Applebaum over the years and by mortgaging his own home to provide the funds THC needed to settle the Sun Bank lawsuit. Eileen certified that she acted as THC's treasurer for many years and she had personally seen large sums of money loaned by Fabian to Applebaum "for business purposes."

While the litigation was progressing, the Toben property and condominium were sold. The sale of the Toben property took place in April 2014, and the property was sold for $800,000. From the net proceeds, Toben paid Fabian $97,000, the balance THC owed on the $350,000 Fabian had lent to settle the Sun Bank matter. Toben also paid the Estate monies to repay loans made by Applebaum to Toben. In addition, Toben lent THC monies "to allow it to do necessary seasonal buying for the upcoming pool season." The condominium was sold for $515,000 in February 2017.

In August 2017, Fabian filed the executor's final account for the Estate. Plaintiff opposed that accounting and various motions were filed concerning ongoing disputes.

In October 2018, Fabian filed a verified complaint seeking approval of the executor's final accounting for the Estate. The complaint also sought a judgment allowing payment of the commissions and fees incurred by the Estate. The executor's complaint asserted that the fair market value of the forty shares of THC stock, which represented a 40% interest in the company, was $273,000. The executor sought approval to sell Ben as many of those shares as Ben could afford at fair market value and to allow THC to redeem the remainder of the forty shares at a price of $6,825 per share. The value of the residual Estate proposed for distribution to plaintiff, subject to additional administrative expenses including attorney's fees, was $168,504.98.

The deputy surrogate issued an OTSC and set a return date of December 14, 2018. The OTSC required any party wishing to be heard with respect to the executor's complaint to file "a written answer, an answering affidavit, a motion returnable on the date that this matter is scheduled to be heard, or other response to [the OTSC]" by November 30, 2018.

FILED, Clerk of the Supreme Court, 24 May 2021, **085753**

On November 30, 2018, plaintiff filed an answer to the executor's verified complaint to approve the final accounting. In her answer, plaintiff requested a plenary hearing. She also asserted that it was Applebaum's intent that 40% of THC's shares be distributed to her in-kind. She disputed the executor's valuation of the 40% interest in THC and alleged that the shares should be valued at $1.54 million. Plaintiff also denied that the executor was entitled to any commissions and she disputed the attorneys' fees and other professional fees the executor proposed to pay as part of the final accounting.

Plaintiff also filed a counterclaim, in which she alleged that Fabian had breached his fiduciary duty. She also objected to the fees and costs requested by the executor.

On December 10, 2018, plaintiff filed a motion seeking leave to amend her exceptions to the accounting and to compel the executor to provide various financial statements. She argued that she was unable to provide more detailed exceptions without deposing Gold and without receiving and reviewing THC's most recent financial statements.

On December 14, 2018, the court held a hearing on the OTSC to approve the final accounting. The court repeatedly asked plaintiff's counsel to identify specific numbers he was objecting to, but counsel never directly answered that

question; instead he made various arguments about fraud and mismanagement. Ultimately, the court found that plaintiff was not presenting any specific objections, except for the contention that the shares of THC should be transferred in-kind to plaintiff. The judge therefore reserved decision on the accounting and permitted the parties to submit briefs on the distribution of the THC shares.

In January 2019, plaintiff filed a motion to recuse the Chancery judge and stay all proceedings pending the deposition of Gold. In February 2019, the Chancery court heard argument on plaintiff's motions to file a counterclaim, to recuse the judge, and to stay proceedings pending Gold's deposition. The court denied all those applications.

The court explained that there was "no counterclaim in this kind of case" and plaintiff had already filed objections in her answer, although she had not taken specific exceptions to the accounting. Instead, she had raised a legal argument concerning the distribution of the THC shares. In addition, the court found that there was no basis for recusal. The court also denied plaintiff's request for a stay pending the deposition of Gold. Those rulings were memorialized in orders issued on February 27, 2019.

On April 30, 2019, the court filed a final order and statement of reasons approving the final accounting. The court found that there was no evidence in the record of fraud by the executor. The court also found that Applebaum's will specifically allowed for distributions to be made "wholly or partly in kind or money" and therefore the stock in THC could be sold. Specifically, the court ruled that the stock held by the residual Estate could be sold to Ben and any remaining shares could be purchased by the Trust and the purchase price paid to the residual Estate. The judge dismissed all claims against the executor, discharged the executor, and closed the Estate.

Plaintiff sought a stay of the final order pending appeal, but the Chancery court denied that application. We also denied plaintiff's application for permission to file an emergent motion for a stay, and the Supreme Court denied plaintiff's application for emergent relief.

