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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN E. PEIERLS AND E. JEFFREY PEIERLS,

Petitioner 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

BRIEF OF THE DELAWARE BANKERS ASSOCIATION AS AMICUS CURIAE URGING REVERSAL

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the Delaware Bankers Association (the "DBA"), a non-profit, non-stock chartered trade association comprised of national and state chartered banks, non-depository trust companies and savings banks that conduct business in Delaware. The mission of the DBA is to provide member institutions with the leadership and support necessary to promote a safe and viable financial services industry in Delaware.

The DBA and its members have a vested interest in the outcome of this appeal. If affirmed, the decisions of the Court below would have a severe chilling effect on the movement of trusts to Delaware. Delaware has relied on the free movement of trusts to this State to position itself as the preeminent state for the administration of personal trusts. The erosion of this trust business would result in the direct loss of many *millions* of dollars in annual revenue to member institutions of the DBA. It would also result in the loss of additional millions of dollars in revenue to the State of Delaware. These are precisely the interests that the DBA is charged with protecting on behalf of its members.

For the reasons articulated below, the DBA urges the Court to reverse and vacate each of the opinions and orders entered by the Court below in the three Peierls cases on appeal.[1]

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[1] Appellants have appealed from the Court of Chancery's opinions in the following civil matters: *In re Peierls Family Trust*, C.M. No. 16810-N-VCL, *In re The Ethel Peierls Charitable Lead Unitrust*, C.M. No. 16811-N-VCL, and *In re The Peierls Family Inter Vivos Trusts*, C.M. No. 16812-N-VCL.

ARGUMENT

I. THE COURT BELOW ERRED BY REJECTING THE APPELLANTS' REQUEST TO CONFIRM THAT DELAWARE LAW GOVERNS THE ADMINISTRATION OF THE *INTER VIVOS* TRUSTS.

Trust experts have recognized Delaware as the preeminent state for the administration of personal trusts.[2] Indeed, virtually every national trust company has opened an office in Delaware to conduct trust business in this State.[3] Delaware's dominant position in the personal trust field is a direct result of the General Assembly's commitment to modernizing the State's trust laws and its enactment of statutes ensuring that Delaware law will govern the administration of trusts transferred to this State. As a result of these legislative efforts, Delaware receives millions of dollars in additional revenue *each year* from trusts moved here from other jurisdictions.[4]

The centerpiece of Delaware's legislative initiative allowing for the free movement of trusts is Title 12, Section 3332(b). Under this statute, the General Assembly made clear that Delaware law shall govern trusts administered in Delaware "*unless expressly provided for to the contrary in the trust instrument.*" For beneficiaries and trustees that want to move trusts to Delaware in order to take advantage of Delaware's modernized trust laws, Section 3332(b)

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[2] Robert M. Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356 (Nov. 2005). A compendium of authorities has been filed contemporaneously herewith.

[3] *See*, www.banking.delaware.gov for a list of trust companies with offices in Delaware.

[4] Max Schanzenbach, *Evaluating the Impact of Trust Business on Delaware's Economy* [report commissioned by a coalition of Delaware law firms and banking institutions] (hereinafter "*Schanzenbach Report*").

provides certainty that their trusts will be administered in accordance with Delaware law.

With the enactment of Section 3332(b) in 2006, the General Assembly codified Delaware's longstanding common law principles regarding the applicability of Delaware law to trusts administered in this State. As early as 1936, the Court of Chancery determined that the law governing the administration of a trust is the law of the jurisdiction where the trust is located.[5] In reaching this decision, the Court of Chancery concluded that "[t]here 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."[6] In a later decision in the same litigation, the Court of Chancery held that "all matters relating to the administration of a trust *inter vivos* are ordinarily determined by the law of [the trust's] location."[7] This Court affirmed both *Wilmington Trust* decisions and expressly recognized that it was "no more than common foresight and prudence" for a settlor to allow for a change in the situs of a trust "with a consequent shifting of the controlling law."[8]

Thus, for more than 75 years, Delaware courts have recognized that it is appropriate for the administration of a trust moved to this State (to be thereafter administered in this State by a Delaware trustee) to be governed by Delaware law. This is true even in

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[5] *Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903 (Del. Ch. 1936).

