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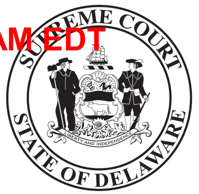

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN E. PEIERLS and
E. JEFFREY PEIERLS,

Petitioners Below,
Appellants

No 11, 2013

Court Below – Chancery Court
of the State of Delaware
C.M. No. 16810-N-VCL

No 12, 2013

Court Below – Chancery Court
of the State of Delaware
C.M. No. 16811-N-VCL

No 13, 2013

Court Below – Chancery Court
of the State of Delaware
C.M. No. 16812-N-VCL

APPELLANTS' OPENING BRIEF

Dated: March 25, 2013
Wilmington, DE

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NATURE OF PROCEEDINGS

This is the consolidated appeal from three separate Opinions and Orders issued by the Court of Chancery on petitions brought in a single proceeding by the beneficiaries and co-trustees of 13 family trusts created from 1953 through 2005 under the laws of New York, New Jersey and Texas to relocate the situs of the trusts to Delaware to have such trusts administered by a Delaware corporate trustee to be approved by the Court of Chancery and to have the terms of the trust instruments modified to make clear the trusts are to be administered thereafter as directed trusts pursuant to the current statutory trust law of Delaware. The relief sought by the petitions was either consented to or not opposed by all persons or entities having an interest in the trusts.

Nonetheless, in a departure from existing and established practice for such petitions, the Court of Chancery found the petitions to be defective for various reasons and denied them all without retaining jurisdiction. Appeals were taken from each of the three Opinions and Orders and were consolidated for the purposes of briefing and argument as a single appeal.

Because the proceedings in the Court of Chancery were uncontested and non-adversarial, this Court has appointed an *amicus curiae* to take a position supportive of the Court of Chancery decisions from which the appeals have been taken.

SUMMARY OF ARGUMENT

I. The first legal proposition on which the Appellants rely is that the Court of Chancery committed error of law by finding that because the trusts had been created by New York, New Jersey and Texas trustors under New York, New Jersey and Texas law it evidenced the intention of the trustors that the trusts were to be administered only pursuant to New York, New Jersey and Texas law, and not the law of any other state, even though all of the beneficiaries and trustees had consented to a transfer of the trust assets to a Delaware corporate trustee to be administered pursuant to the law of Delaware. This determination is contrary to long-established Delaware precedent, contrary to Delaware statutory law and contrary to the common law of trusts generally, and consequently should be reversed.

II. The second legal proposition on which the Appellants rely is that the Court of Chancery committed error of law by finding *sua sponte* that although the petitions seeking orders approving the transfer of the situs of the trusts to Delaware and the modification of the administrative terms of the trusts as permitted by Delaware law, brought with the consent of all persons having an interest in the trusts and in compliance with existing practice and the Rules of the Court adopted specifically to govern such proceedings, the petitions could not

be granted because, inter alia, no actual controversy was presented, because no basis justifying the equitable remedy of reformation was set forth and, because the proposed advisers to the new Delaware trustee were not residents of Delaware, there was concern that the trusts would not be "principally" administered in Delaware. This was error of law because the petitions were not seeking declaratory relief under the Declaratory Judgment Act, were not seeking "reformation" in the traditional equity sense but only modification of administrative provisions as expressly permitted by the Court's Rules, and because Delaware law does not require that advisers to a Delaware trustee be domiciled in or residents of Delaware.

III. The third legal proposition on which the Appellants rely is that the Opinions and Orders of the Court of Chancery should be reversed as violative of public policy. Over the past decade the Delaware General Assembly has systematically revised and amended the Delaware statutes relating to trusts to make them attractive to non-resident trustors and beneficiaries. That effort has been successful, particularly with the relocation of non-resident trusts to Delaware for purposes of administration. Heretofore the Court of Chancery had been supportive of this. Now, for no apparent reason, it has undertaken on its own to impose, by at best a strained application of existing Delaware law, limitations on the

relocation of non-resident trusts for reasons that were never before known to be problematic. Inescapably, this will have an adverse effect on the re-situsing of non-resident trusts to Delaware and run counter to the intent of the General Assembly to attract non-resident trusts to Delaware. It is the legislature, not the courts, that establish the public policy of the State.

STATEMENT OF FACTS

Effective May 1, 2012, the Court of Chancery (the "Court Below") adopted Rules 100-103 governing Proceedings To Modify Trusts By Consent. A-1 to A-5.* These Rules replaced and restated in more detail the previous rules governing proceedings to modify trusts by consent that had been established and implemented by the Court Below by means of Standing Orders. A-6 to A-10.

Both the new Rules and the previous Standing Orders served as an acknowledgement that Delaware trust law, as amended and updated by the General Assembly over the previous decade, permitted and was receptive to the transfer of existing trusts to Delaware from another state or jurisdiction for the purpose of administration, and for the administration of such trusts to be governed by Delaware's trust law for that purpose so long as they continued to be administered in Delaware, while remaining subject to the law of the state or jurisdiction from which they originated for purposes of construction, interpretation or any question as to the validity of the trust. From 2007 through 2010, more than 1,000 petitions to modify trusts by consent, and in increasing numbers in each year, were filed in the Court Below. *See* William B. Chandler, Death Of The Dead Hand?,

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*The Rules in effect when the petitions were filed are included in the appendix. They were modified on October 31, 2012 with changes not relevant to this appeal.

Remarks to 2010 Delaware Trust Conference, Tuesday, November 20, 2010, Hotel DuPont, DuBarry Room, Wilmington, DE 19801 at A-61. Numerous such petitions have been filed since.

On October 11, 2012, petitions to modify trusts by consent for 13 separate trusts that had been established over the years by and among members of the Peierls Family were filed in the Court Below. The petitions were brought by the current beneficiaries and trustees of the 13 trusts. They are the Appellants in this appeal. The petitions were categorized and given consecutive Civil Miscellaneous Numbers 16810, 16811, and 16812 by the Court Below. C.M. No. 16810 consolidated seven testamentary trusts for which the current beneficiaries were the petitioners. C.M. No. 16811 was on behalf of a Charitable Lead Unitrust, a state of Washington charitable trust of which a Peierls Family charitable foundation was the primary beneficiary. The petition was brought by its trustees. C.M. No. 16812 consolidated five *inter vivos* trusts. The petitioners were the current beneficiaries of those trusts.

The petitions on behalf of the 13 trusts all asked for the same thing, namely, for orders (1) approving the resignation of the then current trustees; (2) confirming the appointment of Northern Trust Company of Delaware as the sole successor trustee for each trust; (3) determining that Delaware law governed the administration of each trust; (4) confirming Delaware as the

situs for each trust; (5) reforming the trusts to modify their administrative provisions and, among other things, creating the positions of Investment Direction Adviser and Trust Protector as permitted by Delaware law; and (6) accepting jurisdiction over the trusts by the Court Below. Each petition contained the written consent to the relief sought from all whose interest in the trust would be affected by the petition in compliance with Rule 101(6) of the Court Below. There were no objections to any of the petitions.

The petitions were presented to the Court Below on October 25, 2012. As contemplated by Rules 100-103 the proceedings were non-adversarial. However, the Court Below *sua sponte* raised several concerns and reserved decision. A-11 to A-37 (Hearing Transcript).

On December 10, 2012, the Court Below issued a written Opinion and Order in C.M. No. 16811 on the requested modification of the Charitable Lead Unitrust.[†] From a reading of the trust instrument the Court Below found that by its terms the trustees were permitted to designate a successor trustee and to resign themselves as trustees, and that they were also given the power to change the situs of the trust to make the law of the jurisdiction of the location of the successor trustee govern the

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[†] The Opinion on the Charitable Lead Unitrust is referred to herein as "CLU Op. ____"

administration of the trust. In the words of the Court Below, "[e]ach of these actions can be accomplished pursuant to the express terms of the Trust Agreement." CLU Op. p. 5. Interpreting this aspect of the petition to be one seeking four declaratory judgments, the Court Below concluded that because the change in status prayed for in the sought-after orders could be obtained under the trust instrument without judicial intervention, the "actual controversy" required for declaratory judgment under 10 *Del. C.* § 6501 did not exist and therefore to rule on those four matters as requested would constitute an impermissible advisory opinion. In support of this conclusion the Court Below relied on *Gannett Co. Inc. v. Bd of Managers of Del. Criminal Justice Info. Sys.*, 840 A. 2d 1232 (Del. 2003) for the proposition that it constitutes reversible error for a trial court to have addressed issues as to which there was no actual controversy, and *Stabler v. Ramsey*, 88 A.2d 546 (Del. 1952) for the rule that whether an actual controversy exists is jurisdictional and presents an issue which a court itself is bound to raise. To the extent the petition sought these "declarations," it was dismissed without prejudice. CLU Op. p. 8.

Next, the Court Below seized on the petitioners' request to "reform" the trust to modify its administrative provisions to construe that aspect of the petition to be seeking "reformation"

of the trust. Noting that the equitable remedy of reformation of a document is available only to correct fraud or mutual, or in exceptional cases unilateral, mistake, or, as applied to trusts, to carry out the intent of the settlor if clearly proven, CLU Op. p. 9, the Court Below noted that "[t]he petition does not contend that reformation is necessary to make the Trust Agreement conform to the intent of the settlor, nor does it advance any recognized basis for reforming the Trust." CLU Op. p. 10. Accordingly, the Court Below denied the petitioners' request for "reformation." In so doing the Court Below accepted jurisdiction over the trust for the purpose of denying the reformation request, but having done so, jurisdiction over the trust was not retained. CLU Op. p. 10.

Also on December 10, 2012 the Court Below, again by written Opinion and Order, issued a 34-page ruling on the consent petitions that sought to modify the administrative provisions of the five Peierls Family *inter vivos* trusts.[‡] Two of those trusts were created in 1953, two others in 1975. All four were created under New York law. The 1953 trusts state that they were created by the settlor and accepted by the trustees in the State of New York and that all questions pertaining to their "validity, construction and administration shall be determined

[‡] The Opinion on the five *inter vivos* trusts is referred to herein as "IVT Op. ______."

in accordance with the laws of the State of New York." IVT Op. p. 27. The two 1975 trusts each contain the statement that "This Agreement shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York." IVT Op. p. 28. The fifth trust was created in 1957 in New Jersey and contained the statement that "[t]his Indenture shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey." IVT Op. p. 30. The initial institutional trustee of all five trusts was Bankers Trust Company, a New York banking corporation. Two individuals, one being a beneficiary and member of the Peierls Family, served as co-trustees for the two trusts along with Bankers Trust Company. IVT Op. p. 1-2.

With respect to the two 1975 trusts the Court Below concluded, as it did with the Charitable Lead Unitrust, that because the trust instruments empowered the two individual co-trustees to remove and replace the institutional co-trustee, because the trust instruments also permitted a trustee to resign, and because the two individual co-trustees had executed resignations after having executed instruments to replace the previous institutional trustee with the Northern Trust Company of Delaware ("Northern Trust"), there was no actual controversy for it to determine. For that reason the requests to confirm

the resignations and the appointment of Northern Trust as successor trustee were denied. IVT Op. p. 7-10.

As to the two 1953 trusts and the 1957 trust, the Court Below reasoned that because the trust instruments for all three provided that there should always be three trustees for each trust consisting of two individuals plus a bank or trust company, the requested modification could not be granted unless the trusts were first reformed so as to permit Northern Trust to thereafter serve as the sole trustee, and that this could not be done by the Court Below unless the administration of the trusts was governed by Delaware law.

The Court Below found that it was not governed by Delaware law, and found further that the clear intent of the settlors as expressed in all five trust instruments was to have the administration of the trusts governed by either New York or New Jersey law as stated, and that it had no authority to enter orders transferring the situs of the trusts to Delaware to be administered thereafter by Delaware trust law and therefore no authority to reform or modify the trusts under Delaware law. IVT Op. p. 10-27.

In so doing the Court Below relied upon the decisions of this Court in *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309 (Del. 1942); *Wilmington Trust Co. v. Pennsylvania Co.*, 172 A.2d 63 (Del. 1961); *Dutra de Amorim v. Norment*, 460 A.2d

511(Del. 1983); and *Annan v. Wilmington Trust Co.*, 559 A.2d 1289 (Del. 1989) as well as the Chancellor's decision in *Wilmington Trust Co. v. Sloane*, 54 A.2d 544 (Del. 1947) for the proposition that the intent of the settlor of a trust controls, and that when a settlor has selected a governing law, the power vested in another "to appoint a successor trustee in and of itself is insufficient to override this intent, unless the trust document as construed by the Court expressly provides for such a change." IVT Op. p. 21-22.

Because the Court Below found that New York and New Jersey law applied at the time that the Peierls family petitions were presented and because the petitions on behalf of the five *inter vivos* trusts did not address the parameters of New York or New Jersey law relating to the change of situs or reformation of New York or New Jersey trusts under the law of those states, it concluded that it was not in a position to pass on those issues, and noted further that because the trusts would not have any ongoing obligations to the Court Below nor would Northern Trust be submitting accountings if the petitions were to be granted, it was not clear what accepting jurisdiction over the trusts would mean. IVT Op. p. 31-33.

Finally, the Court Below expressed concern as to whether the principal place of administration of the trusts would be in Delaware if the petitions were to be granted and the trusts

modified as requested since the one consenting co-trustee who would serve as the Investment Direction Adviser and a current individual co-trustee on other of the Peierls Family trusts who was to serve as the Trust Protector "will carry out the bulk of a trustee's traditional duties, functions and responsibilities" and neither is a resident of Delaware. IVT Op. p. 32.

In conclusion, the petitions for all five of the *inter vivos* trusts were denied, the matter was dismissed and jurisdiction was not retained.

On the following day, December 11, 2012, the Court Below issued its ruling, again by a written Opinion and Order, in C.M. 16810. The petitions in that matter sought the modification of seven testamentary trusts.[§] The specific relief sought was the same as in the petitions for the Charitable Lead Unitrust and for the five *inter vivos* trusts. The petitions were brought by the Appellants as the current beneficiaries of the trusts. Two of the trusts originated from the will of the father of the two beneficiaries, one trust for each (referred to by the Court Below as "the 1960 Trusts"); two others from the will of the grandmother of the two beneficiaries ("the 1969 Trusts"), again one trust for each; and the other three from the will of the

[§] The Opinion on the seven testamentary trusts is referred to herein as "TT Op. p. _____."

deceased wife of one of the two beneficiaries (the 2005 Trusts). TT Op. p. 1-2.

The father had died a resident of New Jersey and his will was probated there. The trusts it created were thereafter administered under the laws of New Jersey. Intermediate accountings for the 1960 Trusts had been approved by a New Jersey court, implying to the Court Below that future accountings might be due and that ongoing jurisdiction over the trusts could be anticipated by the New Jersey court. TT Op. p. 6-7.

