2013 RECENT DEVELOPMENTS TO DELAWARE TRUST & ESTATE LAW

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In 2013, the Delaware Court of Chancery and Delaware Supreme Court decided several cases that impact trust and estate professionals. Some of the decisions set new precedent, notably, the Supreme Court's decision in the *Peierls* trio of cases, while others clarified or affirmed existing precedent. Of equal import to practitioners was the enactment of 12 *Del. C.* § 3338, which permits the nonjudicial settlement of certain trust issues. The purpose of this article is to alert practitioners to noteworthy decisions and statutory developments that occurred in 2013.

I. Testamentary Capacity

Succeeding on a claim for undue influence remains an uphill battle. In *Davis v. Estate of Mary S. Perry*,[2] the Court of Chancery confirmed established precedent that evidence of confusion or an improvident dispository scheme is not, in itself, sufficient to prove that the decedent lacked testamentary capacity. In *Perry*, the decedent executed a will in 2001 with the explicit intent to disinherit her grandson, Grayling Davis, who was her sole intestate heir, and to devise her real property to a more distant relative. Unfortunately, due to scrivener's error, the will did not contain a residuary clause. As a result, decedent's real property passed to the identified relative, but the residue of decedent's estate passed to Mr. Davis pursuant to Delaware's intestacy laws. In an effort to obtain the real property, Mr. Davis brought an action contesting the will on grounds of undue influence and lack of testamentary capacity.

The Court determined in a prior decision that Davis had failed to prove that the will was the product of undue influence.[3] In this opinion, the Court found that Mr. Davis also failed to prove that the decedent lacked testamentary capacity. In so ruling, the Court considered testimony about the decedent's health and mental condition, noting that there is a presumption in Delaware that a testator has testamentary capacity. The Court then determined that the evidence supported that presumption. The Court explained that evidence demonstrating that the testatrix was at times confused does not, in itself, mean that the testatrix lacked testamentary capacity. "The fact that a testatrix suffers from confusion does not prevent her from creating a valid will if on the day the will is executed she is not confused and possesses an understanding of her property and the natural objects of her bounty."[4]

II. Attorneys' Fees

In *IMO Trust for Grandchildren of Wilbert L. and Genevieve W. Gore*,[5] the Court of Chancery, over the objection of certain trust beneficiaries, approved payment of attorneys' fees and expenses from a trust to a trustee, and refused to shift attorneys' fees pursuant to 12 *Del. C.* § 3584.[6] The objecting beneficiaries/grandchildren argued that the Trust created by Wilbert L. and Genevieve W. Gore: (1) should not be required to pay the

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[2] *Davis v. Estate of Mary S. Perry*, CIV.A. 2419-VCG, 2013 WL 53991 (Del. Ch. Jan. 2, 2013).

[3] *Davis v. Estate of Mary S. Perry*, CIV.A. 2419-MG (Del. Ch. Dec. 19, 2011)(TRANSCRIPT).

[4] *Id.* at *2.

[5] *In re IMO Trust for Grandchildren of Wilbert L. and Genevieve W. Gore*, CIV.A. 1165-VCN, 2013 WL 771900 (Del. Ch. Feb. 27, 2013).

[6] Section 3584 provides that "[i]n a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

attorneys' fees of one of the co-trustees and certain trust beneficiaries because the trustee's conduct was the cause for the action; and (2) that the trustee and her children should personally pay the attorneys' fees of the co-trustees. Specifically, the objecting beneficiaries/grandchildren argued that the trustee's attempt to "equalize" the allocation of Trust assets by adopting her ex-husband, combined with her failure to disclose that adoption to her family, were acts of bad faith and breaches of the trustee's fiduciary duty as trustee.

Even though the Court found that the trustee and her children's motivations to conceal the adoption were mixed at best, the Court ruled that their conduct "did not provide an adequate basis to warrant imposing the attorneys' fees and expenses resulting from this litigation on [the trustee] and [her children]."[7] This decision was principally based upon the Court's finding that "[a] drawn out and complex litigation effort [was] likely to have been inevitable."[8]

The Court closely scrutinized the claim of the trustee and her children that their attorneys' fees should be paid by the trust, and ultimately permitted such payment. Cognizant of the impact of the trustee's adoption of her ex-husband, the Court noted, "[i]t might be more accurate to report that [the trustee] filed suit in an effort to obtain a bigger share of the Trust for her children."[9] Nonetheless, the Court explained that, as a general rule, a "trustee may look to the trust for payment of her attorneys' fees and expenses '(i) where the attorneys services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust.'"[10] The Court found that as a consequence of the litigation initiated by the trustee, questions about the term "grandchildren" in the trust instrument were resolved, allowing for proper distribution and thereby providing a benefit to the trust. Even though it was the trustee's own conduct — adopting her ex-husband — that called the term "grandchildren" into question, the Court determined that she did not act fraudulently or breach any fiduciary duty when the trustee adopted her ex-husband or pursued litigation.

III. Discovery and Privilege

Two important cases involving discovery in trust and estate disputes were decided in 2013. The first case, *IMO The Estate of James Vincent Tigani, Jr,*[11] involved a motion to compel discovery from the decedent's wife's estate planning attorneys. In *Tigani*, the decedent's son challenged the mental capacity of his mother, the decedent's wife, who was appointed decedent's executor and trustee of a trust created by decedent. Following decedent's death, decedent's wife executed various estate planning documents in 2011 and other irrevocable estate planning documents in 2012 that purportedly divested decedent's son of any interest in his father's estate and, as a result, of standing to seek removal of decedent's wife as executor and trustee. Decedent's son challenged his mother's testamentary capacity to execute those documents, and sought discovery from her estate planning attorneys. Decedent's wife claimed that evidence surrounding the execution of her estate planning documents was protected by the attorney-client privilege, but stated her intention to call those same attorneys as witnesses.