[6] *Id.* at 910.

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

[8] *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309, 314 (Del. 1942).

circumstances where the construction, interpretation or validity of the trust moved to Delaware remains governed by the law made applicable to the trust at the time of its creation.[9]

There is ample authority to support the statutory and common law choice of law principles that govern trusts moved to Delaware. These authorities have emphasized the importance of discerning the intent of the settlor in determining the law governing the administration of a trust transferred to a different jurisdiction. Restatement (Second) of Conflicts provides that the law governing trust administration may change to the laws of the state of the new jurisdiction by express authorization of the settlor or *by implication*.[10] Similarly, other leading treatises on trust law provide that if the settlor failed to expressly designate in the trust instrument the law that governs the *administration* of the trust, the trust will be governed by the local laws of the state in which the trust is administered.[11] *Bogert* recognizes the important distinction between trust interpretation and trust administration, and summarizes the choice of law analysis as follows:

> If the question is not one of interpretation or construction of the trust but relates simply to the administration or management of the trust, for example, the powers, duties and liabilities of the trustee, trust investments, the trustee's compensation and right to indemnity for expenses, the removal and appointment of trustees and the terminability of the trust, the settlor's expressed intent as to the governing law generally will control. For example, if the settlor failed to designate the local laws to govern, matters of administration of the

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[9] *See Wilmington Trust Co.*, 186 A. at 910.

[10] Restatement (Second) of Conflicts of Laws § 271, *cmt. g* (1971); Restatement (Second) of Conflicts of Laws § 272, *cmt. e* (1971).

[11] George Gleason Bogert, et al., *The Law of Trusts and Trustees*, §§ 293, 861 (1992)(hereinafter, "*Bogert*").

> trust will be governed by the local law of the state, to which the administration is most substantially related, often the law of the settlor's domicile or the local law of another state in which the trust is to be administered.[12]

Modern trust theory, encapsulated in the Uniform Trust Code (the "UTC"), a model trust code promulgated by The National Conference of Commissioners on Uniform State Laws that has been adopted in 24 states, as well as the Restatement of Law (Third)on Trusts, further encourages the free movement of trusts from state to state.[13] In fact, not only does the UTC authorize a change in the law of administration when a trust is moved to a new location, it provides a mechanism by which such move may be accomplished and imposes a continuing fiduciary obligation on a trustee to administer the trust in a location that is appropriate to the trust's purpose, administration and beneficiaries.[14] It would be inconsistent with the evolution of modern trust theory if courts suddenly closed their doors on beneficiaries and trustees seeking to change the place of administration to a jurisdiction that best suits the interests of the parties.

Delaware has not adopted the UTC.[15] Instead, it has elected to modernize Delaware's trust laws by targeting specific areas of the law

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[12] *Bogert*, § 293.

[13] *See* http://uniformlaws.org/Act.aspx?title=Trust Code. *See also* Restatement (Third) of Trusts, § 76, cmt. (b)(2) (2007) (hereinafter "Restatement of Trusts").

[14] Uniform Trust Code §§ 106-108 (hereinafter "UTC"). *See also* Restatement of Trusts, § 76, cmt. (b)(2) (stating that "[a] trustee's duty to administer a trust includes an initial and continuing duty to administer it at a location that is reasonably suitable to the purposes of the trust, its sound and efficient administration, and the interests of its beneficiaries.").

