

PEIERLS DECISIONS

Three recent Court of Chancery (the “Court”) opinions all involving related trusts, indicate that some of the relief traditionally granted in response to trust consent petitions filed pursuant to Court Rules 100-104 (the “Rules”) may no longer be granted by the Court. See *In Re The Ethel F. Peierls Charitable Lead Unitrust*, C.M. No. 16811-N-VCL (December 10, 2012); *In Re The Peierls Family Inter Vivos Trusts*, Consolidated C.M. No. 16812-N-VCL (December 10, 2012); *In Re The Peierls Family Testamentary Trusts*, Consolidated C.M. No. 16810-N-VCL (December 11, 2012). These opinions have important consequences for the consent petition process sanctioned by the Rules, as the opinions concern (i) moving a trust to Delaware and making modifications to the governing instrument to take advantage of favorable Delaware law, (ii) asking the Court to accept jurisdiction over a trust, (iii) seeking confirmation that Delaware law governs the administration of a trust after a Delaware trustee is appointed, (iv) transferring the situs of a trust to Delaware, and (v) seeking an order from the Court when the requested relief is expressly allowed under the terms of the trust instrument or applicable law. At this time, the *Peierls* cases have been appealed to the Delaware Supreme Court.

BACKGROUND

These opinions arose from several consent petitions filed with respect to seven testamentary trusts, a charitable lead unitrust, and six inter vivos trusts. Each of the seven testamentary trusts (hereinafter collectively referred to as the “Testamentary Trusts”) was created for the benefit of the settlor’s children, grandchildren, spouse, or issue. The charitable lead unitrust (hereinafter the “Charitable Trust”) was established for the benefit of a family foundation with the remainder to the settlor’s children and more remote issue. Each of the inter vivos trusts (hereinafter collectively referred to as the “Inter Vivos Trusts”) was established for the benefit of the settlor’s children or grandchildren. Consents of all parties required by the Rules, including current and remainder beneficiaries, were obtained with respect to all of the Trusts.

Each of the petitions requested that the Court (i) approve the resignation of individual trustees, and in the case of the Inter Vivos and Charitable Trusts only, replace a corporate trustee; (ii) confirm the appointment of a Delaware trust company as

successor corporate trustee; (iii) determine that Delaware law governs administration of the trust; (iv) confirm Delaware as the trust situs; (v) reform the trusts to modify the administrative provisions and create the positions of Investment Direction Adviser and Trust Protector; and (vi) accept jurisdiction over the trust. In each instance, the Court denied the requested relief.

INTER VIVOS TRUSTS

Declarations Regarding Resignation and Appointment of Trustee

With respect to the trustee resignation and appointment for the Inter Vivos Trusts, the Court denied the requested relief because the resignations and appointments could be accomplished, without the Court’s assistance, pursuant to the terms or the trust agreements. The Court acknowledged that there has been a long standing practice of hearing consent petitions. The Court stated that a consent petition may be appropriate in cases where the trust instrument 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. The Court stated that a petition or request for judicial relief is not appropriate when the trust agreement expressly authorizes the contemplated action. The Court stated: “Such a request consumes judicial resources unnecessarily and does not present a live dispute capable of resolution.”

Choice of Law

The Court denied the request for an order providing that Delaware law would govern the administration of the Inter Vivos Trusts upon the appointment of a Delaware trustee because the Court found that such an order would be contrary to the choice of law provisions in the trust agreements. The Court identified Section 3332(b) of Title 12 of the Delaware Code as potentially relevant. Section 3332(b) states in pertinent part “[e]xcept as otherwise expressly provided by the terms of the 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.” Petitioners argued that because the Delaware corporate trustee would administer the trusts in Delaware, Section 3332(b) would be satisfied and Delaware law would apply. The Court rejected this argument, holding that Section 3332(b) was altogether inapplicable in this case for several reasons. First, Section 3332(b) contemplates that a trust

agreement may contain a contrary choice of law provision or may be subject to a court order that determined that the law of a different state would govern, notwithstanding administration in Delaware. The governing instruments in this case contained choice of law provisions, and, as discussed further below, the Court interpreted those provisions as providing a contrary choice of law. Second, the Court found that Section 3332(b) is not dispositive because the statute contemplates the possibility that a contrary instruction may be made by court order, which could include the very order of the Court in response to a petition seeking instruction on the governing law issue. Third, the Court found that the trusts were not being administered in Delaware, since the Delaware corporate trustee's acceptance of its appointment was conditioned on receiving Court approval. Fourth, the Court concluded that to the extent the Delaware corporate trustee was to become successor trustee, it was "far from clear" that the Delaware corporate trustee's limited functions would satisfy the requirement that the Inter Vivos Trusts be administered in Delaware.