II.

On appeal, plaintiff raises numerous arguments challenging both the final order entered on April 30, 2019, and nine interlocutory orders entered during the litigation. Plaintiff's arguments can be distilled into six primary contentions. She asserts that the Chancery court erred by (1) denying her applications for temporary restraints and injunctive relief; (2) denying her motions to remove the

executor; (3) approving the in-cash distribution of the THC shares to the residual Estate; (4) refusing to compel the deposition of Gold; (5) denying her recusal motion; and (6) failing to conduct an evidentiary hearing regarding her exceptions to the executor's final accounting.

Most of plaintiff's arguments lack support in the record and the law. In addition, it is not clear what relief plaintiff seeks in challenging the interlocutory orders. Some of those orders were entered years ago, and the subjects of those orders were addressed more fully in the final order. Indeed, we commend the Chancery court's patience in addressing repetitive and often inconsistent motions over the course of the six years of this litigation. We are constrained, however, to remand for a limited evidentiary hearing on plaintiff's objections to the executor's final accounting.

1. The Denial of Temporary Restraints and Injunctive Relief

Plaintiff argues that the Chancery court erred when it refused to issue temporary restraints and denied a request for preliminary injunctive relief. Those rulings were made in April and May 2014. Plaintiff maintains that the court improperly applied an irreparable harm standard rather than a "clear and definite proof of fraud" standard. She asserts that the Sun Bank lawsuit and transcripts from the June 27 and August 29, 2013 meetings contain "clear and

definite proof of fraud." She also contends that she was entitled to restraints to stop the sale of the Toben property. We disagree.

The standard for obtaining temporary or preliminary injunctive relief is well-established. Crowe v. De Gioia, 90 N.J. 126, 132 (1982). Such relief is an extraordinary remedy and should only be issued "when necessary to prevent irreparable harm." Ibid. The party seeking preliminary relief must demonstrate by clear and convincing evidence that (1) there is a reasonable probability of eventual success on the merits in accordance with settled law; (2) the moving party will suffer irreparable harm if restraints are not entered; and (3) comparing the "relative hardships to the parties reveals that greater harm would occur if [preliminary relief] is not granted than if it were." Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)).

We review trial courts' decisions to grant or deny a preliminary injunction for an abuse of discretion. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006). Here, we discern no abuse of discretion.

The Chancery court applied the correct standard. The court properly did not accept plaintiff's contention that there had been a showing of "clear and definite proof of fraud." Instead, the court pointed out that plaintiff's

characterization of statements made at the board meetings were taken out of context and did not establish fraud by the executor. Moreover, the court correctly noted that plaintiff had not made a showing of irreparable harm because she was complaining about potential money damages, which rarely satisfy the irreparable harm standard. Crowe, 90 N.J. at 132-33 (noting "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages"); Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997) (explaining irreparable harm means movant "must have no adequate remedy at law").

2. The Requests to Remove the Executor

An executor may be removed if he or she "[e]mbezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in [him or her]." N.J.S.A. 3B:14-21(c). The power of removal, however, "should be granted only sparingly." Wolosoff v. CSI Liquidating Tr., 205 N.J. Super. 349, 360 (App. Div. 1985). "Where a decedent has chosen and designated persons to act as fiduciaries respecting his estate, . . . courts [should] act[] with reluctance to remove them from office." Connelly v. Weisfeld, 142 N.J. Eq. 406, 411 (E. & A. 1948) (citation omitted). Accordingly, "[c]ourts are reluctant to remove an executor or trustee without

clear and definite proof of fraud, gross carelessness, or indifference." In re Hazeltine's Est., 119 N.J. Eq. 308, 314 (Prerog. Ct. 1936); see also In re Margow's Est., 77 N.J. 316, 326 (1978) (noting courts are "hesitant to defeat the will of the testator," even where a chosen executor is flawed). "[S]o long as an executor or trustee acts in good faith, with ordinary discretion and within the scope of his [or her] powers, his [or her] acts cannot be successfully assailed." Connelly, 142 N.J. Eq. at 411. A Chancery court's decision regarding the removal of a fiduciary is reviewed for abuse of discretion. Wolosoff, 205 N.J. Super. at 360.

Plaintiff made multiple applications to remove Fabian as the executor of the Estate. She argued that Fabian had committed fraud because his loans to THC were not disclosed to Sun Bank or Wells Fargo. She also repeatedly referred to comments Fabian had made at the June 27, 2013 joint meeting of the directors of THC and Toben; specifically, that his loans to THC should not be disclosed on the company's books.