The grandmother had died a resident of New York and her will was probated there. The petitions disclosed that New York law had governed the administration of the 1969 Trusts until 2000 when the Probate Court of Dallas County, Texas accepted jurisdiction over them conditioned on an order from a New York court approving the change in situs from New York to Texas. Such an order from the New York Surrogate's Court had been forthcoming and thereafter the Texas court, in 2001, entered a decree that Texas law governed administration while New York law continued to govern the disposition of property under the trusts. TT Op. p. 8.

In its ruling the Court Below acknowledged that it had the power to address the petitions, TT Op. p. 6, but determined that as a matter of comity to the courts in New Jersey and Texas it

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should not do so. As to the 2005 Trusts, it found from the petitions that apparently there were ongoing probate matters in another jurisdiction that were not identified, and that the petition also did not identify where the testatrix had died. From this it concluded that it should exercise judicial restraint and not take action without further information indicating that it would be appropriate for the Court Below, rather than a court in another state, to consider the relief sought in the petitions. TT. Op. p. 9.

For those reasons the Court Below dismissed the petitions for the 1960 Trusts and the 1969 Trusts, without prejudice, and directed that the petitioners should first seek approval for the relief they wanted from the courts of New Jersey and Texas. It also dismissed the petitions for the 2005 Trusts, without prejudice, for lack of information. TT. Op. p. 9.

The parties to the proceedings in the Court Below, as ably described by the Court Below in its Opinions, include the Appellants Brian E. Peierls and E. Jeffrey Peierls, brothers and the sons of settlors Edgar and Ethel Peierls, both deceased. Brian and Jeffrey are the petitioners as to all 13 trusts, in their capacity as the trustees of the Charitable Lead Unitrust and as the current beneficiaries and co-trustees of those of the other 12 *inter vivos* and testamentary trusts created for their benefit. Brian has two adult children, Stephan Peierls and

Derek Peierls, who are also current beneficiaries along with their father of one of the testamentary trusts and who are potential remainder beneficiaries as to the other trusts. Also included is Malcolm A. Moore, an attorney and trusted Peierls Family adviser who serves as co-trustee along with either Brian or Jeffrey on the trusts existing for their benefit. Mr. Moore is a past president of the American College Of Trust And Estate Counsel.

Bank of New York is no longer corporate trustee for any trust. At some point it was succeeded by U.S. Trust Company which, in turn, has been succeeded by Bank of America, the current institutional trustee. A stated reason for the requested change in the situs of the trusts to Delaware for administrative purposes and the appointment of Northern Trust as corporate trustee has been the dissatisfaction of Brian and Jeffrey with the level of communication and responsiveness of both U.S. Trust Company and Bank of America to them and Mr. Moore as co-trustees. IVT Op. p. 2. Bank of America, while not participating as a party to the petitions, has given notice of its consent to the change in corporate trustees.

I.

Question Presented: Did The Court Below Misapply The Law Of Delaware Applicable To The Transfer Of The Situs Of A Non-Resident Trust To Delaware For Purposes Of Administration?

Scope of Review: The standard and scope of review for error of law is de novo. *See, e.g., Delaware Board of Nursing v. Gillespie*, 41 A.3d 423, 425 (Del. 2012); *see also Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 132 (Del. 2011)

Merits of Argument:

This question is raised by the Opinion and Order of the Court Below in C.M. No. 16812. As to the five *inter vivos* Peierls Family trusts that were created under the law of either New York or New Jersey, the Court Below concluded that because the trust instruments stated, either expressly or in effect, that their validity, interpretation and "administration" would be determined or governed by the law of those states, when coupled with the designation of an in-state corporate trustee, it showed conclusively that it was the intent of the settlors that the administration of those trusts would continue to be governed by the law of New York and New Jersey even if the corporate trustee and location of the trust assets might later change with the consent of the beneficiaries to a qualified bank or trust company located in and doing business in another state. In the words of the Court Below:

> When the settlor or grantor has selected a law to govern a trust, Delaware will enforce that choice. The 1953 Trusts and the 1975 Trusts provide for the application of New York law, and the 1957 Trust provides for the application of New Jersey law. Those designations are controlling, even if a Delaware successor trustee is appointed or the situs of the trusts shift to Delaware. IVT Op. p. 31.

However, while that is true with respect to questions of construction, interpretation or validity, it has never been the law of this State with respect to trust administration, as evidenced by both the decisions of this Court on which the Court Below relied and the public policy of this State as confirmed by the General Assembly.

In dismissing the petitions to approve the change in the situs of the five Peierls Family *inter vivos* trusts to Delaware and to modify and modernize their administrative provisions under Delaware law, the Court Below read more into the decisions of this Court on which it relied than was warranted. Those decisions do not stand for the proposition that creating a trust under the law of another state shows the intent of the settlor to forevermore have its administration governed by the law of that state, the same as with questions of construction, interpretation or validity. Nor do they stand for the proposition that a trust created under the laws of another state cannot be relocated to Delaware solely for the purpose of

administration. Indeed, the effect of the seminal decision of this Court in *Wilmington Trust Co. v. Wilmington Trust Co., supra*, is to the contrary.

That case involved a New York *inter vivos* trust created by a settlor domiciled in New York who, as both this Court and the Court Below found, intended initially that the trust be governed by the law of New York for all purposes. However, the trust contained a provision that its beneficiaries, subject to the approval of the settlor during his lifetime, could remove the original trustee (the settlor's wife) and replace her with a bank or trust company meeting the settlor's qualifications located in any state. This later occurred and Wilmington Trust Company in Delaware was made successor trustee and the trust assets transferred to it. The question presented in the litigation was one of conflict of laws - which state's law applied to determine - "the validity and effect" of the exercise of a power of appointment given to a beneficiary under the trust agreement. 24 A.2d 310. It did not deal with the administration of the trust by the trustee as such.

That decision by this Court is significant here because it was preceded by not one, but three, reported opinions in the Court Below. In the second of those decisions, *Wilmington Trust Co., v. Wilmington Trust Co.*, 186 A. 903, 910 (Del. Ch. 1936)

Chancellor Josiah Wolcott made the following observation of existing law:

> There is no irreconcilable difficulty in having the meaning and validity of a trust judged by the law of one jurisdiction and its administration governed by the law of another. Practical considerations render necessary the principle that no matter under what jurisdiction the validity of the trust is to be determined, problems concerning its management are referable to the jurisdiction where the seat of its administration is located. (Citations omitted). When a question of validity is stirred by a dispute over administration, the tribunal having authority to determine the administration must decide the question of validity according to the law of the foreign state whose law is applicable thereto.

On the facts Chancellor Wolcott concluded that the law of New York controlled the issue of validity before him. However, before a decree could be entered, Chancellor Wolcott passed away. He was succeeded by Chancellor William Watson Harrington. Chancellor Harrington heard the case anew as supplemented by additional facts not before Chancellor Wolcott. He agreed with Chancellor Wolcott's statements of the law, but on the facts reached the differing conclusion that Delaware law applied. In the process Chancellor Harrington also acknowledged that:

> …all matters relating to the administration of a trust *inter vivos* are ordinarily determined by the law of its location.

Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 162 (Del. Ch. 1940).

On appeal this Court affirmed Chancellor Harrington and specifically approved the conclusions reached by him and the reasons given in his opinion in the Court Below. In closing this Court observed as follows:

> There is no substantial reason why a donor, in dealing with that which is his own, may not provide for a change in the location of his trust with a consequent shifting of the controlling law. In an era of economic uncertainty, with vanishing returns from investments and with tax law approaching confiscation, such a provision would seem to amount to no more than common foresight and prudence.

Wilmington Trust Co. v. Wilmington Trust Co., at 24 A.2d 309, 314 (Del. 1942).

In 2006, the Delaware General Assembly codified this principle of common law by enacting 12 *Del. C.* § 3332 to read as follows:

> § 3332 Governing Law; Change of Situs
>
> (a) The duration of a trust and time of vesting of interests in the trust property shall not change merely because the place of administration of the trust is changed from some other jurisdiction to this State.
>
> (b) Except as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State.

The synopsis to the Senate Bill creating the statute states:

> Section 3 of the Bill addresses certain conflict of laws issues relating to trusts moving to this State from other jurisdictions. 75 Del. Laws. 300 (2005 S.B. 311).

Accordingly, since at least 1936 the law of Delaware has recognized that it is completely appropriate for the situs of a non-resident trust to be transferred to this State to be thereafter administered and managed in Delaware by a Delaware trustee under Delaware law, and to therefore be subject to the jurisdiction of the Court Below, provided that any questions as to the construction, interpretation or validity of the trust continue to be governed by the law made applicable to the trust at the place of its creation. More recently this longstanding principle and expression of existing public policy has been effectively reaffirmed by this Court sub silentio in *Annan v. Wilmington Trust Company, supra*, at 559 A.2d 1290, 1293 (citing *Wilmington Trust Co. v. Wilmington Trust Co.* at 24 A.2d 313).

The Court below interpreted the language of the five trusts calling for them to be governed by the law of New York or New Jersey to be an expression of intent by the Peierls Family settlors that New York or New Jersey law should govern the administration of the trust unless administration by the laws of

another jurisdiction was either permitted by New York or New Jersey law or, as in *Wilmington Trust Co. v. Wilmington Trust Co.*, by express language in the trust itself. What this overlooks is that each of the Peierls Family trusts provides for the removal and replacement of the corporate trustee with no restriction as to where the successor corporate trustee can be located. This means that a successor corporate trustee with a place of business in a state other than New York or New Jersey is a permissible successor trustee. That was within the intent of the settlors. And in that event, as recognized in *Wilmington Trust Co. v. Wilmington Trust Co. trilogy,* it is generally understood that the law of the state in which the successor trustee is located and conducts business becomes the law which applies to the administration and management of the trust as long as its situs remains there. Logically this must be so. Otherwise every corporate trustee with its place of business in one state would be required to know and be responsible for the specifics of the law of trust administration of every other state or foreign jurisdiction from whence a relocated trust might come, a totally unrealistic legal burden to place on banks and trust companies organized and doing business in Delaware. The Court Below cites no case that supports such a proposition.

The courts of the State of New York recognized this principle in *Matter of New York Trust Company*, 87 N.Y.S. 787

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(1949) permitting an individual trustee to appoint a California trust company and transfer the situs of the trust to California. In distinguishing other cases dealing with governing law, the New York court noted the principles in other cases deal with the law under which "validity, interpretation or effect of a trust instrument shall be resolved. It does not determine the place for administration of the trust or irrevocably fix its situs in this state." Id. 790. The court went on to state:

> The holding that the situs of this trust may be transferred to a sister state without offending our policy gives the trust mobility instead of rigidity. In these days, when *inter vivos* trusts are created with ever growing frequency, when state lines are crossed so easily and people maintain contacts in several states, a sympathetic approach to problems of this sort is more likely to lead to the effectuation of the true intent of the creator of the trust. Id. 794-795.

Indeed, the overwhelming authority is that the law governing the administration of a trust, testamentary or *inter vivos*, is the law of the state where the trust is administered. Restatement (Second) of Conflict of Laws ("Restatement"). §§ 271(b) and 272(b). With regard to testamentary trusts, the Restatement provides that the law governing the administration, if there is no specific designation, is:

> The local law of the state of the testator's domicil (sic) at death, unless the trust is to be administered in some other state, in which case the local law of the latter state will govern. Restatement § 271(b).

None of the testamentary trusts at issue designate the law governing the administration of the trusts and the testator granted the power to change trustees thereby permitting the designation of a trustee in a state other than the testator's domicile. In this regard, comment g to Restatement § 271 provides:

> The court should permit a change in the place of administration and a termination of the trustee's accountability to it if this would be in accordance with the testator's intention, either express or implied. Such a change may be expressly authorized in the will. It may be authorized by implication, such as when the will contains a power to appoint a new trustee in another state, or simply a power to appoint a new trustee if this is construed to include the power to appoint a trustee in another state.

Similarly, while Restatement § 272 recognizes that a trustor may designate the law of the state to govern the administration of an *inter vivos* trust, it also recognizes that the law of administration may change where the change is expressly authorized or authorized by implication in the trust instrument:

> A simple power to appoint a successor trustee may be construed to include a power to appoint a trust company or individual in another state. In such cases, the law governing the administration of the trust thereafter is the local law of the other state and not the local law of the state of original administration. Restatement § 272 cmt e.

The Uniform Trust Code ("UTC")** unequivocally authorizes a change in the law of administration when a trust is moved from one jurisdiction to another. UTC § 108(c). In fact, the UTC imposes a continuing obligation on a trustee to "administer the trust at a place appropriate to its purposes, its administration, and the interest of the beneficiaries." UTC § 108(b). A trust's principal place of administration under the UTC is the place (i) where the trustee is located; (ii) where the trust records are kept; or (iii) in a case of an institutional trustee, the place where the trust officer responsible for supervising the account is located. UTC § 108 cmt. Usually the law of the trust's principal place of administration will govern administrative matters. UTC § 107 cmt. See, also Scott and Ascher on Trusts, Fifth Edition, § 45.5.3.1, "Permitting Change of Place of Administration."

Therefore, by authorizing the change of trustees and the selection of a trustee in a state other than the state where the trust was created, the expressed intent of the settlor/testator was to authorize a change in the law of administration governing the trust to the law of the state where the trust is to be

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**The Uniform Trust Code was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in all the states at an annual conference held from July 28, 2000 to August 4, 2000. The Honorable Maurice A. Hartnett III, then a Delaware Supreme Court Justice, chaired the committee.

administered, in this case, the State of Delaware. Accordingly, in light of the foregoing authorities, the existing case law and the statutory precedent described above, the failure of the Court Below to consider the intent of the settlor under the entirety of the trust instrument was an error of law. As such, this court should affirm the holdings of the *Wilmington Trust Company* line of cases and reverse the Court Below's ruling that the administration of the Peierls trusts, inter vivos and testamentary alike, is governed by the laws of the initially named jurisdictions.

II.

Question Presented: Before The Court-Below Can Approve Modifications Of Administrative Provisions Of A Trust Being Re-Sitused In Delaware By Consent, Must There Be (i) An Actual Controversy; (ii) Grounds For The Equitable Remedy Of Reformation And; (iii) Delaware Residences For Both The Trust Advisors And The Trustee?

Scope of Review: A Court's Legal Interpretations Are Subject To De Novo Review. *See Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006)

Merits Of Argument:

With respect to the Charitable Lead Unitrust in C.M. No. 16811, as to which Brian Peierls and Jeffrey Peierls are co-trustees along with Bank of America, the Court Below took note that the trust instrument authorized Brian and Jeffrey to not only resign as co-trustees but to jointly designate a successor corporate trustee, with the situs of the trust to be the location of that new trustee's main business. It found the same to be true with the two 1975 *inter vivos* trusts in C.M. No. 16812. Because Brian and Jeffrey could without judicial intervention take the action they were asking it to approve, the Court Below concluded that the "actual controversy" required for declaratory relief under the Delaware Declaratory Judgment Act was lacking and therefore denied that aspect of the relief sought by the consent petitions in the proceedings.