The Court opined further that for Delaware law to apply to the exclusion of the laws of another state, the scope of administration in Delaware must be "sufficiently substantial so that the trust is *principally* administered" in Delaware (emphasis in original). The Court emphasized that even if the Delaware corporate trustee had accepted its appointment as successor trustee, its "powers, responsibilities, and functions... will bear little resemblance to those of a traditional trustee". By making the trust directed, the Court noted that essentially all substantive decision-making would be stripped from the Delaware corporate trustee and given to the Investment Direction Adviser and Trust Protector who "would not live, work, or make trust-related decisions in Delaware". In addition, the Court pointed to the limited responsibility and liability that the Delaware corporate trustee would have when acting at the direction of the Investment Direction Adviser and Trust Protector. The Court found that based on the record, "the proposed allocation of powers, responsibilities, and functions among [the trustee], the Investment Direction Adviser, and the Trust Protector raises serious questions about whether the trusts would be principally administered in Delaware."

Citing the seminal case Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309, 313 (Del. 1942), the Court noted that the choice of law inquiry focuses on the settlor's intent and the need to give primacy to the settlor's intent "applies all the more clearly to the selection of the law that governs trust administration." In Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. 1942), the Delaware Supreme Court construed a power to appoint a successor trustee as authorizing a change in situs and a corresponding change in the law governing administration of the trust, where there was no choice of law provision in the trust agreement. However, the trust had a "same

effect provision", which stated that any successor trustee "shall hold the said trust estate subject to the condition herein, to the same effect as though named herein." The Supreme Court read this "same effect provision" to mean that the successor trustee should have the same status of and be treated as the original trustee. Therefore, since the successor trustee was a Delaware trustee and the trust corpus was moved to Delaware, the same effect provision called for the application of Delaware law as if the trust was initially created in Delaware. Citing Wilmington Trust Co. v. Pennsylvania Co., 172 A.2d 63, 67 (Del. 1961), the Court noted that the choice of law provision can be general, and need not use "the magic word 'administration'" to designate the law of a particular jurisdiction.

The Court next analyzed Lewis v. Hanson, 128 A.2d 819 (Del. 1957), where a Pennsylvania resident settled an inter vivos trust with a Delaware corporate trustee that was given "in substance ... the ordinary powers granted to a trustee", except that the Delaware corporate trustee could exercise certain powers only at the direction of an investment adviser. The trust agreement contained no express choice of law provision, but the Delaware Supreme Court held that Delaware law governed the validity and administration of the trust because the settlor's intent was deducible from the circumstances.

Finally, the Court looked at a series of cases outside of the trust context, including Weil v. Morgan Stanley DW Inc., 877 A.2d 1024 (Del. Ch. 2005), that stand for the proposition that a broad choice of law provision should apply to all aspects of an agreement, unless the provision expressly states otherwise. Id. at 1035. The Court reasoned that this principle should apply equally to trusts. The Court stated: "When a settlor includes a broad choice of law provision in a trust 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."

The Court stated: "Where the 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 Court explained that the settlor's intent to choose a particular law may be implied from the document as a whole. The Court held that "[w]hen 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." The Court concluded that "[t]he 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”, such as a power to create a new trust in conjunction with the change in situs.

Relying on these principles, the Court held that the choice of law provisions in the trust agreements all precluded Delaware law from governing administration. One set of Inter Vivos Trust agreements explicitly stated that “all questions pertaining to its validity, construction, and administration shall be determined in accordance with the laws of the State of New York” and the change of the place of administration to Delaware, without more, would not alter this controlling choice of law provision.

The second set of Inter Vivos Trust agreements had a choice of law provision stating that the trust agreement “shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York”. Although the word “administration” was not used, the Court found this provision broad enough to encompass administration as well. Moreover, the Court thought that the agreements read as a whole confirmed that New York law applied to administration because the agreements included numerous trust administration provisions and the settlor initially appointed a New York institutional trustee. Finally, the agreements contemplated the appointment of a successor trustee, but did not include a same effect or like provision that could be construed as causing the governing law to change upon a change in trust situs.

The last Inter Vivos Trust agreement included a choice of law provision that the agreement “shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey.” The Court noted that this provision does not use the word “administration” explicitly either, but it requires that the trust be “regulated” under New Jersey law and, similar to the analysis described above, the provision covered the administration of the trust and New Jersey law applied because of the choice of law provision.

