EFiled: May 09 2013 04:18PM EDT
Filing ID 52210805
Case Number Multi-Case

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' REPLY BRIEF

Dated: May 9, 2013
Wilmington, DE

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I. THE COURT OF CHANCERY IMPROPERLY DENIED THE INTER VIVOS TRUSTS PETITIONS

A. The Finding Of The Court Below As To The Intent Of The Settlors Concerning The Law To Govern Administration Is Not Supported By The Authorities Relied Upon

In their Opening Brief, Appellants cited the decision of this Court in Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. 1942) ("Wilmington Trust III") construing the decisions of the Court Below in Wilmington Trust Co. v. Wilmington Trust Co., 186 A. 903 (Del. Ch. 1936) ("Wilmington Trust I") and Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153 (Del. Ch. 1940) ("Wilmington Trust II") as well as Annan v. Wilmington Trust Co., 559 A.2d 1289 (Del. 1989) as standing for and supporting the proposition that the situs of a trust created under the laws of another state can be relocated to Delaware by the voluntary transfer of its assets to a successor trustee located and doing business in Delaware, with its administration to be thereafter governed by the law of Delaware but with any question as to its validity, construction or interpretation continuing to be governed by the law of the state of its creation. In its Answering Brief, the Amicus Curiae appointed by the Court (the "Amicus") does not take issue with this straightforward proposition. Indeed, the Amicus makes only passing, isolated reference to Wilmington Trust III for this Court's statement that where a donor in a trust agreement has expressed an intent to have it controlled by the law of a certain state, that intent should be respected

(without acknowledging that the intent at issue there concerned the law to be applied to determine the "validity" of a trust provision and had nothing to do with the law to govern administration) (Answering Brief pp. 2, 30). The Amicus references Wilmington Trust I only once (Answering Brief p. 31). Wilmington Trust II is not mentioned at all.

Appellants also pointed out that 12 Del. C. § 3332 was enacted by the General Assembly to codify this long-standing rule of Delaware common law recognized in the Wilmington Trust Company trilogy. The Amicus does not take issue with this either, as well it could not.

Instead, the Amicus attempts to sidestep the issue by seizing upon the language of § 3332(b) that "[e]xcept as otherwise expressly provided by the terms of a governing instrument" the law of Delaware will govern the administration of a trust while the trust is administered in Delaware, and argues that the boilerplate statements in the Peierls' inter vivos trusts indicating generally that they are to be construed, regulated and, as to two trusts, administered under New York or New Jersey law satisfies the "otherwise expressly provided" exception of § 3332(b). Such an interpretation is unrealistic and illogical.

Most trust instruments contain some statement to designate the initial situs and governing law to be applied to the trust. But such general statements should not be construed to constitute an "express provision" of the settlor's intent that the

administration of the trust must always thereafter be governed by the law of the state initially referenced, especially since the law generally, as in Delaware, has long held that a trust is to be administered according to the law of the state in which the trustee is located and the assets of the trust held. Given this, if the law governing the trust's administration is to be permanently frozen to a particular jurisdiction at the outset, it should be clearly so stated – such as "this trust shall always be administered pursuant to the law of New York (or New Jersey) regardless of where the trustee and the trust assets may hereafter be located" – in order to satisfy the "[e]xcept as otherwise expressly provided" exception to the common law rule now codified in § 3332(b). It should not be determined based upon a court's presumption of intent divined from such general reference to applicable law. The argument of the Amicus and the finding of the Court Below as to the intent of the Peierls' trusts' settlors is not supported by the decisional law and statutory interpretation on which they rely.

B. The Issue Of The Absence Of An "Actual Controversy"

The Court Below denied the petitions of Appellants in part because it found that they presented no "actual controversy." The basis for this ruling was that the trust instruments permitted trustees to resign and permitted the individual co-trustees to remove the corporate co-trustee and appoint a successor. In reaching this conclusion, the Court Below relied upon the "actual controversy" required to give courts subject matter jurisdiction over declaratory judgment actions. In their Opening Brief, Appellants pointed out that their consent petitions were not seeking declaratory judgments under the Declaratory Judgment Act.

In attempting to defend this finding of the Court Below, the Amicus relies on NAMA Holdings v. Related World Mkt. Ctr., 922 A.2d 417, 435 (Del. Ch. 2007) and Stabler v. Ramsay, 88 A.2d 546 (Del. 1952). The latter decision dealt with an action seeking a declaratory judgment. The former dealt with the effect on a court's jurisdiction of a case becoming moot as a result of subsequent events. They provide no support for the "actual controversy" rationale as applied to the facts of these matters by the Court Below.