The record establishes that the line of credit from Sun Bank was obtained by Applebaum in 2010, two years before his death. Plaintiff offered no evidence that Fabian was involved in securing that line of credit. THC never received a

line of credit from Wells Fargo. Moreover, the application to Wells Fargo was pursued by Gold, not Fabian.

The deposition testimony of Kevin Harvey, a Wells Fargo principal relationship manager, and Debra Heins, a Sun Bank business relationship officer, provided no evidence of fraud by Fabian. Furthermore, the comments made by Fabian at the June 27, 2013 meeting were not direct evidence of fraud. The Chancery court repeatedly found that Fabian's comments concerning not reporting something were "taken out of context" and plaintiff's allegations were conjecture, rather than evidence of "fraud being committed by [Fabian], or upon anyone, least of all [plaintiff]."

Accordingly, we discern no abuse of discretion in the Chancery court's various orders denying plaintiff's requests to remove Fabian as the executor. We also discern no abuse of discretion in the order denying plaintiff's motion for reconsideration. At the hearing on the motion for reconsideration, plaintiff iterated the same arguments she had made at the initial hearing on her motion to remove the executor. A motion for reconsideration

> should only be used "for those cases which fall into that narrow corridor in which either (1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence."

> [In re Belleville Educ. Ass'n, 455 N.J. Super. 387, 405 (App. Div. 2018) (alterations in original) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)).]

Plaintiff did not show that the decision rested on an incorrect basis or that the court had failed to consider competent evidence.

3. The In-Cash Distribution

Applebaum's will devised 60% of THC's stock to the Trust and appointed Fabian, Rajs, and Ben as trustees. The will did not directly address the remaining 40% of the stock but devised the remainder of Applebaum's estate to plaintiff. The will goes on to authorize the executor "without authorization of the [c]ourt, to sell, convey, mortgage, lease, invest, reinvest, exchange, manage, control, retain or otherwise deal with any and all property, real or personal, comprising [Applebaum's] estate, . . . and to make distribution under [the] Will wholly or partly in kind or money."

Plaintiff contends that the Chancery court erred in approving the in-cash distribution of the stock comprising the residual Estate. She argues that the court order permitting the residual Estate's shares in THC to be sold is contrary to Applebaum's testamentary scheme and is inconsistent with our decision in In re Estate of Hope, 390 N.J. Super. 533 (App. Div. 2007).

Distribution of assets from an estate are addressed in N.J.S.A. 3B:23-1 to -10. N.J.S.A. 3B:23-1 discusses the distribution of assets in-kind when a will does not authorize distributions to be made in cash or in-kind. In that regard, that section of the statute states: "Except where a will authorizes distribution[s] to be made in cash or in kind, the distributable assets . . . shall be distributed in kind to the extent reasonably possible through application of the following provisions[.]"

N.J.S.A. 3B:23-3 addresses the method of distribution and states:

> If the personal representative of either a testate or an intestate estate has, in the exercise of good faith and reasonable discretion, continued to hold in kind the distributable assets of an intestate estate or of the residue of a testate estate, the assets shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests, otherwise those assets shall be converted into cash for distribution.

In Estate of Hope, we held that N.J.S.A. 3B:23-3 expressed a preference for in-kind distribution. 390 N.J. Super. at 540. Nevertheless, we also held that "the mode of distribution is subject to the equitable discretion of the personal representative of the estate, and ultimately, of the court." Ibid. We also recognized that "[a] trial court's rulings on discretionary decisions are entitled to deference and will not be reversed on appeal absent a showing of an abuse of

discretion involving a clear error in judgment." Id. at 541 (first citing State v. Marrero, 148 N.J. 469, 484 (1997); then citing State v. Kelly, 97 N.J. 178, 216 (1984); and then citing Harris v. Peridot Chem. (N.J.), Inc., 313 N.J. Super. 257, 283 (App. Div. 1998)).

Here, we discern no abuse of discretion concerning the in-cash distribution of the THC stock. First, Applebaum's will expressly authorized Fabian, as executor, "to make distribution[s] under [the] Will wholly or partly in kind or money." The will also expressly authorized the executor "to sell, convey, . . . manage, control, retain or otherwise deal with any and all property . . . comprising [Applebaum's] estate." Although that plain language does not indicate whether Applebaum preferred distributions in-kind or in cash, it clearly gave Fabian as executor the discretion to make that determination.

Second, even if the preference for in-kind distribution under N.J.S.A. 3B:23-3 was applied, both the executor and the Chancery court exercised their discretion regarding distribution of the stock in cash. See Est. of Hope, 390 N.J. Super. at 541 (recognizing personal representatives and equity judges may exercise discretion within the scope of their powers). The undisputed record establishes there were sound reasons for that determination.

