



**2013 Delaware Trust Conference
Trust Migration**

**MIGRATION, MODIFICATION AND REFORMATION OF
TRUSTS UNDER DELAWARE LAW:
JUDICIAL AND NON-JUDICIAL METHODS**

Presented by:
Daniel F. Hayward
Gordon, Fournaris & Mammarella, P.A.
1925 Lovering Avenue
Wilmington, DE 19806
Tel: (302) 652-2900
Fax: (302) 652-1142
dhayward@gfmlaw.com

Copyright 2013
Daniel F. Hayward
Peter S. Gordon
Michael M. Gordon

All rights reserved. These materials may not be reproduced without permission of the copyright holder.

I. INTRODUCTION

The migration of existing trusts to Delaware, along with the contemporaneous or subsequent modification or reformation of such trusts, is a common occurrence and may be a desired goal for trust beneficiaries and fiduciaries. Delaware has become a favored jurisdiction for existing trusts for many reasons, perhaps most notably due to the flexibility and administrative advantages afforded by Delaware law. Delaware is a trust friendly state. For more than a century, Delaware has assisted wealthy families in accomplishing objectives such as teaching younger generations about the responsible stewardship of wealth and philanthropy while simultaneously maximizing the investment return on family assets, protecting family wealth from creditors and saving income taxes. See, R. Nenno, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, ALI-ABA Planning Techniques for Large Estates, 509-651 (Apr. 2007), available at www.ali-aba.org. Some of the primary reasons associated with migrating a trust to Delaware and modifying the trust to take advantage of certain aspects of Delaware law, which are also relevant reasons for the creation of new Delaware trusts, are detailed below.

- A. Trust Instrument Controls. Delaware law gives maximum effect to the wishes of the settlor as expressed in the governing instrument. 12 Del. C. § 3303(a). This specific statutory provision states that the terms of a governing instrument may expand, restrict, eliminate or otherwise define the rights of beneficiaries, including the right of a beneficiary to be informed of the existence of the trust, the grounds for the removal of a fiduciary, and the fiduciary's powers, duties and standard of care. Id.

§ 3303. Effect of provisions of instrument

(a) Notwithstanding any other provision of this Code or other law, **the terms of a governing instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary's powers, duties, standard of care, rights of indemnification and liability** to persons whose interests arise from that instrument; provided however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's willful misconduct. The rule that statutes in derogation of a common law are to be strictly construed shall have no application to this section. **It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.** [Emphasis added].

In addition, a trustee has a statutory right to rely on the terms of the trust instrument. In this regard, 12 Del. C. § 3586 states:

§ 3586. Reliance on trust instrument

A trustee who acted in good faith reliance on the terms of a written trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Similarly, 12 Del. C. § 3302(e) states:

§ 3302. Degree of care; authorized investments

(e) Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary's good faith reliance on the express provisions of such instrument. The standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument.

- B. Limitation on Actions Against a Trustee. Delaware law provides that a beneficiary may not initiate a proceeding against the trustee for breach of trust after the first to occur of: (i) two years following the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim or (ii) the date the proceeding was otherwise precluded by adjudication, release, consent or other limitation under Delaware law. 12 Del. C. § 3585(a). The two year claims period applies to minor, incapacitated and unborn persons and persons whose identity or location is unknown whose interest is represented under Delaware's virtual representation statute. 12 Del. C. § 3547, which is further discussed below. In 2008, 12 Del. C. § 3585 was amended to add a new five year statute of repose for breach of trust actions. In cases where the two-year limitation period does not apply, the new limitations period absolutely bars breach of trust claims five years following the first to occur of (i) the removal, resignation or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.
1. Beneficiary's Consent. Delaware law provides that a beneficiary may not hold a trustee liable for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach unless the beneficiary was so induced by improper conduct of the trustee or the beneficiary did not know at the time the beneficiary's rights or material facts the trustee knew or should have known. 12 Del. C. § 3588.
 2. Virtual Representation. Delaware law provides that the interest of "a minor, incapacitated, or unborn person, or a person.... whose identity or location is unknown and not reasonably ascertainable" may be represented and bound by another with substantially identical interests, to the extent that there is no material conflict of interest between the representative and the person being represented with regard to the particular question or dispute. 12 Del. C. § 3547(a). Virtual representation applies for all

purposes including judicial proceedings and such non-judicial matters as releasing the trustee, consenting to the conduct of the trustee or ratifying a transaction engaged in by the trustee. 12 Del. C. § 3588. In the case of a minor or incapacitated beneficiary, the surviving and competent parent may represent and bind the beneficiary. 12 Del. C. § 3547(c). A “presumptive remainder beneficiary” (one who would take if the trust terminated at that time without regard to the exercise or non-exercise of a power of appointment) may represent and bind contingent remainder beneficiaries including adults and charities. 12 Del. C. § 3547(b). A surviving parent or parents or custodial parent (if one parent has sole custody of the beneficiary) may sign on behalf of a minor or incapacitated beneficiary only if “there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary’s parents with respect to the particular question in dispute”. 12 Del. C. § 3547(c). The foregoing provision often avoids the need to appoint a guardian ad litem for purposes of a judicial proceeding relating to a Delaware trust.