Respectfully, the Court-Below erred in its interpretation of applicable Delaware law.

The petitions at issue did not seek declaratory judgments under the Declaratory Judgment Act, either expressly or by implication. No one consenting to the petitions sought a declaration of his or its rights, status or legal regulations with respect to those trusts. See 10 *Del. C.* § 6501. No one consenting to the proposed modifications sought a determination of a question of construction or validity arising under the trust indentures. See 10 *Del. C.* § 6502. No one sought a declaration of rights or legal relations with respect to the trusts in the categories permitted by 10 *Del. C.* § 6504, nor did any of those consenting to the proposed modifications seek by the petitions to settle or obtain relief from uncertainty and insecurity with respect to the rights, status or other legal relations relating to the trusts. See 10 *Del. C.* § 6512. The petitions simply sought approval and confirmation by the Court Below of the relocation to and consolidation of the trusts in Delaware for administration purposes under Delaware law that was being undertaken with the consent of all parties having an interest in the trusts. Moreover, it was being undertaken pursuant to the Rules of the Court Below in place for that purpose.

The petition by consent procedures heretofore developed and implemented by the Court Below for handling applications to approve the transfer of the situs of a non-resident trust to Delaware for administration purposes does not give rise to the waste of judicial resources as feared by the Court Below. IVT Op. p. 9; CLU Op. p. 5. To the contrary, the intent behind the current Rules of the Court Below governing Proceedings To Modify Trusts By Consent is to avoid such a waste. See Argument III, infra.

It was also unwarranted for the Court Below to treat the petition as to the Charitable Lead Unitrust to be seeking "reformation" of that trust and to then find it defective for failing to allege facts and reasons meeting the standard for the equitable remedy of reformation. Reformation, as an equitable remedy, looks backward in time to when a legal document containing a mistake or invalid provision attributable to fraud was first created, and corrects and reforms the document effective as of that date. *Roos v. Roos*, 203 A.2d 140, 142 (Del. Ch. 1964). What the petition sought here was "modification" of a valid and existing trust indenture. Modification looks to the future by altering the administration provisions of the trusts to make them more flexible and to thereby better serve the interests of the beneficiaries going forward. In retrospect, the use of the term "reform" in the

petition was obviously unwise. But surely the Court Below is chargeable with recognizing the distinction. Its own special rules under which the Peierls Family petitions were filed are entitled "Proceedings To Modify Trusts By Consent," and they specifically refer several times in their content to a "petition to modify a trust by consent."

The petition of Jeffrey and Brian Peierls as its individual trustees did not seek reformation of the Charitable Lead Unitrust in the traditional sense used in equity jurisprudence. It sought only approval of a change in its situs and modification of its administrative terms, each of which is contemplated by the statutory law of Delaware, to put it on a level of management equal to or consistent with the administrative flexibility available to a trust created under Delaware law today. Under the circumstances, the Court-Below committed legal error when it applied arbitrarily a standard that runs afoul of its own Rules as the justification for denying the relief requested. For the same reason the rationale of the Court Below in declining the requested modification of the *inter vivos* trusts because the petitions failed to address the parameters of New York and New Jersey law applicable to "reformation" was misplaced.

Also, as an additional reason for denying the change of situs and modification petitions for the five *inter vivos* trusts

in C.M. No. 16812 the Court Below expressed its concern that although Northern Trust "apparently does some unspecified business in Delaware," neither Jeffrey, who was to become the Investment Direction Adviser, nor Mr. Moore, whose role was to become that of Trust Protector, were domiciled in Delaware. The Court Below then surmised that since Jeffrey and Mr. Moore, after assuming their new roles following approval of the resignation of the trustees and the appointment of Northern Trust as sole trustee, "will carry out the bulk of a trustee's traditional duties, functions and responsibilities," it was not clear that the principal place of administration of the trusts would be in Delaware since neither the Investment Direction Adviser nor the Trust Protector would "live, work, or make trust related decisions in Delaware." IVT Op. p. 32.

There is no basis in existing law to support this. Indeed Delaware law is to the contrary. As established in *Wilmington Trust Co. v. Wilmington Trust Co trilogy, supra*, where the sole corporate trustee is a resident of and doing business in Delaware and holds the assets of the trust in Delaware, the situs of the trust for administrative purposes is considered by the law to be in Delaware. A sole corporate trustee with sole custody of the trust assets has other critical administrative duties to perform even if another is given a say over investment decisions. Investment directions must still be carried out,

distributions made and accounted for, taxes calculated, filed and paid, and information provided and relationships with beneficiaries maintained. Indeed giving one other than the corporate trustee a say over investment decisions even when that person or entity is a nonresident is not something new to Delaware trust law.

In *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), aff'd, sub nom. *Hanson v. Denckla*, 357 U.S. 235, reh'g denied 258 U.S. 858 (1958) a Pennsylvania resident created a Delaware trust with a Delaware corporate fiduciary. The trust was revocable and the trustor retained the right to control distribution decisions. Moreover, the trustee could only exercise certain investment authority upon the written direction or consent of a trust adviser. The trustor and the trust adviser were both residing in Florida at the relevant time. This Court found that the trust was administered in the State of Delaware where the trustee was domiciled. This decision was affirmed by the Supreme Court of the United States.

It is also significant that the trustee appointed by the Peierls family, Northern Trust, is a Delaware limited purpose trust company under the regulatory supervision of the Delaware State Bank Commissioner with its sole office location in the State of Delaware. Neither the investment direction adviser nor

the trust protector is subject to any such regulatory authority in the state of his residence.

Moreover, nowhere in Title 12 of the Delaware Code does the term "principal place of administration" appear. The General Assembly recognized the popularity of Delaware directed trusts under 12 *Del. C.* § 3313 and chose to permit any trust administered in Delaware (not just those principally administered here) to take advantage of certain Delaware laws relating to the administration of a trust. See, 12 *Del. C.* § 3332(b) (the laws of this state shall govern the administration of the trust while the trust is administered in this State); 12 *Del. C.* § 61-106(l) - relating to total return trusts - (this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Delaware under Delaware law) - with certain exceptions - synopsis: This section is designed to be available to all trusts administered in Delaware, regardless of whether they are administered by corporate or individual trustees. It will also be available to trusts that are moved to Delaware. 73 Del. Laws. 48 (2001 S.B. 169); 12 *Del. C.* § 3528(f) - relating to the Delaware decanting statute - (this section shall be available to any trust that is administered in this State); and 12 *Del. C.* § 61-605 - relating to the Delaware

Uniform Principal and Income Act - (this chapter shall apply to any trust that is administered in Delaware under Delaware law).

These sections of the Delaware Code should be compared with 12 *Del. C.* § 3545(b) which codifies the general common law rule that the validity of a trust "executed in compliance with the law, at the time of execution, of the place which serves as the initial place of administration of the trust" is valid notwithstanding that it does not comply with Delaware law.

Further, while the Court Below stated that it did not have before it any record of just what duties Northern Trust was expected to perform, and therefore no basis for speculating that the bulk of the administrative services for the trusts were likely to be performed in Delaware if the petitions were granted, this was not the case. Each of the petitions was accompanied by a letter to the Court Below with a section entitled "Court's Jurisdiction Over Trust" stating that Northern Trust would be responsible for all distribution decisions, including exclusive authority to make income distribution decisions and authority to make principal distribution decisions subject to a veto power in the Trust Protector, and further stating that "Northern Trust Delaware will have authority over all other administrative functions of the Trust which will take place in Delaware, and will be the sole fiduciary responsible for holding all official records of the Trust."

In sum, the Court Below misconstrued the relief requested in the petition - despite the fact that such petitions complied

with the very rules established by the Court Below to obtain such relief - and, in so doing, applied an inapplicable Declaratory Judgment Standard. Further, the Court Below's refusal to order the application of Delaware law to the administration of the Peierls trusts, due to the potential that certain fiduciary functions would be performed outside this jurisdiction, is contrary to existing Delaware law and practice with respect to the rules to be applied to trusts that will be administered in Delaware by corporate trustees located in this State. Additionally, the Court Below's imposition of a "principal" place of administration standard is inconsistent with applicable Delaware law and the policy of this state as established by the General Assembly. Accordingly, the foregoing actions of the Court Below constituted errors of law and should be reversed.

III.

Question Presented: Do The Opinions And Orders Of The Court Below Conflict with Delaware Public Policy?

Scope of Review: The standard and scope of review for a question of law is de novo. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1353 (Del. 1992)("To the extent our decision turns on public policy grounds, it implicates purely a question of law over which de novo review is appropriate.")

Merits Of Argument:

There is an additional reason why the Orders of the Court Below should be reversed. The Opinions and Orders of the Court Below run against the public policy of Delaware as it relates to the administration of trusts. From 2000 to 2010, the Delaware General Assembly adopted 22 bills making multiple amendments primarily to Title 12 of the Delaware Code dealing with the creation and administration of trusts under Delaware law. A-38 to A-39. This was done to encourage the development of trust business in Delaware, both as to new trusts going forward as well as the transfer of existing trusts from other jurisdictions for administration in this State. The Opinions and Orders of the Court Below have the effect of seriously questioning Delaware's receptiveness to the movement of trusts to Delaware from another jurisdiction for purposes of administration and

have cast doubt on the efficacy of numerous consent orders entered by the Court Below under its initial Standing Orders for approving the relocation of non-resident trusts to Delaware, as well as other transactions that have effectively moved trusts to Delaware for purposes of administration.

As shown previously, Delaware has always recognized that a trust settled under the law of a sister state could be transferred to Delaware for administration purposes. That is the law in most other states as well. See, Nonjudicial Transfer of Trust Situs Chart, A-77 to A-93. Under the former practice, the situs of a trust and its assets could be transferred to Delaware without the benefit of a court order. Once here, a petition could then be brought to modify one or more of the administrative provisions of the trust pursuant to Delaware law. Members of this Court may recall that in past practice the process was initiated by a civil action seeking a rule to show cause, with notice by registered mail or otherwise being given to all interested parties directing them to appear in the Court on a date certain to give any reason they might have why the relief should not be granted. Typically, no one appeared and the requested order would be entered without objection. This process, although used infrequently, was cumbersome and not the best use of Court time and resources.

As the trust business in Delaware increased in response to the modernization of the trust laws by the General Assembly, the consent procedures were developed by a collaboration of the Delaware trust bar with the Court Below (under the then Chancellor) for the benefit of both the Court Below and trust beneficiaries and trustees who determined to change the situs of a trust to Delaware. The former rule to show cause practice was replaced by the common sense approach of simply entertaining petitions and entering orders to acknowledge the transfer of the non-resident trust to Delaware accompanied by an unopposed modification of its administrative provisions as part of a single, non-adversarial, proceeding in which all persons having an interest in the trust had provided their consent to the Court Below in writing. This not only reduced the call on the time and calendar of the Court Below that would have otherwise ensued, it also gave the Court Below the opportunity to review the propriety of the proposed transfer in advance and placed the onus on counsel to assure that all was in order before presentation.

This involvement of the Court Below, with its national reputation, proved to be an added attraction that has brought about the re-situsing of many trusts to Delaware. For a description as to how the consent procedure came about and the rationale behind both it and change in the outlook of Delaware

trust law, the Court is respectfully referred to the *Report To The Court of Chancery Of The State of Delaware On The Matter Of Consent Petitions* (without exhibits) dated March 8, 2010, A-40 to A-58, and the previously referenced *Death of the Dead Hand?*, dated September 30 2010, A-59 to A-76.

Prior to the entry of the Opinions and Orders by the Court Below, the consent procedures for the modification of trusts, pursuant to both the initial Standing Orders of the Court Below and the present procedures under Rules 100-103, Proceedings to Modify Trusts By Consent, have worked well, and Delaware's trust business has prospered as intended by the General Assembly. Now, however, if the determinations of the Court Below that are challenged herein are permitted to stand it will dramatically reduce, if not effectively eliminate in some circumstances, the incentive for the trustees and beneficiaries of non-resident trusts to relocate their trust business to Delaware to take advantage of Delaware's modern law of trust administration and will thereby frustrate the public policy of the State as expressed by the General Assembly, particularly by 12 *Del. C.* § 3332 with respect to non-resident trusts.

It is for the legislature, not the courts, to declare the public policy of the State, and regardless of what might be believed to be the best public policy, it is the legislature and not the judiciary that should make the determination. *Federal*

United Corporation v. Havender, 11 A.2d 331 (Del. 1940); *Sands v. Lefcourt Realty Corporation*, 117 A.2d 365 (Del. 1955); *Allstate Insurance Company v. Gillaspie*, 668 A.2d 757 (Del. Super. 1995).

Here, by unilaterally developing on its own and imposing requirements that did not exist previously to serve as unnecessary impediments to the transfer of non-resident trusts to Delaware for purposes of administration, the Court Below is, in effect, substituting its view of what the policy of the State should be for that of the legislature. This is particularly evident by its reliance on the judicial principle of "comity" as the basis for the rejection of the Peierls Family petitions seeking to change the situs and the law of administration for the seven Peierls Family testamentary trusts to Delaware.

Two of those trusts came into being in 1960 upon the death of the Appellants' father in New York; two others in 1969 following the death of their grandmother in New Jersey. There is no indication that any litigation or accounting obligation was pending 40 to 50 years later in the courts of either New York or New Jersey concerning any of the four trusts. Had there been, it would have been disclosed and explained in the petitions. In fact, administration over the two New York trusts had already been transferred to Texas with the consent of New York. Yet, on the basis of comity, the Court Below, while

acknowledging that it had the power to address the petitions (TT Op. p. 6) dismissed them and directed the Appellants to go to the courts in New Jersey and Texas to obtain approval of the transfers before it would consider granting the applications to have the trusts administered in Delaware. This is not a jurisdictional requirement under current Delaware trust law.

As stated in *White v. Govatos*, 10 A.2d 524, 529 (Del. Super. 1939) comity is not a positive rule of law:

> "… but a rule of a practicality based upon a proper regard for the laws and institutions of a foreign state. The obligation is not imperative, and however regarded as a basis of jurisdiction, the truth remains that jurisdiction depends on the law of the forum, and this law, in turn, rests on the public policy declared by the legislature."

Or as more emphatically stated by this Court in *Italo-Petroleum Corporation of America v. Hannigan*, 14 A.2d 401, 404 (Del. 1940), citing *White v. Govatos*:

> Comity does not demand the surrender of the public policy of the State.