The Court ruled that evidence surrounding decedent's wife's execution of estate planning documents in 2011 and 2012 was within the permissible scope of discovery.[12] In addition, the

[7] *Id.* at *3.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *In re Estate of Tigani*, CIV.A. 7339-ML, 2013 WL 1136994 (Del. Ch. Mar. 20, 2013).

[12] In its draft report, the Court granted discovery of evidence concerning the estate planning documents executed in 2012, but excluded discovery concerning the 2011 documents because decedent's wife was not relying on those documents in any way and because decedent's wife based her motion to

Court ruled that decedent's wife had waived the attorney-client privilege in connection with each of her estate planning attorneys that she identified as possible trial witnesses. The Court reasoned that "[a] party cannot use the attorney-client privilege as both a sword and shield by taking a position in litigation and then erecting the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position."[13] The Court determined that decedent's wife was seeking to do just that by proffering her attorneys' testimony to demonstrate that she possessed testamentary capacity, but then using the privilege to prevent opposing counsel from inquiring into the communications that may form the basis for such attorney's testimony. Further, in connection with decedent's wife's production of documents, the Court instructed counsel that if they were in possession of any "'counterindicating facts' regarding the completeness of [decedent's wife's] responses to Requests for Production Nos. 19 and 20, they will dig deeper to make sure she has produced all responsive documents. Simply asking a client if she has responsive documents does not satisfy an attorney's discovery obligations."[14]

Interestingly, another waiver of the attorney-client privilege resulted from an expert report from a doctor who was expected to testify regarding the decedent's wife's capacity. The expert interviewed one of decedent's wife's estate planning attorneys and relied, at least in part, on that attorney's opinion about decedent's wife's capacity.

The second discovery-related trust case decided in 2013 was *Kathryn Mennen, et al. v. Wilmington Trust Company, et al.*[15] In *Mennen*, the Court of Chancery confirmed that a fiduciary exception to the attorney-client privilege continues to exist under Delaware law. The action began in 2012, when Wilmington Trust Company, a co-Trustee of the Trust, filed a Petition for Instructions (the "Petition Action") seeking a determination that the Trust was a "directed trust," and that the individual co-trustee should be removed because he directed Wilmington Trust Company to make poor investments which resulted in the loss of a substantial portion of the Trust's value.

In March 2013, the beneficiaries of the Trust filed a complaint against Wilmington Trust Company and the individual co-trustee, alleging that the co-trustees breached their fiduciary duties. The complaint sought $100 million in damages. The Beneficiaries filed a motion to compel the production of: (1) documents relating to advice provided by counsel to Wilmington Trust during the Petition Action; and (2) documents relating to advice provided by counsel to Wilmington Trust regarding Wilmington Trust's duties and powers as Trustee.[16]

The Court of Chancery began its analysis by confirming that *Riggs National Bank of Washington D.C. v. Zimmer*[17] "was not superseded or abrogated by subsequent changes to Delaware law" and, therefore, a fiduciary exception to the attorney-client privilege of Rule 502 of the Delaware Rules of Evidence continues to exist in Delaware. The

dismiss solely on the impact of the documents that she executed in 2012. The Court, however, was persuaded that the exclusion of discovery related to decedent's wife's capacity in 2011 was "artificial and potentially unmanageable." *Id.* at *2.

[13] *Id.* at *3.

[14] *Id.* at *5 (citation omitted).

[15] *Mennen v. Wilmington Trust Co.*, CV 8432-ML, 2013 WL 4083852 (Del. Ch. July 25, 2013).

[16] The beneficiaries also claimed that the individual co-trustee's invocation of the work product doctrine was inappropriate with respect to a memorandum prepared in anticipation of a different litigation. The Court agreed, explaining that work-product protection is only extended to another litigation when "the two cases are closely related in parties or subject matter." *Id.* at *8. The presence of one party in both cases is insufficient to trigger the protection of the work-product doctrine.

[17] 355 A.3d 709 (Del. Ch. 1976).

fiduciary exception to the attorney-client privilege requires that communication between the fiduciary and the fiduciary's attorney be disclosed to the trust's beneficiaries because this communication ultimately benefits the beneficiaries. Under *Riggs*, a fiduciary exception to the attorney-client privilege exists when the beneficiaries are the "real" or "ultimate" clients, and in making that determination, the Court will consider "(i) the purpose of the legal advice; (ii) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained; and (iii) the source from which the legal fees associated with the advice were paid."[18]

After applying the *Riggs* factors, the Court concluded that the documents related to the Petition Action were protected by the attorney-client privilege. Specifically, the Court found: (1) Wilmington Trust sought the advice of counsel for its own protection and benefit; (2) a threat of litigation existed between the beneficiaries and Wilmington Trust; and (3) the attorneys who provided the advice were paid by Wilmington Trust Company's parent company, M&T Bank, and not by the trust.

In addition, the Court required production of documents relating to advice provided to Wilmington Trust as to its powers and duties as trustee of the trust. Citing *Riggs*, the Court explained that "'[a] beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust' and that beneficiaries must have 'knowledge of the affairs and mechanics of the trust management' in order for them to hold the trustee to the proper standards of care and honesty."[19]

[18] *Mennen*, 2013 WL 4083852, at *4.

[19] *Id.* at *7.

IV. After-Born Children

Estate and Family law intersected in *Cummings v. Estate of Lewis et al.*[20] In *Cummings*, the Court addressed whether a claim for child support filed against the estate of a decedent, relating to a child who was born after decedent's death, was barred by the 8 month creditor claim period of 12 *Del. C.* § 2102(a).