- (a) “Material Conflict of Interest” Defined. In 2013, 12 Del. C. § 3547 was amended to provide that a material conflict of interest between a representative and each beneficiary is presumed when, as a result of the judicial proceeding or nonjudicial matter:
 - i. the representative will be appointed to a fiduciary or nonfiduciary office or role, unless the representative already serves in a fiduciary or nonfiduciary office or role and will not receive greater authority, broader discretion, or increased protection as a result of the new appointment;
 - ii. the representative currently holds a fiduciary or nonfiduciary office or role and will receive greater authority, broader discretion, or increased protection; or
 - iii. the representative has any other “actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.” 12 Del. C. § 3547(e).
- (b) The 2013 amendment to 12 Del. C. § 3547 aligns the statute with Delaware Court of Chancery Rule 103, which relates to consent Petitions and is further discussed in Section II of this outline.

- C. Favorable Income Tax Laws. Delaware does not tax that portion of trust income and capital gains accumulated and set aside for future distribution to nonresident

beneficiaries. 30 Del. C. § 1636(a). If all of the beneficiaries of a Delaware trust are nonresidents, the trust pays no Delaware state income tax at all. Id. Many non-resident trusts (including many from New York) have been moved to Delaware to avoid state income tax that would otherwise apply. See, for example, N.Y. Tax Law § 605(b)(3)(D) exempting resident trusts from New York income tax where all of the trustees are domiciled in a state other than New York, the entire trust corpus is located outside the State of New York and all income and gain of the trust are derived from or connected with sources outside the State of New York. Clients with existing trusts in high income states often move their trusts to Delaware in anticipation of a transaction that will result in a substantial capital gain (i.e., a sale of a block of low-basis stock) in order to avoid the state income tax that would be imposed as a result of the transaction. Delaware does not have a tax on intangible personal property and there are no other franchise taxes, gross receipts taxes or hidden fees that apply to Delaware trusts.

- D. Prudent Investor Rule. Delaware adopted its version of the uniform Prudent Investor Act in 1986. 12 Del. C. § 3302(b). Delaware permits a trustee to acquire virtually every kind of investment and judges the trustee's investment performance based upon the performance of the entire portfolio of the trust and not on an asset by asset basis. 12 Del. C. § 3302(c). Where the terms of a governing instrument direct the fiduciary to retain specified trust property as a trust investment, the duty of diversification otherwise applicable to the fiduciary with respect to such property shall be deemed to be waived and the fiduciary shall be exonerated from liability for retaining the property except in the case of willful misconduct proved by clear and convincing evidence in the Delaware Court of Chancery. 12 Del. C. § 3304.
- E. Self-Settled Asset Protection Trusts. Delaware enacted a self-settled asset protection trust law "The Qualified Dispositions in Trust Act" in 1997. 12 Del. C. § 3570, et. seq. ("Act"). The Act specifically allows a transfer by one trustee to a qualified Delaware trustee to be treated as a qualified disposition. 12 Del. C. § 3570(7). The Act provides asset protection to certain self-settled trusts permitting a settlor to transfer the settlor's own assets through a qualified disposition to an irrevocable trust, retain certain beneficial interests in the trust and protect those assets from the claims of the settlor's creditors. Id. A creditor's claim against a Delaware asset protection trust is barred unless (i) the claim arose before the qualified disposition and suit is filed not later than four years after the date of the qualified disposition or one year after the creditor discovered or should have discovered the qualified disposition or (ii) the claim arose after the qualified disposition and suit is filed within four years after the qualified disposition. 12 Del. C. § 3572(b). A significant number of out of state trusts have migrated to Delaware to take advantage of the Act.
- F. Total Return Trust. Many trusts have had their place of administration transferred to Delaware has been moved to Delaware specifically for the purpose of allowing the Delaware trustee to convert an income only trust to a total return trust

Delaware was the first state to adopt total return legislation when it enacted 12 Del. C. § 3527 on June 21, 2001. The total return statute creates a simplified procedure that allows a “Disinterested Trustee” (such as a corporate fiduciary) to convert an income only trust to a total return trust without court proceedings. 12 Del. C. § 3527(b). The statute allows a trustee to establish a unitrust rate from 3% to 5% in lieu of trust income and to allocate to the unitrust payment tax characteristics such as short-term and long-term capital gain. 12 Del. C. § 3527(h). The power of a trustee to convert an income trust to a total return trust or a total return trust to an income trust is, by statute, a law pertaining to the administration of a trust and is available to any trust administered in Delaware. 12 Del. C. § 3527(1).