The true test is whether the petitions satisfied the "justiciable controversy" requirement of the Constitution in order for a court to have jurisdiction to act. A "controversy" in this sense must be one that is appropriate for judicial determination. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 57 S. Ct. 461,

300 U.S. 227 (1937). As stated by Chief Justice Hughes at 57 S. Ct. 464, 300 U.S. 240-241:

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. (Citations omitted.) The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Citations omitted.) It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Citations omitted.) Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Nor is it any less the presentation and resolution of a justiciable controversy because the judgment entered is brought about by consent. As recognized in Pope v. United States, 65 S. Ct. 16, 22, 323 U.S. 1, 12 (1944):

> It is a judicial function and an exercise of the judicial power to render judgment by consent. A judgment upon consent is a judicial act.

Here, Appellants' petitions sought judicial orders touching the legal relations and rights of the parties having separate legal interests (as corporate trustees, individual trustees, current beneficiaries and contingent beneficiaries) based upon concrete facts and admitting of specific relief through a decree of a conclusive

character. They did not present a mere hypothetical dispute. That the petitions were brought by consent pursuant to the Rules of the Court Below does not deprive them of their justiciable controversy status measured by the standard set forth above.[1]

The Amicus also assumes in the Answering Brief (p. 34) that Appellants' position on the "actual controversy" issue must be that Rule 100 of the Rules of the Court Below "is itself a jurisdictional grant." Appellants have made no such contention, and make none now.

[1] In their Opening Brief, Appellants made reference to the previous practice whereby a petition to modify a trust was initiated by a complaint for a rule to show cause with service on interested parties and a fixed hearing date – clearly setting up an anticipated adversarial proceeding which was often resolved by consent – and pointed out that the consent petition practice was developed between the Court Below and the Trust Bar to reduce the call on court time and resources. The Amicus makes no reference to this in its Answering Brief.

C. There is NoRequirement Under Delaware Law That A Trust Be "Principally" Administered In Delaware In Order To Be Governed By Delaware Law.

In their Opening Brief, Appellants pointed out that Delaware law does not require that a trust be "principally administered" in Delaware in order for the law of Delaware to govern the administration of the trust. Under existing common law recognized in the Wilmington Trust Company trilogy and later codified under 12 Del. C. § 3332 (b), all that is required is that the trust assets be held and administered in Delaware by a Delaware trustee. In that scenario, Delaware law governs the administration of the trust regardless of the residence or domicile of a particular person who might make a decision on behalf of the Delaware trustee or, as an investment direction adviser permitted by Delaware statute, on behalf of the trust itself.

In defense of the Court Below, the Amicus does not dispute this, but rather relies on the fact that Rule 100 of the Rules of the Court Below applicable to Proceedings To Modify Trusts By Consent requires a consent petitioner, as a condition to obtain trust modification relief, to explain to the satisfaction of the Court Below why Delaware will be the principal place of the trust's administration and to compare the duties that will be carried out on behalf of the trust by persons domiciled outside of Delaware in addition to the services provided in-state by the

trustee. In other words, the only authority the Amicus is left to rely upon is the Rule adopted by the Court Below itself.

The Amicus cites no authority that recognizes the power of the Court Below to change unilaterally the substantive law of Delaware by court rule, and Appellants are not aware of any. The Court Below committed error of law by effectively purporting to do so.[2]

Similarly, the Amicus also argues that it was proper for the Court Below to deny the petitions seeking modification of the inter vivos trusts because they failed to address the law of New York and New Jersey on the change in situs of a trust, and also because they failed to address New York and New Jersey law on "reformation" and "modification." However, the Court Below did not deny the relief requested in the petitions based on any such deficiency. It is improper for the Amicus to argue on appeal that such deficiencies support the Court Below's denial of the relief requested when that proposition is not supported by the opinions of the Court Below. Moreover, even if it could be considered proper for the Amicus to make assertions regarding potential deficiencies not addressed by the Court Below, such deficiencies would not have resulted in the complete denial of the relief requested. Instead, counsel should have been provided with notice of

[2] Appellants are unaware of Rules 100-104 having been approved by this Court and the Chief Justice, and therefore presume that they were adopted by the Court Below pursuant to Article IV, § 13(1) of the Delaware Constitution.

such deficiencies and an opportunity to cure them. Further, the only authority cited for Appellants' obligation to address the law of New York and New Jersey on the change in situs of a trust is Rule 100 of the Court Below. There is no citation to any existing Delaware law that would support the invocation of such a new procedural requirement carrying substantive consequences.