As evidenced by the efforts of the General Assembly over the last quarter-century, the public policy of this State is to encourage the creation of Delaware trusts and the transfer of non-resident trusts to Delaware to be administered under Delaware's now-leading trust administration law. This policy will be greatly impaired if the Opinions and Orders of the Court Below are permitted to stand - a result that is greatly at odds

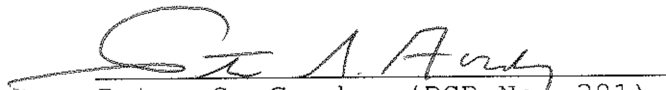
with the established principle that public policy is determined by the legislature, not the judiciary. For this reason, as well as the others hereinbefore described, the rulings of the Court Below should be reversed.

CONCLUSION

For the reasons and arguments set forth herein, the Opinion and Order in each of C.M. No. 16810, C.M. No. 16811 and C.M. No. 16812 in the Court Below should be reversed and vacated and the Court Below directed to enter the proposed orders submitted as applicable to each of the petitions for the 13 Peierls Family trusts approving the relocation of the situs of the trusts to Delaware, approving Northern Trust as the sole successor trustee and confirming that the law of Delaware is to govern the administration of the trusts while the trusts are administered in Delaware pursuant to 12 *Del. C.* § 3332, with any questions as to the construction, interpretation or validity of any of the trusts to be determined by the laws of the state under which they were created.

Dated: March 25, 2013
Wilmington, DE

GORDON FOURNARIS & MAMMARELLA, P.A.



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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE PEIERLS FAMILY	)	CONSOLIDATED
TESTAMENTARY TRUSTS	)	C.M. No. 16810-N-VCL

OPINION

Date Submitted: October 25, 2012
Date Decided: December 11, 2012

Daniel F. Hayward, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware; *Counsel for Petitioners.*

LASTER, Vice Chancellor.

Current beneficiaries of seven testamentary trusts have petitioned for orders (i) approving the resignations of the individual trustees, (ii) confirming the appointment of Northern Trust Company of Delaware as the successor corporate trustee for each trust, (iii) determining that Delaware law governs the administration of each trust, (iv) confirming Delaware as the situs of each trust, (v) reforming the trusts to modify their administrative provisions and create the positions of Investment Direction Adviser and Trust Protector, and (vi) accepting jurisdiction over the trusts. The petitions are dismissed in deference to the courts which have asserted jurisdiction over and have an ongoing supervisory role with respect to the testamentary trusts. The petitions should be directed to those courts.

I. FACTUAL BACKGROUND

Petitioners Brian E. Peierls and E. Jeffrey Peierls are brothers. Brian and Jeffrey's father, Edgar S. Peierls, established a pair of trusts in his Last Will and Testament dated June 30, 1960, as modified by First and Second Codicils, each also dated June 30, 1960. Article SIXTH, subdivision (e) creates one trust for Brian's benefit and a second trust for Jeffrey's benefit. This decision will refer to this pair of trusts as the "1960 Trusts."

Brian and Jeffrey's grandmother, Jennie Newgass Peierls, established a second pair of trusts in her Last Will and Testament dated November 18, 1969, as modified by a Codicil dated November 22, 1972. Article FOURTH creates one trust for Brian's benefit and another trust for Jeffrey's benefit. This decision will refer to this pair of trusts as the "1969 Trusts."

Brian's wife, Elizabeth B. Peierls, established three trusts in her Last Will and Testament dated April 4, 2005. Part One, Article Three, Paragraph 3.5 of her will creates a trust known as the By-Pass Trust. Part One, Article Four, Paragraph 4.1 creates two trusts known as Marital Trust No. 1 and Marital Trust No. 2 (together, the "Marital Trusts"). This decision will refer to the three trusts as the "2005 Trusts."

Edgar, Jennie, and Elizabeth are deceased. Brian has two adult sons, Stefan Peierls and Derek Peierls. Jeffrey does not have any children.

Edgar's will appointed as executors and trustees his wife Ethel F. Peierls, his friend Newman Pearsall, and Bankers Trust Company of New York. Article SEVENTH directed that "there shall at all times be one corporate and two individual Executors and Trustees." The current trustees of the 1960 Trusts are Brian, Jeffrey, and Bank of America, N.A., as successor to U.S. Trust Company. Jeffrey is the sole current beneficiary of his 1960 Trust, and Brian is the presumptive remainder beneficiary. Brian, Stefan, and Derek are the current beneficiaries of Brian's 1960 Trust, and Stefan and Derek are the presumptive remainder beneficiaries.

Jennie's will as amended appointed as trustees Jeffrey, Philip J. Hirsch, and Bankers Trust Company of New York. The current trustees of the 1969 Trusts are Jeffrey, Malcolm A. Moore, an attorney and trusted family advisor, and Bank of America, N.A., as corporate successor to U.S. Trust Company. Jeffrey is the sole current beneficiary of his 1969 Trust, Brian is the presumptive remainder beneficiary, and Stefan and Derek are remote contingent beneficiaries. Brian, Stefan, and Derek are the current

beneficiaries of Brian's 1969 Trust, Stefan and Derek are the presumptive remainder beneficiaries, and Jeffrey is a remote contingent beneficiary.

Elizabeth's will appointed Brian as the sole trustee of the 2005 Trusts. Brian, Stefan, and Derek are the current beneficiaries of the By-Pass Trust, and Stefan and Derek are the presumptive remainder beneficiaries. Brian is the sole current beneficiary of the Marital Trusts, and Stefan and Derek are the presumptive remainder beneficiaries.

The petitions aver that the parties with interests in the trusts have become generally unhappy with the level of communication and responsiveness provided by Bank of America. The petitions seek to remove Bank of America as the corporate trustee, appoint Northern Trust as the successor corporate trustee, and reform the wills to create directed trusts.

The proposed changes would alter significantly the structure and administrative schemes of the trusts by converting them to directed trusts. Edgar's and Jennie's wills contemplate that the 1960 and 1969 Trusts each would have three trustees, one institutional trustee and two individual trustees. Elizabeth's will contemplates that the 2005 Trusts would have one trustee. Currently, each trustee must exercise fiduciary judgment over the administration of the trust. The proposed changes would revise each trust to have only a single institutional trustee, who would administer the trust as a directed trust without meaningful responsibility for trust oversight.

II. LEGAL ANALYSIS

The trusts are multistate trusts, meaning each is "a trust having significant contacts or relationships with more than one state." George Gleason Bogert, et al., *The Law Of*

Trusts And Trustees § 291 [hereinafter Bogert]. Multistate trusts raise complex issues of jurisdiction and choice of law. *See id.* "In determining whether it has jurisdiction to entertain the proceedings and what local law should be applied in resolving the issues, the forum court in which the proceedings are brought must consider the nature and extent of the various contacts which the several states have with the trust." *Id.*

> Resolution of the underlying substantive issue before the court should not depend upon "forum shopping" by a plaintiff seeking the most favorable result under the local law of a particular state. Conflict of law rules have been developed in order that the resolution of the controversy will likely be the same regardless of the state in which the proceedings are brought. . . . [U]niformity of results regardless of the forum tends to lead to predictability in estate planning and in the administration of trusts. . . . However in many instances the laws of the various states relating to the disposition and administration of property differ significantly.

Id. (footnote omitted). The Bogert treatise cites numerous examples of rules regarding the validity, construction, and administration of trusts that differ across various jurisdictions and which could be defeated if courts failed to follow choice of law rules carefully.

To promote comity and respect for other states' laws, a court presented with issues involving a multistate trust should first decide if it has jurisdiction to resolve the dispute. *Id.* § 292. "Generally, a court has jurisdiction to adjudicate by reason of its relationship to the trust, the trust parties or the trust property which is sufficient to make its decree reasonable and recognized as valid in other states." *Id.* To have the power to adjudicate, a court must have sufficient minimum contacts with the parties or the property that is the subject of their dispute to satisfy the Due Process Clause of the United States

Constitution. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "[D]ue process is satisfied by express consent, since express consent constitutes a waiver of all other personal jurisdiction requirements." *Sternberg v. O'Neil*, 550 A.2d 1105, 1110 (Del. 1988).

Even if a court has the power to exercise jurisdiction, it may decline to adjudicate a multistate trust matter in deference to another court. *See* Bogert § 292. "For example, another court having continuing supervisory jurisdiction may be a more convenient forum to decide the particular matter, or exercise of the forum court's jurisdiction might constitute an undue interference with primary administration of the trust by the courts of another state." *Id.* "In the case of a trust created by will there may be a statute of the state of the testator's domicile by which the court having jurisdiction over administration of the testator's probate estate retains supervisory jurisdiction over matters relating to administration of the trust, such as settling the accounts of the trustee or the appointment of a successor trustee." *Id.* (footnote omitted). Alternatively,

> [u]nder the "trust entity" theory a testamentary trust is established and remains at the testator's domicile, thereby giving the domiciliary court *in rem* jurisdiction independent and apart from the presence of the trustee, the trust assets or the trust beneficiaries. If a court of the domiciliary state has already assumed jurisdiction, the courts of another state with jurisdiction based upon the situs of trust property or upon the trustee's domicile generally will decline to entertain a proceeding relating to the construction, validity or administration of the trust.

Id. (footnote omitted).

In this case, the parties have consented to this Court's jurisdiction. Brian and Jeffrey have invoked it by filing the petitions relating to the 1960 Trusts and the 1969 Trusts, and Brian has done so with respect to the 2005 Trusts. In their capacities as beneficiaries, Stefan and Derek have consented to the Court's jurisdiction for purposes of each petition, as has Moore in his capacity as an individual trustee of the 1969 Trusts. Moore and Jeffrey each filed a written declination of his right to serve as successor trustee of the 2005 Trusts. Northern Trust of Delaware is a Delaware entity and subject to this Court's jurisdiction. Bank of America has not subjected itself to this Court's jurisdiction, but has filed a written acknowledgement of its removal as corporate trustee of the 1960 Trusts and the 1969 Trusts and a written declination of its right to serve as successor trustee of the 2005 Trusts.

Although this Court has the power to address the petitions, comity dictates that the Court decline to do so with respect to the 1960 Trusts. Edgar died as a resident of the State of New Jersey, and his will was probated there. The petition relating to the 1960 Trusts avers that New Jersey was the situs of the 1960 Trusts and that New Jersey law has governed the administration of the trusts since their inception. In addition, the 1960 Trusts were the subject of a judgment of the Superior Court of New Jersey, Chancery Division: Essex County, (the "New Jersey Court") approving an intermediate accounting for the 1960 Trusts and granting various other relief, including commissions to the trustees (the "2001 New Jersey Order"). *See* 1960 Trusts Pet. Ex. B. It appears from the 2001 New Jersey Order that there were earlier accountings that were submitted to the New Jersey Court. The fact that the New Jersey Court approved an "intermediate

accounting" rather than a "final accounting" indicates that the Court anticipated ongoing jurisdiction over the 1960 Trusts.

The petition relating to the 1960 Trusts avers that the situs of the 1960 Trusts was recently changed to Delaware pursuant to a certificate issued by the New Jersey Court on September 13, 2012 (the "Certificate"). *See id.* Ex. H. That is not what the Certificate actually says. The document, titled "Succeeding Trustee Short Certificate," simply identifies the trustees who have "accepted the said Trusteeship and is/are duly authorized to execute the said Trust according to law and the terms of said Will." *Id.* The four trustees who are identified are Brian, Jeffrey, Philip J. Hirsch, and Northern Trust. Hirsch is not identified as a trustee in the petition in this Court. Jeffrey is identified in the Certificate as a resident of New Jersey; in the petitions in this Court, he has been identified as a resident of Colorado. Nothing about the Certificate indicates any decision by the New Jersey Court to approve a change of situs or alter the law that governs the 1960 Trusts. To the contrary, the Certificate recites that letters of succeeding trusteeship were granted to each of the four trustees and "have never been revoked and still remain in full force and effect." *Id.*

As explained in the Bogert treatise, and as demonstrated by the 2001 New Jersey Order and the Certificate, the 1960 Trusts remain under the supervision of the New Jersey Court. Rather than seeking rulings from this Court, the relief requested in the petition relating to the 1960 Trusts should be presented to the New Jersey Court. That Court is best situated to determine whether the relief requested would run afoul of or conflict with any substantive or procedural aspect of New Jersey law.

Comity likewise dictates that this Court decline to address the petition relating to the 1969 Trusts. Jennie died a resident of the State of New York, and her will was probated there. The petition relating to the 1969 Trusts avers that New York was the situs of the 1969 Trusts and that New York law governed the administration of the trusts until 2000. By order dated September 23, 1999 (the "1999 Order"), the Probate Court of Dallas County, Texas (the "Texas Court") accepted jurisdiction over the 1969 Trusts conditioned on an order from a New York court approving the change in situs from New York to Texas. *See* 1969 Trusts Pet. Ex. B. By order dated March 29, 2000, the Surrogate's Court for the State of New York approved the change in situs. *See id.* Ex. C. By order dated May 18, 2001 (the "2001 Order"), the Texas Court decreed that Texas law governs the administration of the 1969 Trusts while New York law continues to govern the disposition of the property of the 1969 Trusts. *See id.* Ex. D.

Under the express language of both the 1999 Order and the 2001 Order, the 1969 Trusts remain subject to the jurisdiction of the Texas Court. This Court takes seriously an order establishing jurisdiction over a trust. In *Bessemer Trust Co. of Del. N.A. v. Wilson*, 2011 WL 4484557, at *1 (Del. Ch. Sept. 28, 2011), the trustee of a Delaware trust invoked just such an order to seek a declaratory judgment that the defendant in a Florida wrongful death action was not a beneficiary of the trust and that the plaintiffs in the Florida lawsuit could not obtain discovery from the trust. This Court declined to stay the Delaware action in favor of the Florida wrongful death action, holding that the Court of Chancery—and not the Florida court—was the proper forum to hear the dispute regarding rights in the trust. Under the *Bessemer* ruling, the petition relating to the 1969

Trusts should be presented to the Texas Court. The Texas Court has stated that it has jurisdiction over the 1969 Trusts, and any request to move the situs of the trusts, change the governing law, or reform the trusts should be presented to the Texas Court.

The petition relating to the 2005 Trusts does not provide sufficient information for this Court to proceed further. The petition avers that the Marital Trusts are still being funded from Elizabeth's estate, suggesting that there are still ongoing probate matters or issues of estate administration. The petition does not identify where those matters are taking place, or even where Elizabeth died, although it appears likely that she was a resident of Texas. Because it seems likely that the testamentary trusts created by Elizabeth's will are under the supervision of another state's courts, judicial restraint dictates that this Court decline to act without further information from the petitioner indicating that it would be appropriate for this Court, rather than another state's courts, to consider the petition.