- G. Decanting. Delaware law authorizes a trustee, that has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a portion of the principal subject to the power of invasion in favor of a trustee of a trust under a separate trust instrument (a second trust). 12 Del. C. § 3528(a). Decanting has become an increasingly popular method for migrating trusts to Delaware and modifying such trusts to take advantage of certain aspects of Delaware trust law. The Delaware decanting statute is discussed in more detail later in this outline.
- H. Confidentiality / “Quiet” Trusts. Delaware law places great emphasis on the confidentiality of matters relating to Delaware trusts. A settlor may direct the trustee (for a period of time) not to inform the beneficiary of the beneficiary’s interest in the trust. 12 Del. C. § 3303(a).
- I. Directed Trusts. Delaware recognizes directed trusts and limits the liability of a trustee who acts upon the direction of an adviser appointed in the trust agreement to make an investment decision, a distribution decision or other decisions. 12 Del. C. § 3313. The judicial and non-judicial methods described in Section II of this outline to migrate a trust to Delaware and modify or reform the trust are perhaps most often employed to make the trust a directed trust under Delaware law as to investment decisions (via the creation of the position of an Investment Direction Adviser or Special Holdings Direction Adviser), distribution decisions (via the creation of the position of Distribution Adviser), or both.
 - 1. Definition. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distribution decisions and any other decision affecting the administration of the trust. The starting point for the creation of directed trusts is the statutory framework that permits them coupled with the carefully worded language of the trust instrument.
 - 2. Delaware Provisions. The foregoing provisions for directed trusts should

be compared with the more protective provisions adopted by Delaware and a few other states.

- (a) Delaware law recognizes a broad class of advisers including direction advisers, consent advisers and trust protectors. Where one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decisions of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides. 12 Del. C. § 3313(a).
- (b) When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its "willful misconduct".

Direction Provision

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). [emphasis added] The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4).

- (c) The statutory standard of care required of a fiduciary acting on the consent of a Consent Adviser is only somewhat broader. When a trustee acts with the consent of a Consent Adviser, the trustee will only be liable for its "willful misconduct" or "gross negligence".

Consent Provision

If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then **except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's failure to provide such consent after having been requested to do so by the fiduciary. 12 Del. C. § 3313(c). [emphasis added]

- (d) In all cases, there may be an adviser who is a "trust protector".

Trust Protector

... the term “adviser” shall include a “protector” who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

- (i) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
 - (ii) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
 - (iii) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument. 12 Del. C. § 3313(f).
- (e) The statutory protection afforded trustees of directed trusts would be diminished if advisers or beneficiaries could sue the trustee on the theory that the trustee had a duty to keep them informed and to impart to them knowledge affecting their interests in the trust so they could perform their duties as advisers or otherwise protect their beneficial interests in the trust.

Duty to Monitor, Communicate and Inform

Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, **the fiduciary shall have no duty to:**

- (i) **monitor the conduct of the adviser;**
- (ii) **provide advice to the adviser or consult with the adviser; or**
- (iii) **communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary’s own discretion in a manner different from the manner directed by the adviser. 12 Del. C. § 3313(e). [emphasis added]**

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority. Id.

II. MIGRATION, MODIFICATION AND REFORMATION OF AN IRREVOCABLE UNDER DELAWARE LAW

This section will discuss both the judicial and non-judicial methods for migrating a trust to or from Delaware, in addition to the contemporaneous or subsequent modification / reformation of the trust once a nexus with Delaware has been established. As an initial matter, it is obvious that trusts may already contain provisions which not only allow for the appoint of successor trustees in any jurisdiction (which is quite common), but also may contain provisions allowing for the trustee or other fiduciary, such as a trust protector, to change the place of administration of a trust and elect that the laws of the transferee jurisdiction shall govern the administration of a trust (which is less common, especially for older trusts). The trust may also include provisions which allow for limited modifications to the trust. When such provisions are present and can be utilized to accomplish the goals of the interested parties to the trust, they would likely obviate the need to employ any of the judicial or non-judicial methods described in below.