[15] Delaware courts have, however, relied on the Restatement of Trusts on many occasions, including in the Peierls' opinions. *See Taylor v. Jones*, 2006 WL 1566467, at *4 n.16 (Del. Ch. May 25, 2006)(stating that the Delaware Supreme Court has "variously relied" on the Restatement of Trusts).

that would make Delaware an attractive jurisdiction in which to administer trusts. Section 3332, a centerpiece of these modernization efforts, represents the General Assembly's codification of Delaware's choice of law principles regarding the administration of trusts—a point explicitly stated in the related legislative synopsis.[16] As evident from the plain language of the statute, the General Assembly addressed potential conflict of law issues by clearly providing for Delaware law to govern trusts administered in this State *unless* the trust instrument "expressly" provides otherwise or by court order.[17]

Notwithstanding the more than 75 years of jurisprudence in Delaware codified in Section 3332, the Court below concluded in C.M. No. 16812 that the five *inter vivos* Peierls trusts that were created under the laws of either New York or New Jersey will continue to be administered under the laws of those states even if a Delaware trustee is appointed or the location of the trusts is moved to Delaware.[18] The ruling of the Court below constitutes a legal error.[19]

Most notably, with respect to the 1957 and 1975 *inter vivos* trusts, the Court below inferred that the settlors chose the laws of the states in which the trusts were originally created to govern the administration of the trusts even though the 1957 and 1975 trusts were completely silent with respect to the law governing trust

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[16] 75 Del. Laws 300 (2005 S.B. 311) (stating that Section 3332 "addresses certain conflict of laws issues relating to trusts moving to this State from other jurisdictions").

[17] 12 *Del. C.* § 3332(b).

[18] C.M. 16812 Op. at 31.

[19] The DBA fully adopts the arguments set forth in Appellants' Opening Brief, pp. 17 to 27.

administration.[20] This ruling is contrary to Section 3332(b), which requires Delaware law to govern the administration of trusts moved to this State absent an express statement otherwise. The 1957 and 1975 trusts contain no provision, express or implied, requiring the laws of New York or New Jersey to govern administration of the trusts, particularly if such trusts are moved to another jurisdiction. To conclude otherwise would eviscerate the intent of Section 3332(b).[21]

Similarly, the 1953 trusts should not be interpreted to expressly designate the law of one jurisdiction to forever govern the administration of such trusts. While these trusts contain a boilerplate provision that provides that "all questions pertaining to its validity, construction and administration shall be determined in accordance of the laws of the State of New York," such a provision alone cannot be interpreted to forever preclude the application of another state's law to the administration of trusts moved to that state. Indeed, to require greater evidence of intent is consistent with other Delaware statutory provisions containing similar phrasing and leading trust authorities.[22]

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[20] C.M. 16812 Op. at 28-31.

[21] A trust's silence with respect to the law governing its administration may suggest the settlor's implied intent that the *situs* of the trust and the law governing administration could change as needed. *See Scott and Ascher on Trusts*, § 45.5.3.2 (p. 3304) (noting that "[i]n some such cases, it has been held that the change in the place of administration also resulted in a change of the law applicable to the administration of the trust.").

[22] For example, Title 12, Section 61-106 is available to any trust administered in Delaware or whose construction or administration is governed by Delaware law unless the trust instrument "expressly prohibits" its use. For purposes of this statute, an "express statement" would be "a provision in the governing instrument that 'The provisions of 12 *Del. C.* § 61-106, as amended, or any corresponding provision of future law, shall not be used in the administration of

Moreover, the lower Court's ruling overlooks the fact that the 1953 trusts (and, for that matter, the 1957 and 1975 trusts) implicitly provide for a change in the law governing administration by permitting the removal or replacement of the successor corporate trustee regardless of the location of the successor trustee. Such a provision demonstrates the settlor's *implied intent* that the law governing administration could and should change upon the designation of a successor trustee located in another jurisdiction. To allow, on the one hand, a corporate trustee domiciled elsewhere to serve as successor trustee, but then require such corporate trustee to administer the trusts in accordance with the laws of the state where the trust was created would, in effect, impose upon such corporate trustees a responsibility to have knowledge of, and administer multiple trusts based on the applicable law of, the many jurisdictions from where the trusts were moved (potentially all fifty states plus foreign jurisdictions) – a burdensome, costly and administratively inefficient result. Such an obligation would have a severe chilling effect on the willingness of trustees to serve as fiduciaries and