III. CONCLUSION

The petitions for the 1960 and 1969 Trusts are dismissed without prejudice in deference to the courts of the States of New Jersey and Texas. The petitions should be filed in those jurisdictions, as appropriate. The petition for the 2005 Trusts is dismissed without prejudice because of an insufficient showing for this Court to exercise its jurisdiction. The petition should be filed in the jurisdiction where probate matters are ongoing or refiled with supplemental information in this Court. **IT IS SO ORDERED.**

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Transaction ID 48321962
Case No. CM16811-N

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE ETHEL F. PEIERLS CHARITABLE LEAD UNITRUST	))	C.M. No. 16811-N-VCL

OPINION

Date Submitted: October 25, 2012
Date Decided: December 10, 2012

Daniel F. Hayward, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware; *Counsel for Petitioners.*

LASTER, Vice Chancellor.

The trustees of a Washington charitable trust have petitioned for orders (i) approving their resignations; (ii) confirming the appointment of Northern Trust Company of Delaware as successor trustee; (iii) confirming Delaware as the situs of the trust; (iv) determining that Delaware law governs the administration of the trust; (v) accepting jurisdiction over the trust; and (vi) reforming the trust. The first four requests seek impermissible advisory opinions. The Court accepts jurisdiction over the trust for the limited purpose of considering the application for reformation, which is denied. Jurisdiction over the trust is not retained.

I. FACTUAL BACKGROUND

The petitioners are Brian E. Peierls and E. Jeffrey Peierls, who are the current trustees of a trust known as the Ethel F. Peierls Charitable Lead Unitrust (the "Trust"). Ethel, now deceased, was Brian and Jeffrey's mother. She settled the Trust under an agreement dated September 12, 1994, with Brian and Jeffrey as initial trustees (the "Trust Agreement"). The Trust currently holds cash and securities.

The Peierls Foundation (the "Foundation") is a charitable organization qualifying under Section 170(c) of the Internal Revenue Code, 26 U.S.C. § 170(c). The Trust Agreement provides that in each taxable year during the Trust term, an amount equal to six percent of the net fair market value of the Trust estate shall be paid to the Foundation (the "Unitrust Amount"). The Trust Agreement provides that if the Foundation ever ceases to qualify under Section 170(c), then the trustees shall select a successor organization that qualifies under Section 170(c) to receive the Unitrust Amount. Brian

and Jeffrey have authority to designate one or more alternate qualifying organizations, other than the Foundation, to receive part or all of the Unitrust Amount.

The Trust will expire on September 12, 2029. The Trust Agreement provides that upon expiration, the Trust estate will be distributed as Brian directs pursuant to a limited power of appointment that may be exercised in favor of Brian's issue, one or more qualifying organizations, or the issue of Brian's father, Edgar. If Brian fails to exercise his power of appointment, then the Trust estate will be distributed as Jeffrey directs pursuant to a limited power of appointment by which Jeffrey must allocate beneficial interests in the Trust property, either outright or in trust, to Brian's issue, *per stirpes*.

The Foundation is thus the sole current beneficiary of the Trust. In light of Brian and Jeffrey's power to select alternative beneficiaries, one or more qualifying organizations are potential current beneficiaries of the Trust. Brian's adult sons, Stefan Peierls and Derek Peierls, are the presumptive remainder beneficiaries of the Trust.

The current trustees are Brian and Jeffrey. The Trust Agreement provides that if Jeffrey ceases to serve as trustee, then Malcolm A. Moore, an attorney and trusted family advisor, shall serve as Jeffrey's successor trustee unless Brian and Jeffrey jointly designate one or more persons or corporations to serve as a successor trustee. The Trust Agreement provides that if Brian ceases to serve as trustee, there need not be a mandatory successor unless Brian and Jeffrey jointly designate a successor trustee.

Jeffrey and Brian wish to reform the Trust Agreement to convert the Trust into a directed trust. Under a new Article NINTH, the Trust Agreement would provide for the position of Investment Direction Adviser, with Jeffrey serving initially in that capacity.

Proposed Section 9.2 provides that "[t]he Investment Direction Adviser shall hold and exercise the full power to manage the investments of the Trust . . . ." The same section requires that "[t]he Trustee shall follow the direction of the Investment Direction Adviser with respect to all matters relating to the management and investment of the assets of the Trust." Proposed Section 9.5 confirms that "[t]he Investment Direction Adviser shall have sole responsibility (and the Trustee shall have no responsibility) for the investment, voting and management of the assets of the Trust." Under current Section 6.8 of the Trust Agreement, "[n]either [Jeffrey] nor [Brian] shall receive any compensation for serving as Trustee . . . ." Under proposed Section 9.13, "[t]he Investment Direction Adviser may be entitled to reasonable compensation for its services as agreed upon by the Investment Direction Adviser and the Trust Protector," a second new position to be created by the proposed revisions.

Under a new Article TENTH, the Trust Protector will have power (i) "to amend the administrative and technical provisions of the Trust at such times as the Trust Protector may deem appropriate for the proper administration of the Trust and for tax purposes," (ii) "to remove and appoint Trustees," and (iii) "to remove and appoint Investment Direction Advisers." Moore would serve initially as Trust Protector.

Jeffrey and Brian wish to have Northern Trust serve as sole trustee. The proposed changes make clear that Northern Trust will not have any responsibility for or involvement in the decisions made by the Investment Direction Adviser or Trust Protector. Under proposed Section 9.5, the trustee will have:

> no duty to monitor the conduct of the Investment Direction Adviser, provide advice to the Investment Direction Adviser or consult with the Investment Direction Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed.

§ 9.5. Under the same section, the trustee "shall incur no liability for any act or failure to act by the Investment Direction Adviser, or for acting on a direction of the Investment Direction Adviser or with respect to its implementation of any such direction of the Investment Direction Adviser . . . ." Under proposed Section 9.4, the trustee has "no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them" and is "exonerated from any and all liability in relying on any such direction from a person purporting to be the Investment Direction Adviser without further inquiry by the Trustee." Similar provisions apply to the trustee's relationship with the Trust Protector.

Proposed Section 9.7 requires the Trust to indemnify the Investment Direction Adviser, as long as either Jeffrey or Brian is serving in that capacity, for "all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Investment Direction Adviser." If anyone other than Jeffrey or Brian is serving as Investment Direction Adviser, then indemnification is only available "to the extent agreed upon by such Investment Direction Adviser, the Trustee, and those individuals with the authority to

appoint Investment Direction Advisers." A parallel indemnification obligation covers the Trust Protector.

Ironically, because the petition contemplates that the changes to the Trust Agreement will be accomplished by judicial reformation, the Trust Agreement would remain dated as of September 12, 1994. It also would remain signed by the original signatories, including Ethel, the deceased settlor.

II. LEGAL ANALYSIS

The relief sought by the petition falls into two categories: (i) four declaratory judgments and (ii) reformation of the trust. Both categories of relief are denied. Although the Court has accepted jurisdiction over the Trust for the limited purpose of considering reformation, jurisdiction is not retained.

A. The Advisory Opinions

The petition seeks orders (i) approving the petitioners' resignations as trustees; (ii) confirming the appointment of Northern Trust as successor trustee; (iii) confirming Delaware as the situs of the trust; and (iv) determining that Delaware law governs the administration of the trust. Each of these actions can be accomplished, without judicial involvement, pursuant to the express terms of the Trust Agreement. As explained in a contemporaneously issued decision involving a related set of trust petitions, "[a] petition or request for judicial relief is not appropriate when the trust agreement expressly authorizes the contemplated action. Such a request consumes judicial resources unnecessarily and does not present a live dispute capable of resolution." *In re The Peierls Family Inter Vivos Trusts*, C.M. No. 16812, at 9 (Del. Ch. Dec. 10, 2012). A

judicial declaration on these issues would constitute an impermissible advisory opinion. *See* 10 *Del. C.* § 6501; *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973).

Section 6.3.2 of the Trust Agreement provides that "[a]ny individual co-Trustee may, by written instrument delivered to all other then acting co-Trustees, relinquish his or her powers, rights or duties, to any extent and upon any terms." The complete relinquishment of powers, rights, and duties is synonymous with resignation. Brian and Jeffrey propose to resign as trustees. In conjunction with the petitions, Brian and Jeffrey have delivered their proposed resignations to each other (the current co-trustees), to Northern Trust (the successor trustee), to the Foundation (the current beneficiary), and to Stefan and Derek (the presumptive remainder beneficiaries).

Section 6.1 of the Trust Agreement authorizes Brian and Jeffrey to jointly designate by written instrument "one or more persons and/or a corporation to do [sic] a trust business to serve as successor to [Jeffrey] as Trustee . . . ." Brian and Jeffrey propose to exercise their authority, before resigning, to designate Northern Trust as Jeffrey's successor.

Section 7.1 of the Trust Agreement addresses the Trust's situs. It states:

> The situs and place of administration ("situs") of the trust created under this Trust Agreement shall, as to real property held in trust, be the jurisdiction where such property is located. The situs of this trust shall, as to personal property, be (i) the location of the main business office of the Trustee who then has custody of the trust records, wherever the Trustee may locate that office, or (ii) any other situs (designated by the Trustee in a writing filed with the trust) that has sufficient contact with the trust to support jurisdiction

> of its courts over the trust. These provisions shall apply regardless of the Settlor's domicile at the execution of this instrument, or the domicile or residence of any Trustee or beneficiary.

§ 7.1. By written instrument dated September 12, 1994, Brian and Jeffrey originally designated Washington as the situs of the Trust. They can readily designate the State of Delaware as the situs of the Trust, or Northern Trust can do so as successor trustee.

Section 7.2 of the Trust Agreement addresses the law that governs the administration of the Trust. It states:

> Washington law shall govern the execution and construction of this Trust Agreement. The administration of this trust, however, shall be governed first by the provisions of this Trust Agreement, including any laws incorporated in this Trust Agreement by reference or otherwise made applicable by this Trust Agreement, and second, to the extent consistent with such provisions, the laws of the trust's situs.

§ 7.2. The language of this provision continues by stating that if another trust is created through the exercise of a power of appointment granted under the Trust Agreement, the validity of the appointment shall be governed by "(i) the law of the situs of this trust at the expiration of the trust term; or (ii) the law of any other jurisdiction designated by the donee of the power of appointment that has a substantial relation to this trust at the expiration of the trust term." Section 7.2 thus contemplates that the law governing administration will change with the situs of the trust, subject to the requirements of Section 7.2. If the situs of the trust is changed to Delaware, then Delaware law will govern the trust to the extent permitted by Section 7.2.

Each of the foregoing changes can be effectuated without judicial involvement by exercising powers expressly granted in the trust instrument. It constitutes reversible error for a trial court to have "addressed issues as to which there was no actual controversy." *Gannett Co., Inc. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1238 (Del. 2003). "That all parties consented to jurisdiction is immaterial." *Stabler v. Ramsey*, 88 A.2d 546, 553 (Del. 1952). To the extent the petition seeks these declarations, it is dismissed without prejudice.

B. Reformation

The petition next seeks an order reforming the Trust to include an array of additional administrative provisions. The petition does not seek a judicial modification of or deviation from the trust instrument. *See* 12 *Del. C.* § 3306 (recognizing judicial power to authorize deviation from trust instrument); *id.* § 3541 (authorizing *cy pres*); Restatement (Third) of Trusts §§ 66-67 (2003) (discussing modification and *cy pres*).

"Trust reformation is an equitable remedy and is an ordinary remedy for mistake in the terms of a trust instrument." 90 C.J.S. Trusts § 92 (footnotes omitted). "A trust may be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust may be rescinded or reformed." Restatement (Third) of Trusts § 62. "Where no consideration is involved in the creation of a trust, it can be rescinded or reformed upon the same grounds, such as fraud, duress, undue influence, or mistake, as those upon which a gratuitous transfer of property not in trust can be rescinded or reformed." *Id.* cmt. a.

Delaware adheres to these principles and, with one exception, applies the traditional law of reformation to an application to reform a trust. *See Roos v. Roos*, 203 A.2d 140, 142 (Del. Ch. 1964). "It is a basic principle of equity that the Court of Chancery has jurisdiction to reform a document to make it conform to the original intent of the parties." *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990). Outside of the trust context, "reformation is appropriate only when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence." *Emmert v. Prade*, 711 A.2d 1217, 1219 (Del. Ch. 1997) (internal quotation marks omitted).

> The doctrine of reformation for mistake with regard to trusts differs from instruments such as contracts in one important respect; in contract law, reformation will not be granted unless the parties' mistake is mutual, but mutuality of mistake is not always required where trusts are concerned, in that, because a settlor usually receives no consideration for the creation of a trust, a unilateral mistake on the part of the settlor is ordinarily sufficient to warrant reformation.

90 C.J.S. Trusts § 92 (footnote omitted); *accord Roos*, 203 A.2d at 142.

The Court of Chancery has the power to reform a voluntary trust instrument even after the death of the settlor, as long as the record "clearly and affirmatively establishes" the grounds for reformation. *Roos*, 203 A.2d at 143. Even when all parties to a case seek relief via consent petition, the petitioners must introduce "clear and convincing evidence of the decedent's intent" in order to obtain reformation. *In re Estate of Tuthill*, 754 A.2d 272, 273 (D.C. Ct. App. 2000). "Even though a unilateral mistake by the settlor is a sufficient ground for reforming a trust that was created without any consideration, the

burden is nonetheless on the party seeking reformation to establish by clear and convincing evidence the mistake." 90 C.J.S. Trusts § 92 (footnote omitted).

The petition does not contend that reformation is necessary to make the Trust Agreement conform to the intent of the settlor, nor does it advance any recognized basis for reforming the Trust. The petition openly admits that the parties are seeking reformation simply because they are dissatisfied with the administrative provisions in the Trust Agreement and would like to administer the Trust in a different manner. Convenience is not a valid ground for departing from the settlor's intent. The request for reformation is denied.

C. Continuing Jurisdiction Over The Trusts

The petition asks the Court to accept jurisdiction over the trusts. The Court has exercised jurisdiction for purposes of ruling on the petition to the extent it seeks reformation. The Trust will not have any ongoing obligations to the Court, and the trustees will not be submitting accountings. Accordingly, jurisdiction over the trust is not retained.

III. CONCLUSION

The petition is denied. This matter is dismissed. **IT IS SO ORDERED.**

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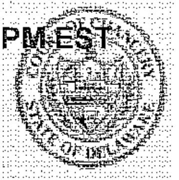

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE PEIERLS FAMILY *INTER VIVOS* TRUSTS	))	CONSOLIDATED C.M. No. 16812-N-VCL

OPINION

Date Submitted: October 25, 2012
Date Decided: December 10, 2012

Daniel F. Hayward, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware; *Counsel for Petitioners.*

LASTER, Vice Chancellor.

Current beneficiaries of five *inter vivos* trusts have petitioned for orders (i) approving the resignations of the individual trustees, (ii) confirming the appointment of Northern Trust Company of Delaware as the sole successor trustee for each trust, (iii) determining that Delaware law governs the administration of each trust, (iv) confirming Delaware as the situs of each trust, (v) reforming the trusts to modify their administrative provisions and create the positions of Investment Direction Adviser and Trust Protector, and (vi) accepting jurisdiction over the trusts. The petitions are denied. Jurisdiction over the trusts is not retained.