II. THE COURT OF CHANCERY IMPROPERLY DENIED THE TESTAMENTARY TRUST PETITIONS

The Court Below relied on the judicial doctrine of comity to reject Appellants' petitions to approve the transfer of the situs of the seven Peierls family testamentary trusts to Delaware so as to enable them to thereafter be subject to the jurisdiction of the Court Below as to any questions stirred by the administration of the trusts while being administered in Delaware.

Comity permits one state to give effect to the laws of a sister state, not out of obligation, but out of respect or deference. Columbia Casualty Company v. Playtex FP, Inc., 584 A.2d 1214 (Del. 1991). Comity also applies where there is a prior pending action in the court of another state involving the same parties and the same claims. McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng. Co., 263 A.2d 281 (Del. 1970). However, Delaware courts have correctly refused to apply the principle of comity when there is no prior action pending in another jurisdiction and a party is merely seeking a dismissal based on doctrine of forum non conveniens. Taylor v. LSI Logic Corporation, 715 A.2d 837 (Del. Ch. 1998).

In other words, the doctrine of comity is properly applied where there is law of another state that should control the situation or where there is something pending in the courts of another state. But it is not appropriate to rely on comity to defer to the courts of another state to the exclusion of a court in this state in the absence of a present interest in either the law or the courts of the other state.

The Amicus finds the Court Below's reliance on comity to be appropriate because as to the two 1960 New Jersey testamentary trusts an order was entered by a New Jersey court approving an intermediate accounting more than 10 years ago, and as to the two 1969 New York testamentary trusts orders were entered more than 12 years ago by New York and Texas courts to transfer the situs of the trusts from New York to Texas for purposes of administration.[3] From these facts, the Amicus argues that there is a "likelihood of judicial involvement in the probate process" relating to the trusts (p. 38) and that "serious questions were left unanswered about jurisdiction exercised by a sister state court for a lengthy period of time." (Answering Brief p. 40)

In short, both the argument of the Amicus and the Opinion of the Court Below reveal that there was no proceeding pending in the courts of New Jersey or Texas with respect to the four testamentary trusts and no pending issue of New Jersey or Texas law to which the Court below could defer on the basis of comity. Speculation that something might exist in either of those jurisdictions that could possibly impact the voluntary and unopposed decision of the trustees of the trusts

[3] The fact that at one time a court in another state may have settled a dispute or addressed a particular question with respect to a trust should not, as a legal and practical matter, indefinitely prohibit every other court in the country from determining a matter involving such trust. Modern trusts can, and typically do, have connections to multiple jurisdictions due to various factors, including the location of the assets constituting the corpus of the trust, the location of fiduciaries, and the particular activities of a trust. Such connections, in the absence of a present interest in the courts of another jurisdiction in the trust before the Court of Chancery, should not cause a court of the State of Delaware to refuse to accept jurisdiction with respect to a matter currently presented to them over which jurisdiction could be exercised.

to transfer their situs to Delaware for purposes of future administration does not meet the test for the application of the doctrine of judicial comity.[4]

[4] The same holds true for the three 2005 testamentary trusts as to which the Court below reasoned that "it seems likely that the [2005 Trusts] are under the supervision of another state's courts." (p. 40)

III. THE COURT OF CHANCERY IMPROPERLY DENIED THE CHARITABLE LEAD UNITRUST PETITIONS

The Court Below denied Appellants' petition to modify the Peierls family's Charitable Lead Unitrust because it construed the petition to be seeking declaratory judgments for which there was no actual controversy and because it did not meet the test for reformation under Delaware law (and not because the petition failed to address reformation under the governing law of the state made applicable to it at the time of its creation).[5]

In their Opening Brief, Appellants pointed out that they were not seeking "reformation" in the traditional sense of an equitable remedy, but were seeking modification of the administrative provisions of the trust on a going-forward basis as contemplated by the Court Below's Rules applicable to Proceedings To Modify Trusts By Consent. Surely, the Court Below had to know this, and the Amicus does not appear to dispute it, as obviously it could not. Accordingly, it was an error of law for the Court Below to deny the petition to modify and reform the Charitable Lead Unitrust because it failed to meet the test for the equitable remedy of reformation of instruments under Delaware law.