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this trust' or 'My trustee shall not determine the distributions to the income beneficiary as a unitrust amount.'" Further, in related contexts, leading trust authorities note that material trust purposes are "not readily to be inferred". *Scott and Ascher on Trusts*, § 34.1 (citing to Restatement (Third) of Trusts, § 65, cmt. d (2003)). Rather, "[a] finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor...." *Id.* A determination that a settlor intended to have a trust forever governed by a particular law should be viewed as a material trust purpose "not readily to be inferred."

would be contrary to Delaware's public policy encouraging the free movement of trusts.[23]

Finally, under modern trust theory, it is recognized that trusts must have the freedom to move from one jurisdiction to another in order to make favorable trust laws available to the trust and its beneficiaries.[24] Consistent with this theory, a settlor's initial designation of a jurisdiction as the place of administration is not necessarily controlling.[25] This is especially true where the law governing trust administration is mentioned only in a boilerplate provision that is silent with respect to the law governing administration when the situs of a trust is changed. A boilerplate provision, without more, is not indicative of any particular intent on the part of the settlor.[26]

The lower Court's rejection of the Appellants' consent petitions has significant economic implications. In a recent report that analyzed the impact of trusts on Delaware's economy, a nationally recognized trust expert estimated that Delaware's "non-domestic trust

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[23] It would also be contrary to the public policy of the State of New York. *See In re New York Trust Co.*, 87 N.Y.S.2d 787, 794-95 (N.Y. Sup. Ct. 1949) (holding that the policy of allowing for the situs of New York *inter vivos* trusts to be moved to sister states "is more likely to lead to the true effectuation of the intent of the creator of the trust.")

[24] *See* UTC § 108(b) and comments; Restatement of Trusts, § 76, cmt. (b)(2). For discussions on the key rationales supporting the free movement of trusts, *see* Margaret E. W. Sager and Bradley D. Terebelo, *Down the Rabbit Hole and Through the Looking Glass: The Wonderland of Trust Situs and Governing Law*, SU025 ALI-ABA 437 (Nov. 15, 2012); John P.C. Duncan and Anita M. Sarafa, *Achieve the Promise- and Limit the Risk- of Multi-Participant Trusts*, 36 ACTEC L. J. 769 (Spring 2011).

[25] *Scott and Ascher on Trusts*, § 45.5.2.2 (p. 3290) and § 45.5.3 (p. 3291).

[26] *See supra note* 22.

business" contributes between *$600 million and $1.1 billion annually* to Delaware's economy.[27] The same report concluded that *$300 million* per year in fiduciary fees are paid to Delaware financial institutions as a result of Delaware's trust business.[28] Annually, Delaware receives between *$19 and $33 million* in state income tax from this business.[29] These estimates, by the report author's own admission, are likely understatements of the actual trust business occurring in Delaware.[30]

Unfortunately, the Court of Chancery's rejection of the consent petitions at issue, its flawed legal analysis and its use of unnecessary dicta has imperiled the future of Delaware's trust business. For the last several decades, trustees and beneficiaries who moved trusts to Delaware had comfortable certainty that trusts administered in this State by a Delaware trustee would be governed by Delaware's modernized trust law. Since December 2012, these feelings of certainty and predictability have been replaced by skepticism, fear and anxiety. The filing of consent petitions in this State has come to a grinding halt. Trustees and beneficiaries in other jurisdictions looking to move trusts to a more favorable location to be administered by experienced trust officers are uncertain whether Delaware law will govern the administration of their trusts if moved to this State and thus are exploring other options. For those trusts that already have moved to Delaware, the trust bar is concerned that the Court of Chancery will not accept jurisdiction over these trusts should a need