I. FACTUAL BACKGROUND

The petitioners are Brian E. Peierls and E. Jeffrey Peierls. The four petitions concern five *inter vivos* trusts. There are two pairs of trusts that are substantively identical, with one pair benefiting Brian and the other pair benefiting Jeffrey. A fifth trust benefits Brian, Jeffrey, and Brian's two adult sons, Stefan Peierls and Derek Peierls.

Jennie Newgass Peierls, Brian and Jeffrey's grandmother, settled the first pair of trusts under agreements dated January 14, 1953, with Bankers Trust Company, Edgar S. Peierls, and Ethel F. Peierls as initial trustees. Edgar and Ethel, presently deceased, were Brian and Jeffrey's parents. I will refer to this pair of trusts as the "1953 Trusts."

Ethel settled the second pair of trusts under agreements dated August 14, 1975, with Bankers Trust Company, Philip J. Hirsch, and Jeffrey as initial trustees. I will refer to this pair of trusts as the "1975 Trusts."

Edgar settled the final trust under agreement dated May 24, 1957, with Bankers Trust Company, Newman Pearsall, and Ethel as initial trustees. I will refer to this trust as the "1957 Trust."

Brian is the sole current beneficiary of his 1957 Trust and his 1975 Trust. Stefan and Derek are the presumptive remainder beneficiaries of both trusts.

Jeffrey is the sole current beneficiary of his 1957 Trust and his 1975 Trust. Jeffrey is not married and does not currently have children. Brian is the presumptive remainder beneficiary of Jeffrey's trusts.

Jeffrey is the sole current beneficiary of the 1953 Trust. Brian, Stefan, and Derek are the presumptive remainder and contingent remainder beneficiaries.

The current individual trustees of each trust are Jeffrey and Malcolm A. Moore, an attorney and trusted family advisor. The current corporate trustee of each trust is Bank of America, N.A., as corporate successor to U.S. Trust Company.

The petitions aver that the parties with interests in the trusts have become generally unhappy with the level of communication and responsiveness provided by Bank of America, particularly with respect to carrying out investment decisions made by the individual trustees, who comprise a majority of the trustees of each trust. The petitions seek to remove Bank of America as the corporate trustee and appoint Northern Trust as the successor corporate trustee. By titling the trust assets in the name of Northern Trust, a trust company subsidiary domiciled in Delaware, the petitions seek to change the situs of the trust to Delaware and establish that Delaware law governs the

administration of the trusts. The petitions then request that the trusts be reformed to take advantage of provisions authorized by the Delaware Code.

The proposed changes will alter the structure and administrative schemes of the trusts by converting them to directed trusts. Currently, each of the trust agreements contemplates three trustees, one institutional trustee and two individual trustees. Each trustee must exercise fiduciary judgment over the administration of the trust. The proposed changes will reform each trust to have only a single institutional trustee, who will follow directions of the Investment Direction Adviser and the Trust Protector, two newly created positions. The single institutional trustee will not have significant substantive responsibility for overseeing the trust.

Jeffrey will serve initially in the newly created position of Investment Direction Adviser. According to the proposals, "[t]he Investment Direction Adviser shall hold and exercise the full power to manage the investments of the Trust . . . ." *See e.g.*, 1953 Trusts Pet. Ex. G. at 3. The proposals require that "[t]he Trustee shall follow the direction of the Investment Direction Adviser with respect to all matters relating to the management and investment of the assets of the Trust." *Id.* at 4. The Investment Direction Adviser "may be entitled to reasonable compensation for its services as agreed upon by the Investment Direction Adviser and the Trust Protector," a second new position created by the proposed amendments. *Id.* at 9.

Moore will serve initially as Trust Protector. For as long as either Jeffrey or Brian lives, the Trust Protector will have the power to remove any trustee or appoint any successor trustee by providing notice to the trustee, the Investment Direction Adviser,

and the adult income beneficiaries of the trust. After the death of the survivor of Jeffrey or Brian, the Trust Protector only will be able to remove or appoint a trustee with the written consent of a majority of the adult income beneficiaries of the trust. The Trust Protector will have the power to remove the Investment Direction Adviser and appoint any successor Investment Direction Adviser by the same mechanism, with the caveat that Brian automatically becomes the successor Investment Direction Adviser after Jeffrey. The Trust Protector also will assume primary oversight over requests from beneficiaries for distributions from the trust, which the Trust Protector will have the power to veto.

The proposed changes are designed to facilitate future changes in the language of the trust. The Trust Protector will be granted "the power to amend the administrative and technical provisions of the Trust at such times as the Trust Protector may deem appropriate for the proper administration of the Trust and for tax purposes." *See e.g.*, 1953 Trusts Pet. Ex. G. at 10. In addition, a new section will provide that "Delaware law shall govern the administration of the Trust as long as Delaware is the situs of the Trust." *Id.* at 2. In light of these provisions, the application of Delaware law to the trusts and Delaware's interest in them easily could be transitory and passing things.

The proposed changes make clear that the successor institutional trustee will not have any responsibility for or involvement in the decisions made by the Investment Direction Adviser or Trust Protector. Under the proposed changes, the trustee will have

> no duty to monitor the conduct of the Investment Direction Adviser, provide advice to the Investment Direction Adviser or consult with the Investment Direction Adviser or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or

> might have exercised the Trustee's own discretion in a manner different from the manner directed.

See e.g., 1953 Trusts Pet. Ex. G. at 6. The trustee "shall incur no liability for any act or failure to act by the Investment Direction Adviser, or for acting on a direction of the Investment Direction Adviser or with respect to its implementation of any such direction of the Investment Direction Adviser." *Id.* The trustee also "shall not be liable for any loss resulting from action taken by the Investment Direction Adviser." *Id.* Moreover, the trustee will have "no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them" and is "exonerated from any and all liability in relying on any such direction from a person purporting to be the Investment Direction Adviser without further inquiry by the Trustee." *Id.* at 5. Similar provisions apply to the trustee's relationship with the Trust Protector.

The amendments will require the trust to indemnify the Investment Direction Adviser, as long as either Jeffrey or Brian is serving in that capacity. The indemnification obligation will extend to "all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Investment Direction Adviser . . . ." *See e.g.*, 1953 Trusts Pet. Ex. G. at 7. If anyone other than Jeffrey or Brian is serving as Investment Direction Adviser, then indemnification only will be available "to the extent agreed upon by such Investment Direction Adviser, the Trustee, and those individuals

with the authority to appoint Investment Direction Advisers . . . ." *Id.* at 8. A parallel indemnification obligation will cover the Trust Protector.

II. LEGAL ANALYSIS

The petitions seek declarations designed to cause Delaware to govern the administration of the trusts so that they can be reformed to take advantage of features authorized by the Delaware trust statute. The petitions proceed on the assumptions that if a trustee domiciled in Delaware becomes sole successor trustee and takes custody of the trust assets, then Delaware will become the situs of the trust, Delaware law will govern the administration of the trust, and reformation can proceed. The requests for orders approving the resignations of the individual trustees, confirming the appointment of Northern Trust as the successor corporate trustee for each trust, and declaring Delaware as the situs of each trust are intended to create a factual predicate for applying Delaware law. The petitions fail primarily because Delaware law does not govern the trusts. Each of the trusts affirmatively selects the governing law of a different jurisdiction.

A. The Requests For Declarations Regarding The Trustees' Resignations And The Appointment Of A Sole Successor Trustee

Each petition seeks an order declaring that the resignations of the two individual trustees are approved. Neither individual trustee has actually resigned. Instead, each has submitted a resignation conditioned on receiving judicial approval. Each petition also seeks an order confirming the appointment of Northern Trust as successor trustee. As with the individual trustees' resignations, Northern Trust has not actually taken over as trustee but rather conditioned its acceptance of the appointment on this Court's approval.

With respect to the 1957 Trust and the 1953 Trusts, the requested relief cannot be granted unless the trusts are first reformed. Section 5 of the 1957 Trust and Article TENTH of the 1953 Trusts provide that there shall always be three trustees for each trust, two of whom shall always be individuals and one of whom shall always be a bank or trust company. Whether this Court can reform the trusts depends on what law governs the trusts. For the reasons discussed in later sections of this opinion, Delaware law does not govern the trusts, and it is not appropriate to reform the trusts.

With respect to the 1975 Trusts, there is no actual controversy for this Court to resolve. The Court's power to issue declaratory judgments like those requested in this case flows from the Delaware Declaratory Judgment Act, which states:

> Any person interested as or through an executor, administrator, trustee, guardian or fiduciary, creditor, devisee, legatee, heir, next-of-kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, a person with a mental condition, may have a declaration of rights or legal relations in respect thereto:
>
> (1) To ascertain any class of creditors, devisees, legatees, heirs, next-of-kin or others; or
>
> (2) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
>
> (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

10 *Del. C.* § 6504.

To grant a declaratory judgment, a case must present an *actual controversy*. *See* 10 *Del. C.* § 6501.

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.

Rollins Int'l, Inc. v. Int'l Hydronics Corp., 303 A.2d 660, 662-63 (Del. 1973). It constitutes reversible error for a trial court to have "addressed issues as to which there was no actual controversy." *Gannett Co., Inc. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1238 (Del. 2003). Inquiry into whether an actual controversy exists is "jurisdictional in its character, and presents an issue which the court itself [is] bound to raise." *Stabler v. Ramsey*, 88 A.2d 546, 549 (Del. 1952). "That all parties consented to jurisdiction is immaterial." *Id.*

Sound policy reasons underlie this careful approach:

> "First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal action [appropriate for judicial resolution]. Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment." Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.

Stroud v. Milliken Enters., Inc., 552 A.2d 476, 480 (Del. 1989) (alteration in original) (citation omitted) (quoting *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987) (Allen, C.)). These principles apply fully to

petitions seeking declarations regarding the meaning of trusts. *See Bessemer Trust Co. of Del., N.A. v. Wilson*, 2011 WL 4484557, at *5 (Del. Ch. Sept. 28, 2011) (raising *sua sponte* whether an actual controversy existed in adversarial proceeding involving a trust).

A consent petition or similar request for judicial relief involving a trust can be appropriate in many circumstances. Recently, the Court of Chancery formally recognized the longstanding practice of hearing consent petitions by adopting Rules 100-103. A consent petition may be appropriate, for example, in cases where the trust agreement does not expressly authorize the action in question, the agreement is genuinely ambiguous, or there are minor or unborn beneficiaries whose interests must be protected through judicial oversight of the virtual representation process or, if necessary, the appointment of a guardian or attorney *ad litem*. A petition or request for judicial relief is not appropriate when the trust agreement expressly authorizes the contemplated action. Such a request consumes judicial resources unnecessarily and does not present a live dispute capable of resolution.

Section 7(f) of the agreements governing the 1975 Trusts provides that any trustee shall have the power to resign by delivering written notice to any successor or co-trustee, with the resignation to take effect on the date specified in the notice, without necessity for prior accounting or judicial approval. Jeffrey and Moore can readily execute resignations as individual trustees of the 1975 Trusts, and they already have done so, albeit conditioned on judicial approval. In conjunction with the petitions, Jeffrey and Moore delivered their resignations to each other and Bank of America (the current co-trustees), to Northern Trust (the successor trustee), and to Stefan and Derek (the presumptive

remainder beneficiaries of Brian's trusts). Section 6 of the 1975 Trusts authorizes the individual trustees of each trust to remove the corporate trustee and appoint a successor corporate trustee. Jeffrey and Moore exercised their authority, before conditionally resigning, by removing Bank of America and appointing Northern Trust. In light of the terms of the 1975 Trusts, to rule on Jeffrey and Moore's conditional resignations or Northern Trust's conditional acceptance of its appointment as trustee would constitute an impermissible advisory opinion.

The requests for declarations regarding the trustees' resignations and the appointment of a sole successor trustee are therefore denied.

B. Whether Delaware Law Governs The Trusts

The petitions next seek orders confirming that Delaware law governs the administration of each trust. As noted, the petitions proceed on the assumption that once a Delaware corporate trustee has been appointed and the custody of the trust assets has been transferred to the Delaware corporate trustee, then Delaware law will govern administration of the trust. These requests are denied because the orders would be contrary to the choice of law provisions in the trust agreements.

1. Choice Of Law Principles For Multistate Trusts

"In a multistate trust proceeding the forum court must first apply its own law to determine the local law of the state to be applied in determining the substantive issue." George Gleason Bogert, et al., *The Law Of Trusts And Trustees* § 294 [hereinafter Bogert]. "The forum court's rules do not themselves determine the rights and liabilities

of the parties, but rather guide decision as to which local law will be applied to determine these rights and duties." *Id.* (internal quotation marks omitted).

To resolve choice of law issues, Delaware follows the Restatement (Second) of Conflict of Laws. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991). Section 6 of the Restatement explains that in the first instance, "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Restatement (Second) of Conflict of Laws § 6 (1971) (the "Restatement"). In light of the constitutional obligation to show comity to other co-equal state sovereigns, "[a] court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved." *Id.* § 9.

If there is no controlling statutory directive, a court faced with a choice of law issue should consider

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement § 6. In addition to these general guidelines, the Restatement provides specific principles for particular choice of law problems. For trusts, the Restatement provides different guidance depending on (i) whether the trust is a testamentary, *inter*

vivos, or charitable trust, (ii) whether the trust holds real estate (described in the Restatement as "immovables") or personal property (described by the Restatement as "movables"), and (iii) whether the choice of law issue concerns the validity, construction, or administration of the trust. *See generally* Restatement §§ 267-82. All of the trusts at issue are *inter vivos* trusts that hold cash and marketable securities. The petitions recite that the trusts also hold certain unidentified real estate, but the account statements show only shares in publicly traded real estate investment trusts. This decision assumes that the trusts do not own any real estate directly.

Section 272 of the Restatement summarizes the common law rules for determining the law that governs the administration of an *inter vivos* trust where the corpus consists of personal property and not real estate. As with trust law in general, the rules begin with the settlor's intent: If the trust instrument selects a particular law to govern the trust's administration, then that selection controls. Even without an explicit designation, it may "otherwise be apparent from the language of the trust instrument or from other circumstances, such as the extent of the contacts with a particular state, that the settlor wished to have the local law of a particular state govern the administration of the trust." Restatement § 272 cmt. c. If the settlor's intent is apparent, then the settlor's choice again controls.

2. Applying Delaware's Choice Of Law Rules Within The Restatement Framework

Under the Restatement, the choice of law analysis begins with the forum state's relevant choice of law statute, if any. The Delaware General Assembly has adopted

Section 3332(b) of Title 12 which states, in pertinent part, that "[e]xcept as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State." 12 *Del. C.* § 3332(b). Under the petitioners' theory, Northern Trust will administer the trusts in Delaware, satisfying the statute and causing Delaware law to apply. But the statute does not dispose of the choice of law issues in this case.