[5] Appellants' reply to the "actual controversy" argument of the Amicus has been addressed previously.

IV. THE OPINIONS OF THE COURT OF CHANCERY DO NOT FURTHER THE BROADER INTERESTS OF DELAWARE PUBLIC POLICY

The longstanding public policy of Delaware has been to encourage nonresident trusts to move to Delaware and to be administered here. To this end, the General Assembly passed at least 22 bills from 2000 to 2010 dealing with the creation and the administration of trusts under Delaware law. A-38 to A-39. One of those laws was 12 Del. C. § 3332(b), which clearly states that "the laws of this State shall govern the administration of a trust while the trust is administered in this State." The Court of Chancery itself, in reliance on Delaware laws, approved more than 1,000 consent petitions from 2007 through 2010, most of them modifying nonresident trusts that moved to Delaware to take advantage of Delaware law. See, William B. Chandler, *DEATH OF THE DEAD HAND?* at A-61.

The work of the General Assembly and the Court Below, under the leadership of the prior Chancellor, generated enormous economic benefits for the State of Delaware with nonresident trusts administered in Delaware contributing as much as $1.1 billon to the Delaware economy annually, at least $300 million in trustees' fees and as much as $33 million is annual Delaware income tax. (See, Mat Schanzenbach, Evaluating the Impact of Trust Business on Delaware's Economy, at 1-2, Tab 3 to DBA's Amicus brief Appendix.) The Delaware State

Bank Commissioner's April 30, 2013 Report of Delaware Financial Institutions shows 42 separate trust companies with offices for trust business in Delaware. www.banking.delaware.gov. These trust companies lease office space in Delaware and provide good paying jobs to Delaware residents. Significantly, more than one-half of these trust companies (23) are limited purpose trust companies which must be "operated in a manner so as not to attract customers from the general public in this State." 12 Del. C. § 777(b)(1). Even the Delaware state banking laws support the creation of trust companies to serve nonresident trusts moving to Delaware. Id.

Moreover, while the Amicus warns that the Delaware trust business threatens Delaware's preeminence in corporate and entity formation, it cites no authority or information to support that proposition. In fact, the growth of the Delaware trust business supports entity formation here as many nonresident trusts that move to Delaware transfer assets, such as out of state real estate, to Delaware limited liability companies which are formed to facilitate the funding of the trusts.

Finally, the opinions of the Court Below presently on appeal create confusion and are likely to lead to future litigation with respect to nonresident trusts that have already moved to Delaware. This is true even for those that moved to Delaware using the consent petition procedure of the Court Below, many of which relied on 12 Del. C. § 3547, Delaware's virtual representation statute. That statute permits "a minor, incapacitated or unborn person" to be represented in a

judicial proceeding by another "who has a substantially identical interest." 12 Del. C. § 3547(a). This is a provision of Delaware law that may not be in effect in the jurisdiction from which the nonresident trust was transferred. There are also many more trusts that came to Delaware without using the consent petition proceedings by methods including decanting under 12 Del. C. § 3528(f) and merger into another trust under 12 Del. C. § 3325(29). All of those nonresident trusts now in Delaware, which have been administered in accordance with Delaware law for some time in reliance 12 Del. C. § 3332(b), could now be called into question. For those that came by order of the Court of Chancery, a Rule 60(b) motion may be made to set aside the court order modifying the trust on grounds of mistake with respect to governing law. For those that came without court order, the grounds for challenging the modifications and administration of the trust will be based on the premise that Delaware law did not govern the administration of the trust and therefore the modification or administrative act at issue was not permissible.

In Elf Atochem North America, Inc. v. Cyrus Jaffari and Malek LLC, 727 A.2d 286, 295 (Del. 1999), this Court refused to declare that arbitration clauses in LLC agreements were unenforceable stating: "[i]f we were to hold otherwise, arbitration clauses in existing LLC agreements could be rendered meaningless." The Court went on to state "[s]uch a result could adversely affect many arbitration agreements already in existence in Delaware." Id. at 296. The same reasoning

applies here. To change the law of trust administration as it has been applied in this State since 1936 to nonresident trusts could adversely affect thousands of nonresident trusts that have already moved to Delaware.

For the foregoing reasons, the decisions of the Court Below from which these consolidated appeals have been taken do not further the broader interests of Delaware public policy.

CONCLUSION

For the reasons and arguments set forth in the Appellants' Opening Brief as well for those 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 consented to modifications relocating 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: May 9, 2013
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