[27] *Schanzenbach Report*, at 1-2.
[28] *Id.* at 2.
[29] *Id.*
[30] *Id.* at 7.

for the Court's intervention arise. Further, with respect to those same trusts, Delaware financial institutions are now uncertain whether they have been properly administering such trusts according to Delaware law (rather than the law of the jurisdiction from which the trusts moved). The implications of what state's law should be applied in administering trusts are significant from both a fiduciary liability and cost perspective. Not surprisingly, Delaware financial institutions fear the significant economic impact that the uncertainty created by the lower Court will have on this State's growing trust business if this Court does not reverse the lower Court's ruling.

II. THE COURT BELOW ERRED BY REJECTING APPELLANTS' CONSENT PETITIONS TO MODIFY THE PEIERLS TRUSTS WHEN ALL PARTIES DETERMINED THAT IT WAS IN THE BEST INTERESTS OF THE BENEFICIARIES TO MODIFY THE TRUSTS.

Two rules emerged under common law with respect to interested parties' ability to modify trusts – the English Rule and the American Rule. The English rule allows a court to modify the terms of a trust with the consent of the beneficiaries regardless of the intentions of the settlor.[31] Alternatively, the American rule provides that, absent a positive rule of law to the contrary or a violation of public policy, the settlor's intent will dictate whether a modification of the trust is permissible.[32]

Beginning with a few early decisions in which Delaware courts indicated a willingness to reform or terminate trusts based on the

[31] *See Crumlish v. Delaware Trust Co.*, 46 A.2d 888, 889-90 (Del. 1946). For a modern restatement of the American Rule, *see* UTC § 411(b) ("A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.").

[32] *Crumlish*, 46 A.2d 889-90.

consent of the beneficiaries,[33] Delaware has moved decidedly towards the application of the English rule. Indeed, until very recently, the Court of Chancery fully endorsed the concept of modifying trusts upon the consent of the beneficiaries.[34]

As the concept of modifying trusts by consent became more widely known and accepted[35], the number of consent petitions filed in the Court of Chancery increased progressively and the Court's procedures were refined.[36] The Court of Chancery routinely entered orders approving administrative modifications to trusts and, significantly, never once expressed concern that the consent petitions filed by

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[33] *See Roos v. Roos*, 203 A.2d 140 (Del. Ch. 1964) (court reformed trust following death of settlor based on the court's determination that the beneficiaries would not be adversely affected by the reformed trust); *A.B. v. Wilmington Trust Co.*, 191 A.2d 98 (Del. 1963) (concluding that a trust could not be terminated unless all interested parties consented to the termination).

[34] This is evidenced by the absence in the Court of Chancery Rules 100-104 of any requirement to show that the modification requested is consistent with the settlor's intent or does not violate a material trust purpose. *See* Ct. Ch. R. 100-104.

[35] For a history of how the consent petition process evolved over the past few decades, *see* Appellants' Opening Brief, pp. 38-40. Further, Delaware's liberal standards for the modification of trusts are consistent with leading trust authorities. *See Scott and Ascher on Trusts*, § 33.6, "Loosening the Standards for Termination and Modification" (stating that "in many jurisdictions, it is now substantially easier to terminate and modify trusts than it was once thought to be. Leading proponents of this view are the Restatement (Third) of Trusts and the Uniform Trust Code."). *See also* UTC §§ 111, 410, 411; Restatement (Third) of Trusts, § 65.