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No one disputes that THC had more value as an ongoing entity than if its assets were liquidated. The Chancery court found that there was no evidence that the trustees were improperly managing THC. Indeed, by the time that the final accounting was approved, Ben was the president of THC, and plaintiff has offered no evidence that Ben acted inappropriately.

This case is also distinguishable from the facts in Estate of Hope. There, the Chancery court ordered a sixteen-acre parcel of land to be sold and the proceeds distributed in cash to the four heirs. Id. at 536. On appeal, two of the heirs argued that N.J.S.A. 3B:23-1 and -3 required that the property be distributed in-kind. Id. at 537. We held that N.J.S.A. 3B:23-1 did not apply. Id. at 538. As already noted, we further held that although N.J.S.A. 3B:23-3 expressed a preference for in-kind distributions, an in-kind distribution may not be appropriate where a beneficiary with an interest in the asset objects. Id. at 540. We concluded that the executor and ultimately the court had the equitable discretion to distribute an asset in cash. Id. at 541. Accordingly, our reasoning and holdings in Estate of Hope support an affirmance of the Chancery court's ruling in this case. See ibid.

4. The Request to Depose Gold

Plaintiff's arguments concerning her request to depose Gold lack sufficient merit to warrant extensive discussion in a written opinion. See R. 2:11-3(e)(1)(E). Accordingly, we make only a few brief comments.

The record reflects that plaintiff had the opportunity to depose Gold for several years but for some reason the deposition never took place. On November 30, 2018, more than a month after Fabian filed the verified complaint seeking approval of the final accounting, plaintiff filed a motion to extend discovery and compel Gold's deposition. On January 3, 2019, after the return date for approval of the final accounting, plaintiff sought to stay the proceedings so that she could depose Gold. By that time, Gold was not the accountant for the Estate and was only the accountant for THC. More critically, the Chancery court determined that there was no good cause for delaying this matter further. We discern no abuse of discretion in that decision. See Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) (explaining that we review rulings on discovery matters for abuse of discretion).

5. The Motion to Recuse the Judge

In January 2019, plaintiff moved to recuse the Chancery judge who was then handling the matter. She claimed that the judge showed "clear bias in

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granting the executor's every request, while denying everything sought by plaintiff." She also asserted that the judge "ab initio 'exonerated' the executor for fraud . . . while characterizing plaintiff's proofs in a scandalous manner[.]" In addition, she faulted the judge for imposing the "death penalty" remedy of disinheriting her because of his rulings concerning the Estate.

The grounds for disqualifying a judge are set out in Rule 1:12-1. Primarily, they focus on the judge having a familiar relationship with the parties or the attorneys or having an interest in the subject of the litigation. R. 1:12-1(a) to (f). The rule also provides that a judge can be disqualified "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g).

Under Rule 1:12-1(g), "it is not necessary to prove actual prejudice on the part of the court[;]" rather, "the mere appearance of bias may require disqualification." State v. Marshall, 148 N.J. 89, 279 (1997). "However, before the [judge] may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." Ibid. "[B]ias is not established by the fact that a litigant is disappointed in a court's ruling on an issue." Id. at 186.

"Motions for disqualification must be made directly to the judge presiding over the case." State v. McCabe, 201 N.J. 34, 45 (2010); R. 1:12-2. "They are entrusted to the sound discretion of the judge and are subject to review for abuse of discretion." McCabe, 201 N.J. at 45 (citing Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001)). Here, we discern no abuse of discretion.

Plaintiff offered no proof that the judge was biased against her. Instead, she complained that the judge never agreed with her. Dissatisfaction with a judge's rulings does not warrant recusal. Marshall, 148 N.J. at 186. Indeed, if plaintiff were to apply that standard, she would be seeking to recuse all the judges who sat on the case concerning her husband's estate. More pointedly, our careful review of the record discloses no grounds that would warrant the recusal of the judge.