First, Section 3332(b) is not dispositive because it contemplates that a trust agreement may contain a choice of law provision specifying that a particular law will govern. Delaware respects freedom of contract. The trusts in this case contain choice of law provisions, and the Court must interpret them to determine whether administration falls within their scope.

Second, Section 3332(b) is not dispositive because it contemplates the possibility of a determination "by court order" that the law of a different state would govern, notwithstanding that a trust may be "administered in this State." Section 3332(b) thus establishes a default rule, while recognizing that some cases may result in a different state's law governing pursuant to a court order. Section 3332(b) does not dictate the outcome of a petition *seeking* a "court order," such as the petitions in this case.

Third, Section 3332(b) is not dispositive because the trusts in this case are not currently being "administered in this State." The petitions seek this Court's approval of the appointment of Northern Trust as successor trustee, and Northern Trust has conditioned its acceptance of the role of successor trustee on an order of this Court. At present, therefore, the trusts are not yet being administered in Delaware.

Fourth, to the extent that Northern Trust were to become successor trustee in conjunction with and conditioned upon the simultaneous reformation of the trust agreements in the manner sought by the petitions, it is far from clear that the limited functions that Northern Trust will perform would satisfy the statutory requirement that the trust be "administered in this State." For the application of Delaware law to be "reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved," Restatement § 9, the term "administration" must have meaningful content. For Delaware law to apply to the exclusion of other sovereigns, the scope of the administration in this State must be sufficiently substantial so that the trust is *principally* administered in this State. Otherwise, Delaware cannot claim a greater interest than other states in the administration of the trust, and Delaware would not have grounds to trump the jurisdiction of its sister states or authority to implement its own public policies and regulatory regime to the exclusion of those of its sister states. *See* Ch. Ct. R. 100(d)(4) ("the trust petition shall explain why Delaware is the principal place of trust administration"); *see also* Unif. Trust Code § 107 cmt. (2000) (noting that if the trust agreement does not select a governing law, "[u]sually, the law of the trust's principal place of administration will govern administrative matters"); *id.* § 202 (providing that trustees and beneficiaries consent to suit in principal place of administration).

If reformed as proposed in the petitions, the powers, responsibilities, and functions of Northern Trust will bear little resemblance to those of a traditional trustee. Responsibility for substantive decision-making will be stripped from Northern Trust and

vested in the Investment Direction Adviser and Trust Protector, who will not live, work, or make trust-related decisions in Delaware. Northern Trust simultaneously will be divested of any obligation to investigate instructions provided by the Investment Direction Adviser or Trust Protector or even confirm their authenticity. Northern Trust will have no obligation to monitor the conduct of, provide advice to, or consult with the Investment Direction Adviser or Trust Protector. Northern Trust also will have no obligation to communicate, warn, or apprise any beneficiary of Northern Trust's views about any action taken by the Investment Direction Adviser or Trust Protector. It remains possible that a further and more detailed showing could be made, but based on the current record, the proposed allocation of powers, responsibilities, and functions among Northern Trust, the Investment Direction Adviser, and the Trust Protector raises serious questions about whether the trusts would be principally administered in Delaware.

Because Section 3332(b) is not dispositive, common law principles apply. The leading Delaware Supreme Court choice of law decisions are fully consistent with the Restatement and establish that the touchstone for choice of law analysis is the settlor's intent.

In the first decision, *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309 (Del. 1942), the Delaware Supreme Court stated:

> Contracting parties, within definite limits, have some right of choice in the selection of the jurisdiction under whose law their contract is to be governed. *And where the donor in a trust agreement has expressed his desire, or if it pleases, his intent to have his trust controlled by the law of a certain state, there seems to be no good reason why his intent should not be respected by the courts*, if the selected jurisdiction has a

> material connection with the transaction. More frequently, perhaps, the trust instrument contains no expression of choice of jurisdiction; but, again, *there is no sufficient reason why the donor's choice should be disregarded if his intention in this respect can be ascertained from an examination of attendant facts and circumstances*, provided that the same substantial connection between the transaction and the intended jurisdiction shall be found to exist.

Id. at 313 (emphases added). In this passage, the Delaware Supreme Court was considering the choice of law principles for determining the law that governs the validity of a trust, with the requirement that a settlor select the law of a state with a "material connection" to the trust. *Id.* Subject to this condition, the Delaware Supreme Court held squarely that the choice of law inquiry focuses on the settlor's intent. The Delaware Supreme Court's directive to give primacy to the settlor's intent applies all the more clearly to the selection of the law that governs trust administration, where a settlor can select the law of any jurisdiction, even one with no connection to the trust. *See* Restatement § 272 cmt. c.

In a second Delaware Supreme Court decision, *Wilmington Trust Co. v. Pennsylvania Co.*, 172 A.2d 63 (Del. 1961), the high court made clear that a choice of law provision in a trust instrument can speak generally and need not use the magic word "administration" to designate the law of a particular jurisdiction. In *Wilmington Trust Co. v. Pennsylvania Co.*, a provision in a will that created a testamentary trust stated: "I direct further that the laws of the State of Delaware shall be controlling as to all questions pertaining to the Trusts by said Will created . . . ." *Id.* at 67. The Delaware Supreme Court remarked as follows: "The Chancellor held that the provision applies to questions

of the scope of trust powers, questions concerning the administration of the trust, and to like matters. We think he was clearly right." *Id.* Because of the strong public policies that govern probate and decedents' estates, a testator generally has less freedom to select the governing law for a testamentary trust than the settlor of an *inter vivos* trust. *See* Restatement § 272 cmt. c. The high court's holding that the quoted language was adequate in the context of a testamentary trust, a more restrictive setting, strongly indicates that that the same or similar language is sufficient to demonstrate a settlor's intent to select the law that would govern the administration of an *inter vivos* trust, which is a less restrictive setting.

A third decision, *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), illustrates how a settlor may implicitly designate the law of a particular jurisdiction. In *Lewis*, a Pennsylvania resident settled an *inter vivos* trust under an agreement with Wilmington Trust Company, a Delaware institutional trustee. The trust agreement was signed in Delaware, and the trust assets were delivered to Wilmington Trust in Delaware. The agreement directed Wilmington Trust to invest and manage the trust assets and pay the income to the settlor during her lifetime. Wilmington Trust was given "in substance . . . the ordinary powers granted to a trustee," but only could exercise three specific powers at the direction of an investment advisor: (i) the power to sell trust assets, (ii) the power to invest the proceeds from the sale of trust assets, and (iii) the power to participate in mergers or consolidations of corporations whose securities were owned by the trust. *Id.* at 824.

The Delaware Supreme Court observed that "[g]enerally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust." *Id.* at 826. The trust in *Lewis* did not expressly select a law to govern trust administration. The Delaware Supreme Court noted that the trust agreement was "signed and the securities [were] delivered to a trustee doing business in Delaware" and concluded that "this circumstance clearly indicates the intent of [the settlor] to have the trust administered and governed according to the law of Delaware." *Id.* Delaware law therefore governed both the administration and validity of the trust. *Id.* In reaching this conclusion, the *Lewis* court followed the rule announced in *Wilmington Trust Co. v. Wilmington Trust Co.*, where the high court held that "[w]hether [the] choice of jurisdiction has been affirmatively stated . . . or whether the donor's intention is deducible from surrounding facts and circumstances, is a question of evidence and consequent proof; and in what manner the donor's intention is made to appear ought not to affect the result." 24 A.2d at 313. The Supreme Court's approach in *Lewis* also accords with the Restatement, which recognizes that "[d]espite the absence of an express designation, it may otherwise be apparent from the language of the trust instrument or from other circumstances . . . ." Restatement § 272 cmt. c.

The Delaware Supreme Court decisions giving broad effect to the settlor's intent in selecting the law to govern a trust comport with Delaware's general approach to choice of law provisions. "Parties operating in interstate and international commerce seek, by a choice of law provision, certainty as to the rules that govern their relationship." *Abry P'rs V, L.P. v. F&W Acq., LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2008).

> Our state obviously relies upon the willingness of other state courts to honor the choice of law reflected in the corporate charters of Delaware firms, even when the parties before them are not geographically situated in Delaware. When the fact of Delaware incorporation has no bearing on the parties' relationship, and they have agreed to a broad choice of law provision that logically governs the claims brought before a Delaware court and that selects another state's law to govern, that choice of law provision must and should be respected by our judiciary.

Weil v. Morgan Stanley DW Inc., 877 A.2d 1024, 1035 (Del. Ch. 2005). Outside of the trust context, this Court has cautioned that the text of a choice of law provision "should not be interpreted in a crabbed way that creates a . . . senseless bifurcation" of the law that governs different issues. *Id.* at 1032. When the drafter of an agreement selects a law to govern the agreement and the relationship it creates, the logical conclusion is that the drafter intended that law to apply to all aspects of the agreement and relationship, unless the provision specifically states otherwise. *See id.* at 1033. For example, a broad choice of law provision that encompasses all matters arising out of or relating to an agreement extends to tort claims, such as challenges to the agreement based on misrepresentation, duress, undue influence, or mistake. *Abry P'rs*, 891 A.2d at 1048. To presume that a choice of law provision applies only to one aspect of the relationship "would create uncertainty of precisely the kind that the parties' choice of law provision sought to avoid." *Id.* (footnote omitted).

These sensible principles apply equally to trusts. When a settlor includes a broad choice of law provision in a trust agreement that logically governs the issues brought before a Delaware court, and it provides for another state's law to govern, the provision

should and will be respected. A broad choice of law provision should not be interpreted in a crabbed way that results in a senseless multiplication of the jurisdictions whose law governs different aspects of the trust.

3. The Effect Of Changing The Place Of Trust Administration

Determining whether the settlor intended for a single law to govern the administration of a trust can be more complicated if the trust agreement permits a transfer of situs and the appointment of a successor trustee.

> If the actual place of administration is changed, either because the trustee acquires a place of business or domicil in another state, or if in the exercise of a power of appointment a trustee is appointed whose place of business or domicil is in another state, the question arises whether thereafter the administration of the trust is governed by the local law of the other state.

Restatement § 272 cmt. e; *see also* Daniel M. Schuyler, *Creating A Revocable Trust: Some Conflict of Laws Problems*, 1 Real Prop. Prob. & Tr. J. 363, 372 (1966) ("A change in the place of administration . . . may raise an issue as to whether the law applicable to the administration of the trust is also to change.").

Moving the situs or place of administration of a trust from one state to another does *not* automatically result in a change in the law that applies; whether the governing law changes depends on the terms of the trust. *See* Richard W. Nenno, *The Trust from Hell: Can It Be Moved to A Celestial Jurisdiction?*, 22 Prob. & Prop. 60, 61 (May/June 2008); Schuyler, *supra*, at 372; *accord* Restatement § 272 cmt. e (discussing how the terms of the trust dictate whether the governing law over administration will change). If

the settlor has selected a particular law to govern administration, explicitly or implicitly, then that law will continue to govern:

> [I]n a private trust where the settlor has indicated an intent that it should be administered in a certain jurisdiction, it seems both proper and convenient that the law of that jurisdiction should govern questions of administration. When the place of administration has been fixed, a subsequent change of residence by the trustee does not alter the controlling law.

David F. Cavers, *Trusts Inter Vivos and the Conflict of Laws*, 44 Harv. L. Rev. 161, 163 n.10 (1930) (citations omitted); *accord* Nenno, *supra*, at 61; *cf.* Unif. Trust Code § 107(1) (2000). By contrast, if the settlor has not selected a particular law to govern the trust, then

> [a] simple power to appoint a successor trustee may be construed to include a power to appoint a trust company or individual in another state. In such cases, the law governing the administration of the trust thereafter is the local law of the other state and not the local law of the state of original administration.

Restatement § 272 cmt. e.

Consistent with the Restatement, Delaware gives broad effect to the settlor's intent to select a single law to govern a trust. *See* Part II.B.2, *supra.* Where a settlor chooses a governing law, that choice is dispositive. The settlor need not deploy talismanic language in a choice of law provision or specify a litany of trust issues to be governed by the chosen law. The settlor's intent to chose a particular law may be implied from the trust document as a whole. When a settlor has selected a governing law, the power to appoint a successor trustee in and of itself is insufficient to override this intent, unless the

trust document as construed by the Court expressly provides for such a change. These principles can be seen operating in the leading cases of *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309 (Del. 1942) [hereinafter *Wilmington Trust III*], *Wilmington Trust Co. v. Sloane*, 54 A.2d 544 (Del. Ch. 1947), and *Annan v. Wilmington Trust Co.*, 559 A.2d 1289 (Del. 1989).

In *Wilmington Trust III*, the Delaware Supreme Court construed a power to appoint a successor trustee as authorizing both a change in situs and the law governing administration. The trust did not contain a choice of law provision. Instead, the Delaware Supreme Court readily concluded that the trust initially was formed under and governed by the law of New York, noting that "every operative factor pointed solely to that State." 24 A.2d at 313. The high court determined, however, that a power of appointment in the trust instrument contemplated that the law governing administration would change. In reaching this conclusion, the Delaware Supreme Court relied on express language in the trust instrument. Without the express language, a different rule would have applied, and the case would have come out differently.

In *Wilmington Trust III*, the Delaware Supreme Court reviewed two successive trial court decisions in which the then-sitting Chancellor and his predecessor reached opposite conclusions. In the first decision, Chancellor Josiah O. Wolcott held that New York law continued to govern the trust even after the change in situs, following the general rule that "[a] change of domicile by the trustee which is accompanied by a change of the location of the trust property itself does not change the status of the trust."

Wilmington Trust Co. v. Wilmington Trust Co., 186 A. 903, 909 (Del. Ch. 1936) [hereinafter *Wilmington Trust I*]. As Chancellor Wolcott saw the matter,

> Had the original trustee removed to Delaware bringing the trust res with her and there continued to administer the trust, it can hardly be denied that the New York law would have continued to govern its terms. In substance all we have here is the appointment of a new trustee by the beneficiaries with the approval of the living settlor and a removal of the trustee to Delaware with like approval. It is difficult to see anything in that fact which looks to a fundamental change in the terms and conditions of the trust.

Id.

Chancellor Wolcott next considered whether the explicit language of the trust instrument required a contrary conclusion. The trust agreement stated that "the successor trustee shall hold the said trust estate subject to all the conditions herein, *to the same effect as though named herein*." *Id.* I will refer to this language as the "Same Effect Provision."