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Since the Court held that New York or New Jersey law applied to the administration each of the Inter Vivos Trusts, it declined to confirm that Delaware was the situs of the trusts. The Court noted that the laws of the state which presently govern administration of the trust must be followed in order to change the trust situs. It then noted that New York and New Jersey laws had not been briefed in this regard. Finally, the Court noted that it is not clear where the trusts are being principally administered. It noted that the Delaware corporate trustee is a Delaware entity and does some unspecified trust business in Delaware but that

the individual trustees are domiciled in other states. Moreover, the Court stated that one of the individual trustees alone was currently responsible for investment decisions and the Court further stated that investment decisions are a “central part of trust administration”. In addition, the Court echoed its previous sentiment that if the trusts were reformed as proposed, there is good reason to doubt that Delaware would be the principal place of administration.

Trust Reforms

With respect to granting the requested reforms to the trusts, the Court denied such relief since the question of whether or not the trusts could be reformed was a matter of New York or New Jersey law and the parameters of such laws had not been briefed.

Accepting Jurisdiction

Finally, with respect to petitioner’s request that the Court accept jurisdiction over the trusts, the Court again denied the relief. Noting that it only exercised jurisdiction for purposes of ruling on the petition seeking reformation, the Court emphasized that it would not retain jurisdiction where the trust would not have any “ongoing obligations” to the Court, such as submission of accountings.

THE TESTAMENTARY TRUSTS

The Court held that comity dictated that the Court decline to entertain a proceeding involving the Testamentary Trusts. In reaching this decision, the Court relied primarily on the “trust entity” theory, whereby a testamentary trust is established and remains at the testator’s domicile at the time of his or her death, such that the domiciliary court can exercise in rem jurisdiction independent of the presence of any of the trustees, trust assets, or trust beneficiaries. In such a case, the Court reasoned that if the courts of one state have previously exercised jurisdiction over a testamentary trust, the courts of another state, having jurisdiction based on a subsequent change of the situs of the trust or the domicile of the trustee, generally will decline to entertain a proceeding involving the construction, validity, or administration of the testamentary trust. With respect to four of the seven Testamentary Trusts, the Court noted that the testator died the resident of another state, had his or her will probated in such other state, and had a court in the other state expressly accept jurisdiction over the trust or do so impliedly by granting intermediate, instead of a final, accounting. With respect to the other three Testamentary Trusts, the Court declined to proceed because the petition did not provide sufficient information as to where the testator died, and whether or not estate administration had commenced in another state.

CHARITABLE TRUST

The Court divided the requested relief into three categories and denied relief with respect to such requests on different grounds. First, with respect to the requests to confirm the resignation of the individual trustees, confirm the appointment of the Delaware corporate trustee as successor, and confirm a change of situs of the trust to Delaware, the Court opined that these were impermissible advisory opinions because all three requests could be accomplished pursuant to the express terms of the trust agreement. Since each of the changes could be effected without judicial involvement because of express provisions in the trust agreement, the Court held that it would constitute reversible error for the Court to address issues without an actual controversy.

Second, with respect to the request to reform the trust and add a wide array of additional administrative provisions and make the trust a directed trust, the Court denied such relief on the basis that reformation was inappropriate. The Court began its analysis by noting that the petitioners did not seek a judicial modification of or deviation from the trust instrument and therefore the petition was seeking reformation of the Charitable Trust. The Court noted that Delaware adheres to the traditional law of reformation, which allows reformation only to fix a mistake in the terms of the trust instrument. Citing Waggoner v. Laster, 581 A.2d 1127 (Del. 1990), the Court found that

the purpose of reformation is to conform a document to the intent of the parties. Id. at 1135. Citing Roos v. Roos, 203 A.2d 140, 142 (Del. Ch. 1964), the Court noted that it has the power to reform a trust instrument after the death of the settlor only if the record “clearly and affirmatively” establishes the grounds for reformation. Id. at 142. The Court declined to entertain reformation because the petition did not contend that reformation was necessary to conform to the settlor’s intent, and instead, the parties openly admitted that reformation was being sought because the petitioners were not satisfied with the trust’s administrative provisions and wanted it administered in a different manner. The Court held that “[c]onvenience is not a valid ground for departing from the settlor’s intent” and denied the requested relief.

Finally, with respect to petitioner’s request that the Court accept jurisdiction over the trusts, the Court again denied the relief based on the same rationale as for the Inter Vivos Trusts.

Please feel free to contact any member of the Morris Nichols Trusts, Estates & Tax Group to discuss how the Peierls decisions might impact you or your clients.

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