[36] Formalized procedures were adopted by the Court of Chancery in 2010 and made part of the Court of Chancery Rules in 2012. *See* Ct. Ch. Standing Order In Re: Procedural Change in Filing Proposed Orders in Petitions for Modification of Trusts (Oct. 7, 2010); Ct. Ch. R. 100-104. For an overview of the statistics relating to consent petitions, *see* William B. Chandler, *Death of the Dead Hand? Remarks to 2010 Delaware Trust Conference*, Tuesday, November 30, 2010, Hotel DuPont, DuBarry Room, Wilmington, Delaware 19801; 2011 Statistical Information for the Delaware Court of Chancery, Miscellaneous Caseload Breakdown, available at http://courts.delaware.gov/AOC/AnnualReports/FY11/Chancery.stm.

trustees and/or beneficiaries were legally deficient because they did not present an "actual controversy" or failed to establish an adequate basis for "reformation." [37]

The lower Court's recent rulings in the Peierls cases dramatically changed the playing field. Rather than affirming the longstanding consent petition practice and Delaware's *de facto* adoption of the English rule, the lower Court rejected the consent petition filed in C.M. No. 16811 on the basis that the relief could be obtained without a court order and, therefore, failed to present the court with an "actual controversy" to decide.[38] This ruling turns years of established trust practice in this State upside down. Indeed, the primary reason the Court of Chancery adopted the Standing Orders and, ultimately, Rules 100 to 104, was to expedite the resolution of consent petitions that seek the very same relief the lower Court has now decided it is no longer authorized to provide.

Moreover, as fully explained in Appellants' Opening Brief, the Court below incorrectly converted the consent petition in C.M. No. 16811 to a request for a declaratory judgment under 10 *Del. C.* § 6501. The consent petitions in Peierls sought no such relief. Tellingly, prior to the petition in C.M. No. 16811, no consent petition had been rejected on the ground that it sought an "advisory opinion" under the Declaratory Judgment Act. The Court-below provided no reason why it deviated from its standard practice.

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[37] *See* Report to the Court of Chancery of the State of Delaware on the Matter of Consent Petitions, March 8, 2010, pp. 4-5.

[38] C.M. No. 16811 at p. 8.

The Court below also dismissed the consent petition in C.M. No. 16811 because it found that the petition failed to provide a sufficient basis to "reform" the trust instrument. The ruling resulted from the Court below's characterization of the petition as one that sought "reformation" as opposed to "modification." While the petition may have carelessly used the word "reform," it is clear that the petition sought the modification of a valid and existing trust instrument.[39] Indeed, the Peierls consent petitions were filed under the Court of Chancery's special procedure entitled "Proceedings to *Modify* Trusts by Consent." Here, the consent petition sought only to change the situs of the trust and to modify the trust's administrative terms. It was a legal error for the lower Court to classify these forward looking changes as requests to "reform" the trust.

In sum, the Court below erred by rejecting the consent petition filed in C.M. No. 16811. The petition did not seek declaratory relief under 10 *Del. C.* § 6501, nor did it seek to "reform" the trust in the traditional sense of equity jurisprudence as described by the Court-below. Not only is the lower Court's rejection of the consent petitions on these grounds contrary to existing law, it directly conflicts with the consent petition procedure that the Court of Chancery specifically endorsed, encouraged and followed for more than the last decade. The lower Court's outright rejection of the consent petition process places Delaware at substantial risk of losing trust

[39] Trust reformation is an equitable remedy by which a court reforms an instrument to reflect the true intent of the contracting party and is most often used to correct a mistake in the instrument. *Roos*, 203 A.2d at 142 (Del. Ch. 1964). Conversely, modification is a change to the instrument that prospectively serves to modernize or improve the efficient administration of a trust.

business to other states that have supported the evolution of trust law and adopted rules permitting the modification of trusts by consent of the interested parties, whether through judicial or non-judicial means.[40]

III. THE COURT BELOW ERRED BY FAILING TO RECOGNIZE THAT DELAWARE MUST BE CONSIDERED THE PLACE OF ADMINISTRATION FOR TRUSTS ADMINISTERED IN DELAWARE BY A SOLE ADMINISTRATIVE TRUSTEE LOCATED IN DELAWARE.