Chancellor Wolcott held that the Same Effect Provision referred "to the conditions as stated and existing at the time the trust was created" and did not imply that the settlor intended for the law governing administration to change if a successor trustee in a different jurisdiction was appointed. *Id.* In his view, under a contrary interpretation,

> if later the person of the trustee should be changed to successive trust companies located in several states respectively, the terms of the trust would vary with the migration of its administration according as the law of the state for the time being provided. The possibility of this situation is the less likely of acceptance as having been intended by the [settlor] when it is remembered that, though his assent to a change of the trustee to a trust company of any other state was necessary while he lived, after his death the

> adult beneficiaries were fully empowered to make the change in their absolute discretion. . . .
>
> It is hardly to be thought that the [settlor] intended consequences of so fundamental a character to flow from the mere circumstance that he provided that . . . a trust company in any state of the Union could be chosen [as successor trustee].

Id. at 909-10.

After issuing his decision in *Wilmington Trust I*, but before a final decree was entered, Chancellor Wolcott passed away. The pleadings were amended and presented for further decision to his successor, Chancellor William W. Harrington, who took a different view of the case. *See Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153 (Del. Ch. 1940) [hereinafter *Wilmington Trust II*]. Chancellor Harrington agreed with Chancellor Wolcott about the general rule: "After a trust has been set up in one State, the mere removal of the trustee to another State, though he takes the trust assets with him, will not alter its original location, or the law governing its interpretation and administration." *Id.* at 161. Chancellor Harrington also agreed with Chancellor Wolcott that when a settlor specifies a law to govern the trust, his intent controls. *See id.* at 162 ("[T]he late Chancellor adopted the so-called intent rule, and I am likewise in accord with that conclusion."). Chancellor Harrington disagreed only "in applying [the intent] rule to the facts." *Id.* In Chancellor Harrington's opinion, the plain language of the Same Effect Provision established that the settlor intended for the law governing the trust to change with a change in situs, because the language stated that the new trustee would hold the

property "to the same effect as though now named herein," *viz.* as if the successor trustee had been appointed as the original trustee. *Id.* at 163, 168.

On appeal, the Delaware Supreme Court agreed with the general principles of trust law as articulated by both Chancellor Wolcott and Chancellor Harrington, noting that "[t]here was no disagreement in the Court below with respect to the general rules to be applied in ascertaining the situs of an *inter vivos* trust of personalty." 24 A.2d at 313. The Delaware Supreme Court then focused on which of the trial court decisions interpreted the Same Effect Provision correctly. *Id.* The Delaware Supreme Court held that Chancellor Wolcott erred because his analysis adhered to the general rule and "treated [the Same Effect Provision], virtually, as a redundancy." *Id.* at 314. The Delaware Supreme Court agreed with Chancellor Harrington's interpretation and read the Same Effect Provision to have "very plainly declared that if the trustee should be changed . . . the successor trustee should have the same status, and should be considered in all respects, as an original appointee." *Id.* This in turn meant if the successor trustee were a Delaware trustee and the trust corpus moved to Delaware, then the Same Effect Provision called for the application of Delaware law, just as if the trust originally had been created with a Delaware trustee and a trust corpus located in Delaware. *Id.* Without the Same Effect Provision, however, it appears that both *Wilmington Trust II* and *Wilmington Trust III* would have adhered to the general principles that Chancellor Wolcott articulated and the result he reached in *Wilmington Trust I.*

Consistent with the *Wilmington Trust* trilogy, the Court of Chancery subsequently held in *Wilmington Trust Co. v. Sloane* that an *inter vivos* trust permitted a change in the

law governing administration because the trust expressly provided for creation of a new trust. *Sloane*, 54 A.2d at 550. The Court initially inferred that the settlor intended to create an *inter vivos* trust governed by New York law. *Id.* at 549. In the trust terms, the settlor gave the beneficiary a "general testamentary power of appointment over the fund," *id.*, in other words, permission to establish an entirely new trust. Once the power of appointment was exercised to create a new trust with a Delaware trustee, Delaware law governed the administration of the new trust. *Id.* In so holding, the Court followed an established rule:

> The power of appointment . . . had its origin in the donor's deed of trust; the provisions of the deed of appointment are viewed in law *as though they had been embodied in that instrument*; and the rights and interests appointed to the children are regarded *as creations of the trust deed.*

Id. at 550 (emphases added) (internal quotation marks omitted). In the same case, the Court held that a testamentary trust, established under the laws of New Jersey, would remain governed by New Jersey law despite the appointment of a successor trustee located in Delaware. *See Sloane*, 54 A.2d at 550 (applying New Jersey law to determine whether a fund "subject to a general testamentary power of appointment may also be appointed in trust"). Because all that had occurred was the appointment of a successor trustee—and not the creation of a new trust—New Jersey law continued to apply. *Id.*

Most recently, in *Annan v. Wilmington Trust Co.*, the Delaware Supreme Court affirmed this Court's reliance on an explicit choice of law provision. One of the trusts at issue in *Annan* was created in Quebec, initially administered in Quebec, and provided that Quebec law would govern. Although the trust subsequently was moved to Delaware

and administered by a Delaware trustee, the Delaware Supreme Court held that "the Vice Chancellor correctly upheld the choice of law provision." 559 A.2d at 1293.

These decisions comport with the choice of law analysis outlined in the Restatement. Where a choice of law provision is broad enough to cover administration, the settlor's selection is dispositive. Even where a choice of law provision does not expressly mention administration, the settlor's intent may "otherwise be apparent from the language of the trust instrument or from other circumstances." Restatement § 272 cmt. c. The combination of the appointment of a successor trustee located in a different jurisdiction and a change in situs is not sufficient to override the settlor's choice of law. The appointment of a successor trustee combined with a change in situs will change the law governing administration only if the trust document so provides or can be construed to contemplate such a change.

4. Application To The 1953, 1957, And 1975 Trusts

The 1953 Trusts explicitly designate the law that will govern trust administration. Article THIRTEENTH of the agreements governing the 1953 Trusts states: "This trust has been created by the Settlor and accepted by the Trustees in the State of New York, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of New York." New York law therefore governs the administration of the trust.

The petition avers that the 1953 Trusts have been administered for several years under Texas law by U.S. Trust. This fact does not change the controlling law. A trustee's erroneous belief about the law that governs administration cannot trump the

settlor's intent. Changing the place of administration, without more, will not alter a controlling designation of law. *See Annan*, 559 A.2d at 1293-94; *Wilmington Trust III*, 24 A.2d at 314; *Sloane*, 54 A.2d at 550.

The 1975 Trusts contain a broad choice of law provision selecting New York law. Section 8(b) of the 1975 Trusts states: "This Agreement shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York." Although Section 8(b) of the 1975 Trusts does not use the word "administration" explicitly, it refers to the "effect and interpretation" of the agreement. Under the Delaware Supreme Court's decision in *Wilmington Trust Co. v. Pennsylvania Co.*, this language is broad enough to apply to "questions concerning the administration of the trust, and to like matters." 172 A.2d at 67.

Reading the agreements governing the 1975 Trusts as a whole confirms the selection of New York law to govern the administration of the trust. *See Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983) (determining intent of settlor "by considering the language of the instrument, read as an entirety, in light of the circumstances surrounding its creation"); *accord Annan*, 559 A.2d at 1292 (quoting *Dutra de Amorim*).

> Matters of administration are normally thought to include matters relating to trust management, such as the powers and duties of a trustee, the investments he may make, his right to compensation or indemnity and the liabilities to which he may be subjected for breach of trust. Matters seemingly somewhat more substantive, such as the right of beneficiaries to terminate a trust and the effect of spendthrift provisions, are, at least in a sense, also regarded as administrative in character.

Schuyler, *supra*, at 370.[1]

The agreement governing the 1975 Trusts contains numerous provisions addressing aspects of trust administration, including but not limited to:

- The duty of the trustee to invest and reinvest the principal of the trusts and circumstances when the trust should be divided or subdivided (§ 2);
- Circumstances under which the trustee can terminate the trust early (§ 5);
- The selection of trustees, including the designation of successor trustees, the removal and appointment of a corporate trustee, and the filling of vacancies (§ 6);
- Whether a trustee must post bond or other security (§ 6);
- The trustees' discretionary powers (§ 7); and
- The trustees' ability to exercise their powers to administer and make distributions from the trust corpus after termination (§ 8(a)).

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[1] *Accord* Bogert, *supra*, § 293; *see* Restatement § 272 cmt. c. (including matters such as "what compensation should be paid to the trustee, what investments he may properly make, what powers are conferred and what duties are imposed upon the trustee"); *id.* § 268 cmt. d (citing as "administration" such matters as "those involving the powers and duties of the trustee in general, and in particular the investments he may properly make; the compensation to which he is entitled; his right to indemnity . . . ; the liabilities for breach of trust which may be incurred . . . and the power of the beneficiaries to terminate the trust"); *see also* Nenno, *supra*, at 61 ("Questions of trust 'administration' involve matters such as the powers and duties of the trustee, trust investments, compensation of the trustee and its right to indemnity, liability for breach of trust, and the power of the beneficiaries to terminate the trust."); Cavers, *supra*, at 164 ("Clearly matters concerning the conduct of the trustee, his powers and duties with regard to the corpus of the trust, and his liability to account, may be relegated to administration. So, too, may the often litigated problem of division of extraordinary acquisitions between income and capital.").

The settlor also chose a New York institution as the initial institutional trustee. *Accord Walton v. Harris*, 647 N.E.2d 65, 68 (Mass. Ct. App. 1995) ("[A]n institutional trustee 'is relatively likely to remain domiciled in the same forum over the entire period of the trust's existence. By choosing such an institution as trustee, the settlor has impliedly chosen a state of administration.'") (quoting *Norton v. Bridges*, 712 F.2d 1156, 1161 (7th Cir. 1983)); *see also* Andreas F. Lowenfeld, *"Tempora Mutantur . . ."—Wills and Trusts in the Conflicts Restatement*, 72 Colum. L. Rev. 382, 387-88 (1972).

By specifying that New York law will govern the "effect and interpretation" of the trust agreement, by including numerous provisions that address the administration of the trust, and by selecting a New York institution as the initial institutional trustee, the settlor expressly chose New York law to govern trust administration. Although the agreement governing the 1975 Trusts authorizes the appointment of successor trustees, it does not contain language similar to the Same Effect Provision interpreted in *Wilmington Trust III* that could be construed as causing the governing law to change with the appointment of a successor trustee in a different jurisdiction. The settlor chose New York law to govern the administration of the trust, and that choice must be respected.

The 1957 Trust contains a choice of law provision selecting New Jersey law that uses language comparable to Section 8(b) of the 1975 Trusts. Section 7(h) states: "This Indenture shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey." This paragraph does not use the word "administration" explicitly, but requires that the trust be "regulated" under New Jersey law. As with the 1975 Trusts, numerous provisions of the 1957 Trust address matters of administration,

which thus must be "regulated" under New Jersey law. Moreover, when the trust agreement is read as a whole, it is clear that the settlor expressly chose New Jersey law to govern the administration of the 1957 Trust.

The petition avers that the 1957 Trust has been administered in accordance with New York law ever since Bankers Trust Company was directed to turn over the trust property to U.S. Trust Company of New York by order dated March 16, 2001, issued by the Superior Court of New Jersey, Chancery Division: Essex County Probate Part. The order does not say anything about changing the law governing the administration of the trust. As with the 1953 Trusts, the settlor's intent continues to control notwithstanding the current erroneous application of another state's law. New Jersey law continues to govern.

When the settlor or grantor has selected a law to govern a trust, Delaware will enforce that choice. The 1953 Trusts and the 1975 Trusts provide for the application of New York law, and the 1957 Trust provides for the application of New Jersey law. Those designations are controlling, even if a Delaware successor trustee is appointed or the situs of the trust shifts to Delaware.

C. The Confirmation Of Delaware As The Situs Of The Trusts

The petitions also seek orders confirming Delaware as the situs of the trusts. In order to change the situs of a trust, whether by expressly modifying the trust or by appointing a successor trustee in another jurisdiction, the law of the state which presently governs administration of the trust must be followed. *See* Restatement § 272 cmt. e. As explained in the preceding section, New York law governs the administration of the 1953

Trusts and the 1975 Trusts, and New Jersey law governs the administration of the 1957 Trust. The petitions do not address the parameters of New York law or New Jersey law, and the issues have not been briefed.

Equally important, it is not clear factually where trust administration principally is taking place. Although Northern Trust is a Delaware entity and apparently does some unspecified trust business in Delaware, the individual trustees are not domiciled here. Jeffrey is a resident of Colorado, and Moore is a resident of Washington. The petitions aver that Jeffrey takes the lead on investment decisions, which is a central part of trust administration. If the trusts were reformed as contemplated by the petitions, then there is good reason to doubt that Delaware would be the principal place of administration. As discussed above, the Investment Direction Adviser and the Trust Protector will carry out the bulk of a trustee's traditional duties, functions, and responsibilities. Neither the Investment Direction Adviser or the Trust Protector will live, work, or make trust-related decisions in Delaware. Perhaps the necessary factual showing could be made, but it has not been made to date.

This Court is therefore not in a position to address the change of situs. Regardless, for the reasons discussed in the previous section, changing the situs of the trusts would not change the law governing administration.

D. Reformation

The petitions seek to reform the trusts to modify their choice of law provisions, change the number of trustees, create the positions of Investment Direction Adviser and Trust Protector, establish powers for the new positions and limit the duties of the sole

trustee, and provide broad exculpation from liability for the trustee and indemnification for the Investment Direction Adviser and Trust Protector. Whether the 1953 Trusts and the 1975 Trusts can or should be reformed is a matter governed by New York law. Whether the 1957 Trust can or should be reformed is a matter governed by New Jersey law. The petitions do not address the parameters of New York or New Jersey law, and the issues have not been briefed. This Court is therefore not in a position to address the requests for reformation.

E. Accepting Jurisdiction Over The Trusts

The petitions ask the Court to accept jurisdiction over the trusts. The trusts will not have any ongoing obligations to the Court, and the trustees will not be submitting accountings. Under the circumstances, it is not clear what accepting jurisdiction over the trusts would mean. Equally important, there is a risk that such a determination could imply a continuing jurisdictional relationship with this Court that could be invoked in response to other litigation filed elsewhere. *See, e.g., Bessemer Trust Co. of Del. N.A. v. Wilson,* 2011 WL 4484557, at *1 (Del. Ch. Sept. 28, 2011) (seeking declaratory judgments relating to trust from Delaware court in response to Florida tort action); *In re Trusts U/A/D December 30, 1996 & Trusts U/A/D January 13, 2006 Created by Farrell,* 2008 WL 5459270, at *3 (Del. Ch. Dec. 18, 2008) (seeking declaratory judgments relating to trust from Delaware court in response to Pennsylvania family court action). The Court will not accept an ill-defined, ongoing role that could be used for forum shopping.

III. CONCLUSION

The petitions are denied. This matter is dismissed. Jurisdiction is not retained. **IT IS SO ORDERED.**