Choice of Law: Delaware Supreme Court Renews its Commitment to Grantor Intent in the *Peierls* Opinions

Jonathan E. Becker, Esquire

***

Jonathan E. Becker is Trust Counsel for Commonwealth Trust Company. His responsibilities include review of new trusts and related structures, review of documents related to Commonwealth's administration of the trusts, participation in trust annual reviews and offering regular assistance to attorneys and clients in setting up Delaware trusts.

Prior to joining Commonwealth, Jonathan maintained his own practice in the Philadelphia area, concentrating on sophisticated estate and trust planning and administration, fiduciary accounting, and personal, fiduciary and entity tax matters. Jonathan also previously worked as an associate with two prestigious Philadelphia based law firms.

In law school, Jonathan was an Associate Editor of the Law Review, a Member of the Moot Court Board of Advocates, Advocate of the Year (1993/94) and was inducted into the Willis Society, the highest academic honor offered by Ohio Northern University.

Introduction

On October 4, 2013, the Delaware Supreme Court (the "Court") issued three landmark opinions which have a significant impact on Delaware trust law, particularly in the area of trust migration. In the three related *en banc* opinions[1], known as the *Peierls* opinions, the Court clarified the question of when Delaware law will be deemed to govern the administration of a trust which is migrated to Delaware as well as when a Delaware Court would have authority to accept jurisdiction with respect to a transfer trust. The most significant finding of the opinions is that the Court specifically provided that, absent clear evidence of a settlor's contrary intent at the trust's inception, a settlor's choice of governing law will not be read to be absolute or unchangeable. More specifically, the Court stated that Delaware law will be presumed to govern the administration of a trust which (1) is actually being administered by a trustee in the state of Delaware and (2) allows for the appointment of a successor trustee without a geographic limitation.

Background

Among the trust community, the Delaware Court of Chancery ("Court of Chancery") is generally acknowledged as the most efficient, trust friendly and knowledgeable bench in the country. In order to accommodate incoming trust traffic, the modification of older trusts, and the embracing of the directed trust concept, the Court of Chancery has reviewed hundreds of consent petitions over the years.

[1] In the Matter of Peierls Family Testamentary, No. 16810 (Del. Oct 4. 2013), In the Matter of Ethel F. Peierls Charitable Lead Unitrust, No. 16811 (Del. Oct 4. 2013), and In the Matter of Peierls Family Inter Vivos Trusts, No. 16812 (Del. Oct 4. 2013).

These petitions have typically been filed where all parties to a trust have agreed that the goals of the trust will be best served by transferring the situs of the trust to the State of Delaware. Typically filed as uncontested matters, where the requested relief was consistent with the settlor's intent, these petitions were regularly granted.

In December 2012, however, the Court of Chancery was confronted with three related consent petitions – the *Peierls* Trusts[2] - spanning thirteen related trusts of varying nature[3]. The petitioners sought a number of rulings, among which were (i) the changing of the situs of all of the trusts to Delaware, from their current jurisdictions[4] (ii) the removal and replacement the existing trustees with Delaware trustees, the resignation of the existing trustees being conditional upon the Court of Chancery's approval of the Delaware trustees' appointment and (iii) modification of the trusts' administrative provisions to maximize the available benefits under Delaware law.[5]

The Court of Chancery denied the requested relief and set forth an extensive analysis regarding when Delaware law would be permitted to govern the administration of a transfer trust[6] and when the Chancery Court would be able to appropriately exercise jurisdiction. In addition the Court of Chancery clarified that the recent practice of conditional resignations and appointments as part of a consent petition were, in fact, essentially requests for "advisory opinions," which the Court of Chancery was not permitted to issue.[7]

Plaintiff appealed to the Supreme Court.

Supreme Court Decisions

Sitting *en banc*, the Court reviewed the holdings of the Court of Chancery. First, the Court agreed with the lower court's finding that "in the absence of a choice-of-law provision, the settlor implicitly intends to allow a change in the law governing administration by allowing the appointment of a successor trustee"[8] However, the Court, citing *Lewis v. Hanson*,[9] and relying heavily on the Restatement (Second) of Conflict of Laws, determined that these were not the only circumstances under which a situs change could be had. The Court provided that (i) a trust instrument could <u>implicitly</u> permit a change in the law governing administration of the trust, and (ii) the presence of a provision permitting the appointment of a trustee or successor trustee in a jurisdiction <u>other</u> than the original situs of the trust, would (upon such valid appointment) "result in a change of the law of administration, unless the change would be contrary to the testator's[10]intent."[11,12] In applying this finding to *Peierls*, the Court concluded that "the settlor manifested that [implicit] intent by permitting the existing trustees to appoint successor trustees without any geographical limitation and by not otherwise indicating . . ." that the original situs of the trusts "must remain the law of administration despite a validly executed change in the place of administration."[13]

---

2 *In Re Peierls Family Inter Vivos Trusts, 59 A.3d 471, 488* (Del. Ch. 2012),

3 A mixture of *inter vivos*, testamentary and charitable trusts with slight variances to terms, trustee structure with each currently being administered in one of four states.

4 The *inter vivos* trusts were sited in New York and New Jersey, the testamentary trusts in New Jersey, New York and/or Texas and the charitable trust Washington State.

5 While the rulings of the Chancery Court and the Supreme Court address a myriad of issues, and vary somewhat based on the nature of the trusts, this bulletin addresses the impact on those portions of the rulings which have the most practical impact to our clients, and does not address in depth the more technical or esoteric topics.

6 "[T]he appointment of a successor trustee located in a different jurisdiction . . . combined with a change in situs [of administration] will change the law governing administration only if the trust document so provides or can be construed to contemplate such a change." *In Re Peierls, supra n.2 at 488* (Del. Ch. 2012).

7 *In Re Peierls*, *supra n.2* at 479. Prior to these rulings, it was common practice for consent petitions to condition the change in trustees on the approval of the proposed modifications to the trust.

8 *In Re Peierls*, *supra n.2* at 483.

9 *Lewis v. Hansen,* 128 A.2d 819, 826 (Del. 1957)(*citations omitted*).

10 And, implicitly, settlor's.

11 *In the Matter of Peierls Family Inter Vivos Trusts, supra n.1* at 29 (emphasis added).

12 This ruling is perhaps the most philosophically important, in that it clearly removes any doubt that typical situs change and successor trustee provisions will not present an obstacle for trusts wanting to relocate to Delaware, as the original rulings seemed to indicate might be the case.

13 *In the Matter of Peierls Family Inter Vivos Trusts, supra n.1* at 29.

Further, the Court affirmed the Court of Chancery's determination that if Delaware law did not govern a trust at the time a modification or other relief was sought, even though the Delaware court might have jurisdiction to rule on the matter, the parties would be required to brief, and the Delaware court would be required to rule, under the law of the state then governing the trust.[14] The Court also affirmed the Court of Chancery's position that no "advisory opinions" would be issued, and thus any actions that could clearly be accomplished under the terms of the trust instrument or under applicable law are not proper objects of a consent, or other Court of Chancery, petition, since they address no "case or controversy."[15]

Also of significant importance, though never explicitly addressed, the *Peierls* appeals contain no indication that with respect to a trust administered under Delaware's Directed Trustee Statute, the presence of non-Delaware advisors or protectors, serving with a Delaware administrative trustee, could undermine the trust's situs in Delaware, or otherwise jeopardize the applicability of Delaware law to the trust.[16] Thus, the Court's prior *Lewis v. Hanson* analysis of the sufficiency of administration within the state of Delaware stands.[17]

Conclusion

As a practical matter, going forward, these holdings provide that in order to have the Court of Chancery act on a modification, a decanting, or other matter under Delaware law – usually the primary goal of a trust's relocation to Delaware – it is critical that the Delaware Trustee be administering the trust prior to the filing of the petition. Further the common practice of having the Court of Chancery bless all stages of a proposed modification or transaction, including conditional resignations and acceptances of trustees and successor trustees, will cease to be the norm. Moreover, the Court's rulings in the *Peierls* cases have made clear that portability, re-situsing and/or modification of trusts to incorporate the directed trust concept, or otherwise take advantage of the myriad of favorable provisions of Delaware law, are fully available and obtainable under typical choice of law and successor trustee provisions. ◆

---

14 See *In the Matter of Peierls, supra n.5,* at 39-40.

15 *Id.*, at 34-36.

16 "Where the settlor does not include an express choice-of-law provision, his designation 'may otherwise be apparent [*i.e.*, implied] from the language of the trust instrument or from other circumstances, such as the extent of the contacts with a particular state,'" *In the Matter of Peierls Family Inter Vivos Trusts, supra n.1* at 12, quoting *Lewis, supra n.9* at 826 (*citations omitted*), which would seem to rely heavily upon the place of administration of the trust – typically the location of an administrative trustee.

17 The opinion rendered by the Court of Chancery in *Lewis* indicates that the initial investment advisor for the trust was the settlor's husband and that the settlor was at no time domiciled in Delaware. See *Hanson v. Wilmington HNBTC*, 119 A.2d 901 (Del. Ch. 1955), *aff'd sub nom*; *Lewis v. Hanson*, 128 A.2d 819 (Del. Supr. 1957), *aff'd sub nom*; *Hanson v. Denckla*, 358 U.S. 858 (1958). Since it is reasonable to assume that the domicile of the trust settlor's husband was identical to the domicile of the trust settlor, it appears that the initial investment advisor of the trust was not domiciled in Delaware, and it may be reasonably inferred from the Court's statement that the trust was "wholly administered in Delaware" that the Court considers the investment advisory function as being outside of the scope of "trust administration" when determining the administrative situs of a trust.