In addition to denying the change of situs and modification petitions for the five *inter vivos* trusts at issue in C.M. No. 16812, the lower Court, in dicta, expressed doubt as to whether Delaware should be deemed the place of administration for the trusts. The lower Court's confusion is somewhat surprising given that it recognized that the petition appointed The Northern Trust Company of Delaware ("Northern Trust"), a Delaware limited purpose trust company with its sole office located in Delaware, as the sole trustee for each of the trusts. While it was anticipated that Northern Trust would be directed as to investment decisions by the proposed investment advisor and that the proposed trust protector would hold certain amendment and removal rights, there was no indication that the general administration, including the implementation of such directions and decisions, as well as distribution determinations, would not otherwise be carried out in Delaware.

Consistent with existing precedent and statutory authority in this State, where the sole corporate trustee is qualified to conduct business in Delaware, the situs of the trust for administrative

[40] *See, e.g.*, Uniform Trust Code §§ 111, 410 and 411. The Uniform Trust Code has been adopted in twenty-four states. *See* http://uniformlaws.org/Act.aspx?title=Trust Code.

purposes is Delaware, absent an express intent to the contrary contained in the trust instrument.[41] That certain non-administrative trust functions, such as investment decisions in the instant case, may be assigned to other fiduciaries under the governing instrument (and consistent with the provisions of 12 *Del. C.* § 3313) does not nullify Delaware as the place of administration. This is the law even in situations where a co-trustee or investment advisor has the sole authority to make investment decisions *and* distribution decisions on behalf of the trust.[42] In Peierls, the Delaware corporate fiduciary, Northern Trust, not only was to perform routine administrative functions such as accounting, reporting and tax return preparation, but was to retain discretion with respect to distributions, a combination of factors well above what would otherwise be required under existing Delaware law.[43]

Recognizing that it was not uncommon for trust instruments to segregate various functions and liabilities among multiple fiduciaries, and wanting to administratively facilitate the flexibility to do so, the General Assembly (as early as 1986) enacted Title 12, Section 3313, which carefully distinguishes the duties of a

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[41] *See supra* Section I and *notes* 5, 7 and 8.

[42] *See Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), *aff'd, sub nom. Hanson v. Denckla*, 357 U.S. 858 (1958) (holding that there is no requirement that the Delaware trustee have a role in customary trustee duties, including investment decisions and distribution decisions, so long as administration of the trust occurs in Delaware).

[43] *See, e.g.*, 12 *Del. C.* § 3570(8)(b) (For purposes of the Qualified Dispositions in Trust Act, a Delaware trustee who "[m]aintains or arranges for custody in this State of some or all of the property that is the subject of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or otherwise materially participates in the administration of the trust" is considered a "qualified trustee").

trustee and a trust advisor.[44] Implicitly, this statute recognizes that the trustee would continue to administer the trust in accordance with Delaware law.

Finally, the Court below erred by suggesting that a trust must be "principally" administered in Delaware to avail itself of the benefit of Delaware laws applicable to trust administration.[45] Nowhere in Title 12 of the Delaware Code does such a requirement exist. To allow the addition of this new standard would undermine years of jurisprudence and the plain language of Section 3332(b). Thus, while the lower Court suggested that a factual record is needed to establish that Delaware would be the principal place of administration, this is an incorrect statement of the law. As long as Northern Trust continues to administer the trusts from its offices in Delaware, the laws of Delaware should govern the administration of the trusts.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, as well as those set forth in the Appellants' Opening Brief, the lower Court's opinions and orders in the Peierls three cases should be reversed and vacated.

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[44] Recognition of the use of advisors in this context is not unique to Delaware, though Delaware is recognized as a industry leader in this area. *See* Richard W. Nenno, *Directed Trusts: Making Them Work*, Tax Management Estates, Gifts and Trusts Journal. Rather, more than thirty jurisdictions have adopted some form of advisor statute. *Id.*

[45] *See* C.M. No. 16812 Op. at 32.

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