The decedent, Ronald E. "Butch" Lewis, the famed boxing manager and promoter, died testate in Delaware in 2011. His will identified four children. However, prior to his death, decedent was romantically involved with Ms. Cummings, and Ms. Cummings bore a child after decedent died. Ms. Cummings instituted an action pursuant to 12 *Del C.* §§ 301 and 310 to recover the equivalent of an intestate share of decedent's estate for the after-born child. Cummings also filed suit in New Jersey and Delaware seeking child support. The defendants, the four adult children of decedent who were identified in the will, sought leave of Court to amend their Answer and requested that the Court rule on, among others, several issues unique in the context of an after-born child including: (1) whether, if Ms. Cummings prevailed on a claim for child support, she also can recover under 12 *Del. C.* § 301;[21] (2) whether, if Ms. Cummings prevails on a

[20] *Cummings v. Estate of Lewis*, CIV.A. 6948-VCP, 2013 WL 979417 (Del. Ch. Mar. 14, 2013); *Cummings v. Estate of Lewis*, CV 6948-VCP, 2013 WL 2987903 (Del. Ch. June 17, 2013); *Cummings v. Estate of Lewis*, CV 6948-VCP, 2013 WL 3736136 (Del. Ch. July 16, 2013).

[21] 12 *Del. C.* § 301 provides:

> A child born after its parent has made a last will and testament and for which such parent made no provision, vested or contingent, specifically or as member of a class, by will or otherwise, shall take the same portion of its parent's estate, both real and personal, that the child would have been entitled to if such parent had died intestate. This section shall not apply and no intestacy shall be created as to any child or children born after the date of the execution of a will in any case where the testator has provided in the

claim for child support, that claim would offset, or be offset by, a valid claim under 12 *Del. C.* § 301; (3) whether Ms. Cummings must elect one remedy, either child support or recovery pursuant to 12 *Del. C.* § 301; and (4) whether any amount recovered by Ms. Cummings should be classified as a payment to a creditor of the estate or a distribution to a beneficiary of the estate.[22] The Court refused to address these questions on the grounds that it does not issue advisory opinions, and ordered that proceedings with respect to those issues be stayed pending the resolution of the child support claims.[23]

The Court held that Ms. Cummings's claim for child support filed against decedent's estate, was time-barred. In so holding, the Court reasoned that "section 2102(a) contemplates circumstances such as this by stating that it pertains to all claims, whether 'due or to become due, absolute or contingent.'"[24] Thus, the claim for child support was a contingent claim that arose at the time of Mr. Lewis's death, and was therefore subject to the 8 month statute of limitations. Ms. Cummings filed an Application for Certification of Interlocutory Appeal with regard to the Court's decision that the claim for child support was barred by section 2102(a), which the Court granted on July 16, 2013.

V. Gifts

In *Honaker v. The Estate of Dorothy T. Haas*,[25] Petitioners attempted to put a new spin on a well-settled area of law. Petitioners served as the live-in caretakers and butlers for the decedent. In her will, she made specific bequests to both Petitioners in the amount of $25,000. Prior to her death, the Decedent announced a desire to give additional cash gifts of $25,000 to Petitioners. The decedent's accountant, who was also her attorney-in-fact under decedent's durable power of attorney, wrote checks to the Petitioners in the amount of $25,000 each. At the time the checks were written, there were insufficient funds in the decedent's account to cover the checks, and decedent died before sufficient funds were deposited into the account. Petitioners maintained that decedent's financial advisor and accountant planned to liquidate various investments to cover the checks.

Under established Delaware law, an *inter vivos* gift is enforceable when the donee establishes: "(1) an intent, manifested by the donor, to make a gift, and (2) an actual or constructive delivery of the subject of the gift to the donee."[26] Although the complaint pled sufficient facts to demonstrate donative intent, the gift was never delivered. Checks are revocable until cashed. As a result, "when a personal check is given to a donee with the intent to make a gift, there is no delivery of the gift until the funds needed to honor that check are available to be withdrawn from the account and the check is presented and paid."[27]

The Court rebuffed Petitioners' argument that their case presented an exception to this general rule. Specifically, Petitioners claimed that because the check was issued by an attorney-in-fact at the donor's direction, and because one of the beneficiaries signed the check as a co-tenant of the joint account in which the check was drawn, the general rule should not apply. Although the Court "summarily dismissed" these arguments, the Court did note that "[i]f the funds had been deposited by the donor into the joint account, regardless of whether a check was drawn, that act might have

> last will and testament that the birth of any child or children subsequently shall not affect the will.

[22] *Cummings*, 2013 WL 979417, at *2.

[23] *Id*. at *7.

[24] *Cummings*, 2013 WL 2987903, at *5 (Del. Ch. June 17, 2013).

[25] *Honaker v. Estate of Haas*, CIV.A. 7966-VCG, 2013 WL 1459196 (Del. Ch. Apr. 11, 2013).

[26] *Id*. at *2.

[27] *Id*. at *2.

amounted to delivery to the cotenant, but such a deposit was never made here."[28]

VI. Enforceability of Mediation Agreement

In *IMO M. M., a disabled person*,[29] Petitioner, the step-father of the Respondent, sought to set aside a Mediation Agreement on the grounds that: (1) the Mediation Agreement was unconscionable; and (2) Respondent failed to comply with the terms of the Mediation Agreement in a timely manner. The Court held that the Mediation Agreement was enforceable.

To set aside a mediation agreement on grounds of unconscionability, "the burden is on a petitioner to show both that the terms of the contract are oppressive and that the oppressed party was deprived of meaningful choice; in other words, the agreement must be manifestly and fundamentally unfair."[30] Because the mediation was overseen by an officer of the Court and because all parties were represented by counsel, the Court was not convinced that the mediation agreement was manifestly and fundamentally unfair.

The Court was equally unpersuaded by Petitioner's claim that the Mediation Agreement was unenforceable as a result of Respondent's failure to obtain a line of credit by a certain date imposed by the agreement. The Court explained that Respondent's inability to fulfil that requirement was caused, at least in part, by Petitioner, who delayed in providing information to Respondent which was necessary to obtain the line of credit. Because Petitioner contributed to the delay, the Court concluded that he waived the breach.

VII. Removal of Trustee or Administrator

Two cases in 2013 involved the ability of beneficiaries to remove a fiduciary. In the first case, *Taglialatela v. Galvin*,[31] the Court granted Petitioner's motion to remove the Trustee and appoint a successor trustee. Relying on 12 *Del. C.* § 3327(3)(c),[32] the Court explained that it is unnecessary to establish that a Trustee committed a breach of trust in order to remove the Trustee where there is an ongoing hostility and lack of communication between the trustee and the beneficiary that interferes with the efficient administration of the trust. The Court further found that hostility and lack of communication had caused there to be no distributions from the trust for an unreasonable period of time, and that it would be in the best interest of the beneficiaries to appoint a successor trustee to complete the administration of the trust in a reasonable period of time.

The second case, *Pinno v. Pinno*,[33] presented obvious grounds for removal. In *Pinno*, the co-executor refused to execute an accounting, sent caustic facsimiles to chambers, was hostile to the Court, the Register of Wills, and to his co-fiduciaries, and failed to appear at the hearing scheduled to address his removal.

VIII. Validity of a Will

In *IMO Purported Codicil/Amendment to the LW&T of Lucia R. Sierra*,[34] the Court confirmed

[28] *Id.* at *3.

[29] *In re M.M.*, CM15850-S-VCG, 2013 WL 1415837 (Del. Ch. Apr. 4, 2013).

[30] *Id.* at *3.

[31] *Taglialatela v. Galvin*, CIV.A. 5841-MA, 2013 WL 2122044 (Del. Ch. May 14, 2013).

[32] 12 *Del. C.* § 3327(3)(C) provides: "[t]he court, having due regard for the expressed intention of the trustor and the best interests of the beneficiaries, determines that notwithstanding the absence of a breach of trust, there exists . . . [h]ostility between the trustee and beneficiaries that threatens the efficient administration of the trust."

[33] CV 7878-ML, 2013 WL 5943970 (Del. Ch. Nov. 5, 2013).

[34] *Re IMO Purported Codicil/Amendment to the LW & T of Lucia R. Sierra*, C.A. 7769-ML, 2013 WL 3199631 (Del. Ch. June 26, 2013) *adopted sub nom. In re Sierra*, 7769-ML, 2013 WL 3734753 (Del. Ch. July 16, 2013).

that witnesses to a will must sign the instrument in the presence of the testator. In *Sierra*, the decedent was survived by five children and the wife of her deceased sixth child. The will, which was executed in 2009, left the bulk of decedent's estate to the wife of the deceased child. However, prior to her death, decedent visited one of her children in Florida and while there purportedly executed a codicil which provided for an equal distribution of her estate among her heirs. The codicil was signed by the decedent and two witnesses, but the witnesses did not sign in the presence of the decedent as required by 12 *Del. C.* § 202(a)(2). "It is settled law in Delaware that the witnesses to a will 'must sign in the presence of the testator,' which means that the witnesses must sign the will in the same room that the testator is in, and where the testator 'could see them if he chose.'"[35] Pursuant to 12 *Del. C.* § 202(b), any will that is not signed by the witnesses in the presence of the testator is void. In a straightforward application of 12 *Del. C.* § 202(a)(2), the Court declared the codicil void. The fact that the witnesses to the codicil executed affidavits at the Register of Wills was insufficient to cure the statutory defect.

IX. Convenience Accounts

Although *Mack v. Mack*[36] does not involve a trust or an estate, it nonetheless touches upon an issue that trust and estate practitioners frequently encounter: whether a joint account is truly joint and should pass to the surviving joint tenant at death, or whether it should be declared a convenience account and be treated as part of the probate estate. In *Mack*, mother and daughter opened a joint account. Over the next two decades, mother made all of the deposits into the account and, from time to time, authorized daughter to make withdrawals. Mother paid all the income taxes attributable to the interest from the account and treated all of the funds in the joint account as hers. When daughter withdrew over $100,000 from the joint account for her own use, a lawsuit ensued.

On motion for summary judgment, daughter argued that the terms of the joint account agreement — signed by mother and daughter — made it clear that daughter had the unequivocal right to withdraw funds from the joint account. In denying summary judgment, the Court explained "[e]ven if [daughter] should be deemed to have legal title to the funds, there may, nonetheless, be a 'supervening understanding or agreement' that established a different entitlement. [Mother] has proffered evidence to support an understanding that may be enforced in equity to the derogation of a raw legal right."[37]

X. Power of Appointment

In *In the Matter of the Trust Under the Will of Elizabeth Williams Vale for the Benefit of Frederic B. Asche, Jr.*,[38] the testatrix died a resident of Delaware leaving a will which established a trust for the lifetime benefit of her daughter. Upon daughter's death, the trust was divided into equal shares for testatrix's grandchildren and held in further trust. One of the trusts was for the benefit of Testatrix's grandson, who was a resident of Texas. Testatrix's will gave grandson a power of appointment over the trust. In default of grandson's exercise of that power of appointment, the trust was to be distributed at grandson's death to his issue, per stirpes (the "Default Beneficiaries"). Grandson died in 2011, and by his will exercised his power of appointment over the trust in favor of his wife. Grandson's wife died just five months later, and left her estate to Baylor University Medical Center.

The Default Beneficiaries filed a timely petition in Texas contesting grandson's will, asserting that grandson lacked testamentary capacity and was unduly influenced by his wife.

[35] *Id.* at *2.

[36] *Mack v. Mack*, CV 4240-VCN, 2013 WL 3286245 (Del. Ch. June 28, 2013).

[37] *Id.* at *3.

[38] *In the Matter of Vale for Asche*, CV 7662-ML, 2013 WL 3804584 (Del. Ch. July 19, 2013).

PNC Bank, the sole remaining trustee,[39] filed a petition seeking instruction as to: (1) whether it should distribute the assets of the trust pursuant to the power of appointment, or (2) whether it should continue to hold the assets in trust until the Texas will contest was resolved.

The executrix of grandson's wife's estate (the beneficiary of the trust pursuant to the exercise of the power of appointment) urged the Court to direct PNC Bank to distribute the assets to grandson's wife's estate because: (1) any order to the contrary would amount to a collateral attack on the Texas probate court order admitting the will to probate and appointing a personal representative of the estate; (2) the Texas probate court order was entitled to full faith and credit by the Delaware Court of Chancery;[40] and (3) the Default Beneficiaries had no chance of succeeding in the Texas will contest action and therefore lacked standing to challenge the distribution of the trust.

The Court rejected these arguments, and concluded that PNC Bank should continue to hold the trust assets during the pendency of the will contest. The Court reasoned that the Default Beneficiaries were not collaterally attacking the Texas probate court order, but rather disputing whether the Texas probate court order applied to a particular asset, *i.e.*, the trust. Further, for that same reason, the Court's decision did not violate the full faith and credit clause. Finally, the Court reasoned that the release of the trust assets to the executrix of grandson's wife's estate would create the possibility that the Default Beneficiaries would be unable to recover the trust assets even if they prevailed in the will contest, which had been timely-filed. On the other hand, the prejudice to the executrix of grandson's wife's estate of continuing to hold trust assets was merely theoretical.

XI. Accounting

In Matter of the Estate of Leonard Rich,[41] the Chancery Court addressed a common issue that arises in the context of probating an estate: the appropriateness of deductions taken by the estate's personal representative. In Delaware, many rules relating to the deductibility of expenses are rooted in customary practice and not codified in any formal way. The *Rich* Court announced a three-factor test when analyzing the appropriateness of deductions: relevance, reasonableness, and timeliness.[42]

The Court explained that relevance "goes to the heart of estate administration: Does the deduction serve the best interests of the estate? Does the deduction protect and preserve the estate? Is the deduction appropriate, given the general standards of estate administration?"[43] Reasonableness relates to the amount of the expense: "Is the amount spent the fair market value of such goods or services? Is the amount spent proportionate to a benefit that the estate receives or a detriment that the estate avoids?"[44] Finally, timeliness, which was described as "an admired and elusive factor"[45] focuses on how a deduction relates temporally to a benefit conferred on the estate or detriment avoided: "[did] the deduction occur in a

[39] The governing instrument required that there always be three trustees, one corporate and two individual. Due to the death of Testatrix's grandson and the resignation of the other individual co-trustee, PNC Bank was the sole remaining trustee.

[40] "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." U.S. Const. art. IV § 1. *See also* 28 U.S.C. 1738 (West 2013).

[41] *In the Matter of Estate of Rich*, CROWFOLIOF03072007RL, 2013 WL 5966273 (Del. Ch. Oct. 29, 2013).

[42] *Id.* at *4.

[43] *Id.*

[44] *Id.*

[45] *Id.*

timely manner so as to achieve a benefit (or avoid a detriment) for the estate?"[46]

After applying the above factors, the Court approved all but one deduction — a limousine bill for transportation of the family for the unveiling of the headstone some five years after the decedent's funeral.

XII. Cy Pres Doctrine

In the Matter of the Mary R. Latimer Trust U/A/D 12/3/1924[47] involves a Trust settled to maintain two burial plots and their immediate surroundings in an historic cemetery (the "Cemetery") in Wilmington, Delaware. The Cemetery, which had been operating at a deficit, petitioned the Court to modify the Trust to direct that 3% of the net assets of the Trust be distributed annually to the Cemetery for the purposes stated in the governing instrument, as well as for general maintenance of the Cemetery, pursuant to: (1) common law cy pres doctrine; (2) statutory cy pres; and (3) the common law doctrine of deviation. The Court refused to modify the Trust on any of these grounds.

The Court held that the common law doctrine of cy pres was unavailable because the trust at issue was a private trust and not a charitable trust, and the common law cy pres doctrine only applies to charitable trusts.[48] Further, the Court held that Delaware's statutory cy pres doctrine, 12 *Del. C.* § 3541, was equally inapplicable, as the statutory cy pres doctrine only applies to "noncharitable purpose trusts" within the meaning of 12 *Del. C.* §§ 3555 or 3556. The trust at issue was a burial trust pursuant to 12 *Del. C.* § 3551.[49] Finally, the Court held that the common law doctrine of deviation[50] was inapplicable to the facts at hand, as compliance with the literal terms of the trust instrument was neither impossible nor illegal.

XIII. Transferring Situs of a Trust

In the fall of 2013, the Delaware Supreme Court issued a trio of *en banc* opinions[51] significantly impacting the practice of migrating trusts to the State of Delaware. What had become a common practice of simultaneously moving trusts to Delaware and judicially modifying those trusts was called into question when the Court of Chancery decided *In re Ethel F. Peierls Charitable Lead Unitrust*,[52] *In re Peierls Family Inter Vivos*

[46] *Id.*

[47] *Matter of Mary R. Latimer Trust*, 17254-N-VCL, 2013 WL 4463388 (Del. Ch. Aug. 2, 2013).

[48] The Court noted that some burial trusts, such as "[t]rusts established for the creation or general maintenance of an entire public or church cemetery are charitable because of the accompanying public or religious benefit" can be considered charitable trusts. *Id.* at *5. The trust at issue was a trust to maintain two private burial lots.

[49] Assuming that the statutory cy pres doctrine applied to the trust in question, the Court held that petitioners failed to meet the "two step inquiry" which must be met before modification can take place:

> Initially, the court must determine whether (i) the trust's purpose has become unlawful or (ii) the trust does not otherwise serve "any . . . noncharitable purpose." 12 Del. C. § 3541(a). If so, then the court next must evaluate whether the settlor contemplated the particular contingency and provided for it. *See* 12 Del. C. § 3541(b). The court only may modify or terminate a trust if the first inquiry is met and the trust instrument does not address the contingency.

Id. at *6.

[50] The common law doctrine of deviation permits the deviation from the terms of a trust "'where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Id.* at *8 (citing *Bank of Del. v. Buckston*, 255 A.2d 710, 716 (Del. Ch. 1969)).

[51] *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013); *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del. 2013); *In re Peierls Family Testamentary Trusts*, 77 A.3d 223 (Del. 2013).

[52] 59 A.3d 464 (Del. Ch. 2012).

Trusts[53] and *In re Peierls Family Testamentary Trusts*[54] in December 2012. The Supreme Court affirmed all three decisions, but in the process provided a clear framework for practitioners engaged in the practice of moving trusts to Delaware.

Each of the *Peierls* decisions arose out of consent petitions filed by members of the Peierls family, requesting that the Court of Chancery accept jurisdiction over various trusts and make certain modifications to those trusts. In each instance, the Petitioners asked the Court of Chancery to: (1) approve the resignation of the current trustees; (2) confirm the appointment of a Delaware trust company as the sole trustee; (3) determine that Delaware law governs the administration of the Trust; (4) confirm Delaware as the situs of the Trust; (5) reform the Trust's administrative scheme; and (6) accept jurisdiction over the Trust.

Each of the *Peierls* decisions focused on a different legal issue. The opinion in *In the Matter of Ethel F. Peierls Charitable Lead Unitrust*[55] (the "Peierls Family Charitable Trust Opinion") outlined the types of trust petitions that seek impermissible advisory opinions from the Court of Chancery. *In the Matter of: Peierls Family Testamentary Trusts*[56] (the "Peierls Family Testamentary Trusts Opinion") addressed which state's court should exercise jurisdiction over a multistate trust. *In the Matter of Peierls Family Inter Vivos Trusts*[57] (the "Peierls Family Inter Vivos Trust Opinion") addressed which state's laws govern the administration of a trust that has moved from one state to another.

[53] 59 A.3d 471 (Del. Ch. 2012).

[54] 58 A.3d 985 (Del. Ch. 2012).

[55] 77 A.3d 232 (Del. 2013).

[56] 77 A.3d 223 (Del. 2013).

[57] 77 A.3d 249 (Del. 2013).

Peierls Charitable Trust Opinion

The Supreme Court affirmed the Court of Chancery's denial of Petitioner's requested relief in the Peierls Charitable Trust Opinion. The Supreme Court agreed with the Court of Chancery's conclusion that confirming the appointment and resignation of the trustee, confirming the transfer of situs of the trust to Delaware, and declaring that Delaware law would govern the administration of the trust, would constitute an impermissible advisory opinion. With respect to appointment and resignation, the trust agreement at issue expressly provided a mechanism to remove and replace trustees, which was not in any way conditioned upon court approval.[58] Further, Petitioners could have instructed the trustee to file a written declaration that Delaware was the new situs of the trust. Finally, the trust agreement expressly provided that, without any court intervention, the law of the trust's situs would govern the administration of the trust.[59] Because "Petitioners

[58] The Trust Agreement provided "Jeffrey . . . and Brian [may] jointly designate[], by an instrument in writing filed with the trust records, one or more persons and/or a corporation to do a [sic] trust business to serve as successor to [Jeffrey] as trustee . . . ." *Peierls Charitable Lead Unitrust*, 77 A.3d at 236.

[59] The Trust Agreement provided, in part:

> 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.

Id. The Trust Agreement further stated that "[t]he administration of this trust . . . shall be governed first by the

or their successor trustee may unilaterally make the changes that they request[ed] the Court to approve,"[60] granting the relief requested would "amount to an impermissible advisory opinion."[61]

The Supreme Court also affirmed, on different grounds, the Court of Chancery's refusal to modify the terms of the Trust Agreement. Because the Delaware trust company's appointment as successor trustee was conditioned upon the Court of Chancery granting the requested relief, the situs of the trust never changed to Delaware. As a result, Washington law applied to the administration of the trust. The Court therefore concluded that the Petitioners "asked the Vice Chancellor to rule on a request without citing proper legal authority,"[62] and the Court of Chancery properly concluded that it could not reform the trust.[63]

Peierls Family Inter Vivos Trusts

The Supreme Court's Peierls Family Inter Vivos Trusts Opinion addresses the Court of Chancery's denial of Petitioner's relief in the context of five *inter vivos* trusts created by the same Trustor.

As was the case with the trust at issue in the Peierls Charitable Trust Opinion, each of the *inter vivos* trusts permitted trustees to appoint successor trustees without regard to geographic location. Petitioners proposed to change the administrative scheme of the *inter vivos* trusts by extinguishing a three-trustee requirement in favor of a single institutional trustee acting under the direction of an investment direction adviser and a trust protector.

As an initial matter, 12 *Del. C.* § 3332(b),[64] which provides that Delaware law governs trusts administered in the state of Delaware, did not apply because the trusts were not yet being administered in Delaware, as the appointment of the Delaware trustee was conditioned upon the Court of Chancery's "approval." Had Section 3332 applied, the inquiry over which state's law applies to the administration of the trust would have been resolved.

The Supreme Court agreed with the Court of Chancery, and adopted the approach outlined in the *Restatement (Second) of Conflict of Laws* with respect to law governing the administration of trusts when proceeding without a statutory directive. Recognizing that a settlor has some freedom to choose the law that governs the administration of a trust, the Court explained that:

> A settlor may designate, either expressly or implicitly within the trust instrument, the law governing the trust's administration. . . . When, on the other hand, "the settlor does not designate a state whose local law is to govern the administration of the trust," either expressly or implicitly, "the local law of the state to which the [trust's] administration is most substantially related will control."[65]

provisions of this Trust Agreement . . . and second, to the extent consistent with such provisions, the laws of the trust's situs." *Id.* at 237.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 238.

[63] The Supreme Court also affirmed the Court of Chancery's refusal to retain jurisdiction over the Trust because Petitioners did not raise this issue in their opening brief, and it was therefore waived. *Id.* at 238-39.

[64] 12 *Del. C.* § 3332(b) provides as follows: "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."

[65] *Peierls Family Inter Vivos Trusts*, 77 A.3d at 257. The Court further explained that state with the most substantial relationship is the state in which the settlor manifested an intention, express or implied, that the trust be administered. In the absence of any evidence of settlor's intention, courts should consider "the settlor's domicile, where the settlor executed and delivered the trust instrument, where the trust

The Supreme Court did not, however, agree with the Chancery Court that a settlor implicitly intends to permit a change of situs *only* when the instrument allows the appointment of a successor trustee.[66] Instead, unless the trust instrument provides, either expressly or by implication, that a trust is *always* to be governed by the law of a particular jurisdiction, the law governing the administration of the trust can be changed. Further, even if the settlor selects the governing law, "a change in the place of administration resulting from the valid appointment of a successor trustee will result in a change of the law governing administration, unless the change would be contrary to the testator's intent."[67]

After applying these principals, along with various rules of construction, to the three sets of trust agreements at issue, the Court concluded that the settlors implicitly permitted the law governing the administration to change when the place of administration changed.[68] That said, because the appointment of a Delaware trustee was conditioned upon the Court of Chancery's approval, none of the trusts were administered in Delaware and, therefore, Delaware law did not govern the administration of the trusts. Because Petitioners' motion did not address a request for reformation based upon the law governing the trusts,[69] the Court agreed that the Vice Chancellor was "not in a position to address the requests for reformation." The Court further held, consistent with its other *Peierls* decisions, that Petitioners remaining requests to approve the resignations of the current trustees and confirm the appointment of the successor trustees did not involve an actual case or controversy or were not ripe for adjudication.

Although the Court declined to address Petitioners' request that the Court of Chancery accept jurisdiction over the trusts, it did provide guidance with respect to one of the trusts, which was subject to the supervisory authority of the New Jersey courts. A New Jersey court had granted petitions filed in 2001 approving an accounting and the appointment of successor trustees. Because the New Jersey court acquired jurisdiction over the trusts, the Court concluded that it is now "necessary to obtain the permission of that court to terminate such accountability."[70] Therefore, the Petitioners must seek and obtain "permission from the New Jersey courts to terminate any ongoing accountability over the [t]rusts . . . if they intend to subject the [t]rust to Delaware court supervision."[71]

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assets were located at the trust's inception, and the beneficiaries' domicile." *Id.*

[66] *Id*. at 258.

[67] *Id*. at 264. Circumstances suggesting that a settlor intends the law of a particular jurisdiction to govern the administration of a trust includes "when [the testator] has expressly or by implication provided in the will that the administration of the trust should be governed by the local law of the state of his domicil[e] at death, even though the place of administration should subsequently be changed." *Id.* (citing *Restatement (Second) of Conflicts of Laws*, § 271 cmt. G (1971)).

[68] The 1953 trusts provided that "all questions pertaining to [the trusts'] validity, construction and administration shall be determined in accordance with the laws of the State of New York," authorized commissions to be paid to the trustees based on New York law, and permitted the individual trustee to appoint a successor trustee without geographic limitation. *Peierls Family Inter Vivos Trusts*, 77 A.3d at 263. The 1957 trust instrument stated that it "shall be construed and regulated, and its validity and effect determined by the laws of the State of New Jersey," and granted the trustees the power to select successor trustees without imposing any jurisdictional limitation. *Id.* at 264-65. The 1975 trusts provided that each "shall be governed by and its validity, effect and interpretation determined by the laws of the State of New York," and authorized commissions to be paid to the trustee under New York law. *Id.* at 265.

[69] The Court found that Texas law governed the administration of the 1953 trust and New York law governed the 1957 and 1975 trusts.

[70] *Peierls Family Inter Vivos Trusts*, 77 A.3d at 270 (citing *Restatement (Second) of Conflict of Laws*, § 272 cmt e).

[71] *Id.* at 270.

Peierls Family Testamentary Trusts Opinion

The Peierls Family Testamentary Trusts Opinion addresses the same requests for relief in the context of seven Peierls family testamentary trusts (the "Testamentary Trusts"). Because none of the trusts were the same, the Court divided them into three categories: (1) the 1960 trusts, which include two trusts that do not contain any choice of law provisions and were subject to the jurisdiction of the state of New Jersey; (2) the 1969 trusts, which include two trusts that do not contain any choice of law provisions but with respect to which, pursuant to a Texas Order, the law of the state of New York governed the validity and construction of the trusts and the law of the state of Texas governed the administration of the trusts; and (3) the 2005 trusts, which include three trusts that provide that "[u]nless the situs . . . is changed, the laws of the State of Texas shall control the administration and validity."[72]

As a threshold matter, the Court analyzed each set of trusts to determine if the Court of Chancery had jurisdiction over them and, if so, should it have exercised such jurisdiction. Relying on Section 267 of the *Restatement (Second) of Conflicts of Laws*, the Court concluded that because the Court of Chancery "obtained jurisdiction over the trustees, the Court of Chancery had jurisdiction to adjudicate issues of administration of the trusts . . . ."[73]

In order to determine whether the Court of Chancery *should have* exercised its jurisdiction is a more complicated question. In addition to promoting comity and respecting the laws of other states, the question is:

> [L]argely one of which court has "primary supervision" over the trusts. One indication that a particular court has primary supervision over the administration of a trust is if "the trustee is required to render regular accountings in the court in which he has qualified." If the court in which the trustee has qualified "does not exercise active control over the administration of the trust," then the court of the place of administration "may exercise primary supervision." A court having primary supervisory power "[has] and will exercise jurisdiction as to all questions which may arise in the administration of a trust."[74]

The 1960 trusts have a three-trustee requirement. However, unlike other trusts, the corporate trustee of the 1960 Trusts is a Delaware corporation. The Supreme Court discussed the history of the 1960 Trusts' contacts with New Jersey, which included the filing of four accountings with the New Jersey court. Consequently, the Supreme Court determined that the Court of Chancery's decision not to address the Petition with regard to the 1960 Trusts was appropriate because the New Jersey court retains "primary supervision" over those trusts.

The Supreme Court reached a different result with respect to the 1969 Trusts. The Supreme Court determined that the Texas court was called upon to play "pitch and catch"[75] to move the 1969 Trusts' situs from New York to Texas. However, the Supreme Court found that there was no evidence that any Texas court continued to exert "primary supervision" over the 1969 Trusts. Consequently, the Court of Chancery erred in determining that it could not exercise jurisdiction over the 1969 Trusts and address the Petition's merits. Nevertheless, the

[72] *Peierls Family Testamentary Trusts*, 77 A.3d at 226.

[73] *Id.*

[74] *Id.* at 228 (citations omitted).

[75] *Id.* at 230. The term "pitch and catch," which evokes an image of a baseball being thrown back and forth, is the practice of asking a court of one state to release jurisdiction of the trust in favor of a court of a second state, and asking the court of the second state to then make certain determinations with respect to the trust.

Supreme Court did not remand the matter because Texas law governed the administration of the 1969 trusts, and the Petitioners briefed the case based upon the application of Delaware law. However, the Supreme Court invited the Petitioners to play "pitch and catch" between Texas and Delaware to again move the 1969 Trusts' situs and to change the law governing their administration.

The Supreme Court did not address whether the Court of Chancery should have exercised jurisdiction over the 2005 trusts because Petitioners did not "fully and fairly brief[]"[76] the issue with respect to the 2005 trusts.

XIV. Statutory Developments

Trust practitioners were given a new tool for their tool chest in 2013 with the passage of Delaware Trust Act 2013 (the "Trust Act").[77] In addition to the minor improvements to Title 12 and related provisions of the Delaware code, the Trust Act included the introduction of 12 *Del. C.* § 3338 (the "Nonjudicial Settlement Statute"), which permits the use of a nonjudicial settlement agreement to resolve certain types of trust disputes so long as such agreement does not violate a material purpose of the trust and so long as the terms and conditions of the agreement could be properly approved by the Court of Chancery.[78] The Nonjudicial Settlement Statute is substantially similar to the nonjudicial settlement agreement provision of the Uniform Trust Code.[79]

A nonjudicial settlement agreement must be executed by all "interested persons."[80] By reference to Court of Chancery Rule 101(a)(7), a nonjudicial settlement agreement should be signed by: (i) trustees and other fiduciaries; (ii) beneficiaries with a present interest or whose interest would vest upon the termination of a present interest; (iii) the settlor if living; and (iv) all other persons having an interest in the trust according to the trust's express terms.

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[76] *Id*. at 231.

[77] The Trust Act was signed into law by Governor Markell and became effective on August 6, 2013. 79 Laws 2013, ch. 172, § 2, eff. Aug. 6, 2013.

[78] 12 *Del. C.* § 3338 provides as follows:

> (a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery.
> (b) Except as otherwise provided in subsection (c) of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust (other than a trust described in § 3541 of this title).
> (c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law.
> (d) Matters that may be resolved by a nonjudicial settlement agreement include:
> (1) The interpretation or construction of the terms of the trust;
> (2) The approval of a trustee's report or accounting;
> (3) The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
> (4) The resignation or appointment of a trustee and the determination of a trustee's compensation;
> (5) The transfer of a trust's principal place of administration; and
> (6) The liability of a trustee for an action relating to the trust.
> (e) Any interested person may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a nonjudicial settlement agreement adopted under this section, including but not limited to determining whether the representation as provided in § 3547 of this title was adequate.

[79] *See* Unif. Trust Code § 111 (2000).

[80] 12 *Del. C.* § 3338(a).

The Nonjudicial Settlement Statute identifies six specific matters that may be resolved by a nonjudicial agreement: (1) the interpretation or construction of the terms of the trust; (2) the approval of a trustee's report or accounting; (3) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (4) the resignation or appointment of a trustee and the determination of a trustee's compensation; (5) the transfer of a trust's principal place of administration; and (6) the liability of a trustee for an action relating to the trust.

Given the broad language of the Nonjudicial Settlement Statute, ("interested persons may enter into a binding nonjudicial settlement agreement with respect to *any matter* involving a trust"[81]), the six enumerated applications are not an exhaustive list of matters that can be resolved by agreement. Nevertheless, practitioners should use caution if deviating from the matters specifically identified in the Nonjudicial Settlement Statute. If uncertain about the enforceability or validity of a nonjudicial settlement agreement, subsection (e) of the Nonjudicial Settlement Statute allows any interested person to bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a nonjudicial settlement agreement, including a determination of whether the virtual representation of any interested party to the nonjudicial settlement agreement was adequate.

Other statutory changes in the Trust Act include reconciliation of definitions in different titles of the Delaware code (*e.g.* unadopted persons in Title 12 and Title 13), revisions or expansions of certain definitions (*e.g.* "governing instrument" in Title 12; "person" in Title 18), and clarification of existing law (*e.g.* a release of a power of appointment is effective upon delivery under Title 25).

[81] 12 *Del. C.* § 3338(b) (emphasis added).

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