6. The Final Accounting

"Actions to settle the accounts of executors . . . [are] commenced by the filing of a complaint in the Superior Court, Chancery Division, and upon issuance of an order to show cause pursuant to [Rule] 4:83." R. 4:87-1(a). The action proceeds as a summary matter, R. 4:83-1, conducted in accordance with Rule 4:67-5, see N.J.S.A. 3B:2-4 (allowing actions by fiduciaries to proceed in a summary manner); see also Garruto v. Cannici, 397 N.J. Super. 231, 240-41

(App. Div. 2007) (providing an overview of probate proceedings in New Jersey). "[A] court must make findings of facts, either by adopting the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing." Courier News v. Hunterdon Cnty. Prosecutor's Off., 358 N.J. Super. 373, 378-79 (App. Div. 2003). If there are genuine issues as to any material fact, the court should conduct an evidentiary hearing on those disputed issues. Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 365 (App. Div. 2010) (citing R. 4:67-5); Courier News, 358 N.J. Super. at 378. Accordingly, "at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action[.]" R. 4:67-5. The decision to approve the final accounting is reviewed for an abuse of discretion. In re Koretzky's Est., 8 N.J. 506, 535 (1951).

Rule 4:87-8 governs exceptions to final accountings and allows an interested person to file written exceptions. Specifically, the rule states:

> In all actions for the settlement of accounts, other than plenary actions, any interested person may, at least [five] days before the return of the order to show cause or within such time as the court allows, serve the accountant with written exceptions, signed by that person or his or her attorney, to any item in or omission from the account, including any exceptions to the commissions or attorney's fees requested. The exceptions shall state particularly the item or omission excepted to, the modification sought in the account and

> the reasons for the modification. An exception may be stricken because of its insufficiency in law.
>
> [Ibid.]

Exceptions to an executor's account are "a vehicle for determining the propriety of the executor's statement of assets and claims for allowance." Perry v. Tuzzio, 288 N.J. Super. 223, 229 (App. Div. 1996). Our Supreme Court has described an action to settle an account as "a formalistic proceeding" that "involves a line-by-line review [of] the exceptions to an accounting." Higgins v. Thurber, 205 N.J. 227, 229 (2011) (citing R. 4:87-1(a)). Although persons making an objection may file an answer, no counterclaim or crossclaim can be filed without leave of court. R. 4:67-4(a).

The rule regarding exceptions does not specify how the exceptions must be presented, except that they must be written, signed by the person making the exceptions or his or her attorney, and must identify "the item or omission excepted to, the modification sought in the account[ing,] and the reasons for the modification." R. 4:87-8. Plaintiff filed an answer, as permitted by the OTSC and Rule 4:67-4(a). In her answer, she requested a plenary hearing. She disputed the Estate's accountant's valuation of THC, denied the executor was entitled to commissions, and disputed the allowance claimed by the executor for

attorneys' and accountants' fees. As required by Rule 4:87-8, plaintiff also provided reasons for the modifications she sought.

Our review of plaintiff's answer satisfies us that her exceptions were sufficient, and she raised several issues that warranted an evidentiary hearing before the court could approve the final accounting. Accordingly, we remand for a limited hearing. In doing so, we clarify the scope of that limited hearing. First, plaintiff will be limited to the exceptions she identified in her answer filed on November 30, 2018. We discern no abuse of discretion in the Chancery court's determination that plaintiff did not present viable counterclaims. We also discern no abuse in the Chancery court's decision to deny plaintiff's request to amend her answer and counterclaims.

Second, certain issues raised in her answer have already been resolved. Plaintiff seeks to object to the sale of the Toben property, but that issue has already been ruled on and cannot be raised again at the evidentiary hearing. Similarly, we have already affirmed the Chancery court's ruling on the in-cash distribution of the value of the stock in THC, and that issue cannot be raised at the evidentiary hearing.

Third, plaintiff is not entitled to any further discovery. Plaintiff had more than five years to conduct discovery and we discern no abuse of discretion in the Chancery court's decision to end discovery.

Finally, we point out that the Chancery court will have the discretion to limit the evidentiary hearing to genuine, material disputes concerning the accounting. Perry, 288 N.J. Super. at 229. We make this final point because a review of the record establishes that plaintiff's various lawyers have often made allegations of fraud and misconduct while failing to identify specific facts supporting those claims. The brief submitted by plaintiff on this appeal illustrates that point. Plaintiff's counsel repeatedly used words such as "brazenly," "clearly spurious," "draconian," "inhumane," "rampant," "Orwellian," "pernicious," "nefarious," "mind-boggling," and "death penalty." Those hyperboles are a poor substitute for reasoned analysis of the facts and law. Accordingly, although we are constrained to remand this matter for an evidentiary hearing, the Chancery court will have the appropriate discretion to conduct a hearing that is focused on the presentation of facts supported by evidence and facts that are limited to appropriate exceptions to the final accounting.

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III.

In summary, we affirm all the orders plaintiff appealed except the April 30, 2019 order approving the final accounting. We remand for a limited and focused evidentiary hearing on disputed material issues identified in plaintiff's November 30, 2018 answer.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION