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Getting to Delaware

*It’s a great choice, but you can’t always get what you want *

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In my prior article , I discussed trust friendly jurisdictions and compared Delaware and New Jersey. But while using a trust friendly jurisdiction can often be a great choice, trust counsel Mick Jagger reminds us that, "You can't always get what you want."

While being in Delaware is great, getting there might take more than the trustee clicking his heels together three times and reciting "I want to be administered in Delaware." This was discussed in a series of cases.[1] Here's a summary of the pertinent facts.

Peierls Family Trusts

Petitions, filed by members of the Peierls family, requested that the Court of Chancery accept jurisdiction over, and then modify, 13 trusts created during the period 1953 through 2005. None of the trusts were created or settled under Delaware law, and none were ever administered in Delaware. This latter fact is quite important to the analysis of what matters the Delaware courts will entertain and what steps might be warranted to shift a trust to Delaware to take advantage of the many benefits Delaware law and courts can afford to the administration of a trust, as discussed above.

- Edgar Peierls died on May 5, 1962 while a resident of New Jersey, where his will, which established trusts for his descendants, was probated. Each testamentary trust required three trustees (two individuals and one institution).

- The will's language contained no choiceoflaw provision pertaining to the trusts. The Peierls' petition asserted that New Jersey had been the situs of the trusts and that New Jersey law had governed the administration of the trusts since their inception. Moreover, the trusts are currently subject to the jurisdiction of the Superior Court of New Jersey, as evidenced by that court's order dated March 16, 2001 approving an intermediate accounting of the trusts and granting other relief. On Sept. 13, 2012, the New Jersey court also issued a

Succeeding Trustee Short Certificate (the Certificate) identifying the trustees who accepted trusteeships of the trusts.

- Another family member in New York established a second series of trusts. That family member had ties to Texas and New York. These trusts were similar in that they too contained no choiceoflaw provision.
- A different family member created an additional group of trusts. These latter trusts included an explicit choiceoflaw provision regarding the administration of the trusts to the effect that unless the situs of any trust is changed, the laws of Texas shall control the administration and validity of any trust. The governing instrument further provided that Texas shall be and is fixed as the situs of the trusts unless the trustee becomes a resident of, or has a principal place of business in a state other than Texas. In such an instance, the situs of the trust may be changed accordingly.

The beneficiaries had become frustrated with the administration of the trust and what they perceived as a lack of responsiveness by the trustees. As such, they petitioned the Delaware courts to make the following changes that would hopefully favorably modify the administration of the trust:

1. Approve the resignation of the current trustee.
2. Confirm the appointment of Northern Trust Company as the sole trustee.
3. Determine that Delaware law governs the administration of each trust.
4. Confirm Delaware as the situs for each trust.
5. Reform the trusts' administrative scheme.
6. Accept jurisdiction over the trusts.

Jurisdiction Isn't Exclusive

The court considered the *Restatement (Second) Conflict of Laws* (*Restatement*) Section 267 concerning which court has jurisdiction over the administration of a trust. The *Restatement* indicates that if a trustee has qualified as a trustee in a particular court, that court usually has continuing jurisdiction over the administration of the trust. However, even though the trustee has qualified as trustee in a court, its jurisdiction isn't exclusive, and the courts of other states may

exercise jurisdiction in proper cases if they have jurisdiction over the trustee or if they have jurisdiction over trust assets insofar as interests in those assets are concerned. Because the beneficiaries and trustees consented to Delaware jurisdiction, the Delaware Court could entertain the case.

The mere fact that a court has met the prerequisite of having jurisdiction doesn't mean that the court should exercise that jurisdiction unless it has "primary supervision" over the trust in issue. If the trustee is required to provide, or has provided, regular accountings to a particular court in which the trustee has qualified, that court would have primary supervision over the trustee. If the trustees have returned to that particular court, for example, in an action to substitute corporate trustees, that would further evidence the primary supervision of that court. If the court in which the trustee has qualified doesn't exercise active control over the administration of the trust, then the court where the trust is administered may exercise primary supervision. An objective of the *Restatement* provision is to promote comity and respect between various state courts and laws.

The court noted:

> A court of a state other than that of the testator's domicile or that in which the trust is to be administered will not exercise jurisdiction if to do so would be an undue interference with the supervision of the trust by the court which has primary supervision. Whether there is such interference depends on the relief sought. Thus, if a court acquires jurisdiction over the trustee it may entertain a suit to compel him to redress a breach of trust, even though the trustee has qualified as trustee in a court of another state or the administration of the trust is in another state. It may compel the trustee to render an accounting or it may even remove the trustee. On the other hand, it will ordinarily decline to deal with questions of construction or validity or administration of the trust, leaving these matters to be dealt with by the court of primary supervision. Thus, it will not ordinarily give instructions to the trustee as to his powers and duties.[2]

The Delaware court found that as to certain trusts (referred to as the 1960 trusts) the New Jersey courts had primary supervision over the trusts and that the petitioners should bring their requests to the New Jersey courts. For the Delaware courts to address an issue before it when another state court has primary supervision over the trust would be undue interference.

In the third companion case, the Delaware court provided the following details as to the evaluation of which matters are considered administrative for purposes of determining which court has primary administrative supervision over a trust:

> Section 272 of the Restatement specifically addresses which state's law governs the administration of inter vivos trusts. Section 272's Comment a directs us to Section 271's Comment a (which discusses testamentary trusts) to determine what matters are administrative in nature. Administrative matters are "those matters which relate to the management of the trust," including a trustee's powers, the liabilities a trustee may incur for breach of trust, what constitutes a proper investment, a trustee's compensation and indemnity rights, a trust's terminability, and, importantly, a trustee's removal and successor trustees' appointment. [Citations to the Restatement Section 272 omitted]."[3]

1969 Trusts

As to trusts referred to as the "1969 trusts," these were formed in New York and administered in New York until the New York courts "pitched" them to Texas and Texas "caught" the "pitch," accepting jurisdiction. The Texas court approved the change in trustees to a Texas institution and the change in situs of the trust to Texas. The New York courts later affirmed this. However, following the pitch and catch there was no indication of any continued involvement by the Texas courts with the trusts in question. There were no accountings filed or other evidence of involvement by the Texas courts following the "catch." Apparently even if a player makes a great catch he can end up sitting on the bench. The court went on to guide the petitioners as to how they could effectuate the changes they wished for these 1969 trusts by first using the authority in the instrument to designate the desired

new Delaware institutional trustee. That would provide a hook for Delaware to have interest in the matter. Next, the court advised, the petitioners should have the Texas courts "pitch" jurisdiction to Delaware to "catch" much as Texas and New York had done previously.

It's important to emphasize one aspect of the Delaware court's instructions above. Not all actions require court approval at all. The removal of the former corporate trustee, the court found, was a valid exercise of the trustee's powers under the trust instrument and didn't require a judicial endorsement. Thus, to the extent that the draftsperson can provide for flexibility in the instrument, some of the challenges faced in this case might simply be avoided.

In a related case, *In the matter of Ethel f. Peierls Charitable Lead Unitrust,*[4] the Delaware court found no impediment to changing the governing law and situs of a trust. While a court's power to reform a trust depends on which state's law governs the administration of the trust, in this case the trust agreement expressly states that when the situs of the Trust moves, so too does the law governing its administration. The settlor expressly provided in the trust instrument that the situs could freely move and that the law governing the administration of the trust would follow. The analysis of the *Restatement* above is unnecessary to navigate.

It's long established that the settlor of an inter vivos trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust.[5]. *Restatement* Section 272 provides that the law governing a trust's administration is either the local law of the state designated by the settlor, or, if none is designated, the law of the state to which the administration of the trust is most substantially related. If the settlor doesn't include an express choice-of-law provision, the choice of law may be inferred from the language in the trust instrument or from other circumstances, such as the settlor's domicile, the extent of the contacts with a particular state where the trust was signed, where the trustee is based or where property was delivered to the trustee.

Restatement Section 272 comment e provides that because an inter vivos trust's trustee is able to perform its duties without court supervision, no particular court acquires jurisdiction over the administration of the trust until the beneficiaries or the trustee bring a suit . Bringing an action in the non-Delaware Court to "pitch" the trust to Delaware might actually create the tie to the non-Delaware court that is trying to be terminated.

Restatement Section 271 provides in its commentary concerning testamentary trusts that a change in the place of administration resulting from the valid appointment of a successor trustee will result in a change of the law of administration, unless the change would be contrary to the testator's intent. This could occur, for example, if the testator expressly provided in the will that the administration of the trust should be governed by the local law of the state of his domicile at death, even though the place of administration should subsequently be changed.

It's common in drafting trusts and wills to include language to the effect that the trustee shall receive compensation under the laws of a particular state, that the document should be interpreted under the laws of that state and so on. Perhaps drafting more generically using the defined term "State" and then indicating what the initial state will be would be preferable to having multiple provisions listing a specific state. The implication of this type of drafting might support the later petition to move the trust formed under the instrument to a new state. Obviously, providing the express power to move a trust to a new situs and to designate new governing law would be preferable.

The court held that the settlor implicitly permitted the law of administration to change with a change in the place of administration. The settlor manifested that intent by permitting the existing trustees to appoint successor trustees without any geographical limitation and by not otherwise indicating that New York law must remain the law of administration, despite a validly executed change in the place of administration.

Flint

Some attorneys might feel that because a state is characterized as "trust friendly," its courts should confirm anything a trust requests of it. But, as *In Re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek*[6] demonstrates, you can be friendly without being milquetoast.

In *Flint,* the Delaware Court of Chancery denied a beneficiary's unopposed petition to modify the terms of a testamentary trust established by her father in his will because the modification violated the testator's intent. The current income beneficiary of a testamentary trust petitioned the court to modify the trust's administrative provisions, converting the trust from a traditional, trustee-managed structure that the settlor contemplated into a directed trust under which the trustee would serve only an administrative role.

The petitioner sought to re-write the testator's will, 81 years after his death, changing a structure in which the testator placed the trustees in charge of the trust to a directed trust in which the corporate trustee would have no involvement or liability for investments. Perhaps the fact that the preponderance of the trust corpus was a single highly concentrated stock position influenced the court's concerns as well. The magnitude of the changes, purporting to re-write a will rather than making precision modifications, the use of unusual constructs and terminology the court labeled "newspeak" (a reference to the fictional language in the novel *1984* by George Orwell), may have all been important to the court refusing the petitioner's requests.

The court held that the wishes of living beneficiaries, even if they all concur, shouldn't automatically prevail over the intent of the testator as evidenced in the governing instrument. The court held that Delaware should give deference to the testator's intent. Delaware law gives "maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments."[7] The beneficiaries wanted a far greater degree of control over investments of the trust then the will that created that trust provided. The court made clear that it wouldn't rewrite a will,

contrary to what that will indicated the testator intended, simply because the beneficiaries all desired that result.

While English law tends to give great deference to the wishes of the beneficiaries, American law, including that of Delaware, gives the greater deference to the intent of the testator.

The Delaware court used the case to confirm that rubberstamping of beneficiary requests isn't the standard.

> In an effort to persuade the court to grant the relief sought, the petition cites a laundry list of orders and suggests that court previously granted the type of relief that the petition requests. A rote listing of orders is not persuasive. Many date from a period when this court routinely granted relief to which all parties consented, without independently testing whether there was a live dispute or similar basis for jurisdiction and without examining carefully whether there were adequate grounds for the relief requested. All pre-dated the Pierels decisions [See In re Peierls Family Inter Vivos Trusts, 59 A.3d 471 (Del. Ch. 2012), aff'd in part & rev'd in part, 77 A.3d 249 (Del. 2013); In re Ethel F. Peierls Charitable Lead Unitrust, 59 A.3d 464 (Del. Ch. 2012), aff'd sub nom. In re Peierls Charitable Lead Unitrust, 77 A.3d 232 (Del. 2013); In re Peierls Family Testamentary Trusts, 58 A.3d 985 (Del. Ch. 2012), aff'd in part & rev'd in part, 77 A.3d 223 Del. 2013)] and the adoption of a statutory mechanism for nonjudicial settlement.[See 79 Del. Laws, c. 172, § 2 (2013).] They are not precedential.

Endnotes

1. *In re Peierls Family Testamentary Trusts*, 77 A.3d 223 (Del. 2013) (Case No. 11, 2013); *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013) (Case No. 12, 2013); *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del. 2013) (Case No. 13, 2013).

2. *In re Peierls Family Testamentary Trusts*, 77 A.3d 223, 228 (Del. 2013) (quoting Restatement (Second) of Conflict of Laws Section 267 cmt. e).

3. *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 256 (Del. 2013).

4. *In re Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013) (Case No. 12, 2013).

5. *Lewis v. Hanson*, 128 A.2d 819, 826 (Del. 1957) (*citing Wilm. Trust III,* 24 A.2d 309 (Del.1942)).

6. *In Re Trust Under Will of Wallace B. Flint for the Benefit of Katherine F. Shadek,* C.A. No. 10593-VCL (June 17, 2015).

7. 12 Del. C. Section 3303(a).