A. Judicial Methods

1. The "Consent Petition" Procedure. The Delaware Court of Chancery has worked closely with the Delaware Bar Association to allow "Consent Petitions" for purposes of modifying or reforming irrevocable trusts. If all parties interested in the trust agree (or for tax reasons state their non-objection or take no position) the trust may be modified or reformed for a proper purpose. The starting point for analyzing the Consent Petition procedure are Delaware Court of Chancery Rules 100-104 (attached to this outline as Exhibit A), which set forth the documentation and information that must be provided to the Court as part of the Petition, in addition to broadly describing the jurisdictional and governing law issues that must be dealt with to the Court's satisfaction. The general jurisdictional and governing law issues raised in the Court Rules were more specifically addressed by the Court in three decisions issued in December of 2012 known as the *Peierls* cases, most extensively in *In re the Peierls Family*

Inter Vivos Trusts, 59 A.3d 471 (Del. Ch. 2012) (hereinafter “*Peierls Inter Vivos Trusts*”). The *Peierls* decisions contained some odd reversals of long-standing Delaware law and practice, and the cases are currently being considered by the Delaware Supreme Court on appeal. Although the consent Petition procedure has changed significantly over the past few years and the scope of relief that may be requested pursuant to a consent Petition has been reduced, the process can be (and still is) successfully used by practitioners to accomplish the goals of beneficiaries and fiduciaries via the modification or reformation of trusts. Discussed below are some of the practical issues that arise when seeking to comply with the Court Rules and the *Peierls* cases, as well as suggestions as to how such issues may be resolved in order to obtain the desired result from the Court.

- (a) Rule 100(b)(3) states that every Petition must address “the basis for this Court’s jurisdiction over the trust and, to the extent jurisdiction is based on Delaware being the principal place of administration, a description of the administrative tasks and duties carried out by the Delaware trustee....” Additionally, Rule 100(d)(2) requires the Petition to address whether the trust contains a choice of law provision that selects the law of a jurisdiction other than Delaware, and “whether and under what circumstances the law of the other jurisdiction authorizes changing the situs of the trust or the law governing the administration of the trust.” Finally, Rule 100(d)(4) provides that the Petition must address “[w]hether Delaware law governs the administration of the trust, and, if so, why.”
 - (i) On the question of the application of Delaware law to the administration of a trust that had a Delaware trustee, practitioners commonly relief upon 12 Del. C. § 3332(b), which provides that “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”
 - (ii) In *Peierls Inter Vivos Trusts*, however, the Delaware Chancery Court essentially held that 12 Del. C. § 3332(b) was not sufficient to cause Delaware law to govern the administration of a trust once the trust is administered in Delaware if the trust contained a choice of law provision that could be construed to include the administration of a trust. *See Peierls Inter Vivos Trusts* at 483-485. As such, the appointment of a Delaware trustee is not enough to trigger the application of 12 Del. C. § 3332(b), unless the trust contains other provisions which would lead the Court

to conclude that the settlor intended for the law governing the administration of the trust to change when the place of administration of the trust has changed. The Court made it clear that it did not believe that the presence of a provision allowing for the non-judicial removal of a trustee and the appointment of a successor trustee in another jurisdiction would be sufficient evidence of settlor's intent that the law governing the administration of a trust should change if the place of administration is transferred. *Id.* at 483-484.

(iii) Therefore, in the event that 12 Del. C. § 3332(b) is not operative to change the law governing administration of the trust pursuant to the holding in *Peierls Inter Vivos Trusts*, best practice is to ensure that both the place of administration and the law governing administration of the trust have been already changed to Delaware once the Petition has been filed. Listed below are methods that have been used successfully to accomplish these changes prior to the filing of the Petition:

- (1) By court order of the jurisdiction from which the trust is being transferred
- (2) By the statutory law of the jurisdiction from which the trust is being transferred. For example, the parties could enter into a non-judicial settlement agreement under the laws of that jurisdiction.
- (3) If the jurisdiction allows for statutory or common law merger, the existing trust could be merged into a new trust which has a Delaware trustee and includes a Delaware choice of law provision, but which has identical dispositive provisions as the original trust.

(b) If the Petition has established that the trust is being principally administered in Delaware but the law of another jurisdiction still governs the administration of the trust, it may be possible to simply make a showing that the trust modification would be allowed under the law of such other jurisdiction. Example: a recent set of several Petitions sought to modify several trusts that were originally situated in a jurisdiction which had adopted a non-judicial settlement agreement statute as well as statute similar to UTC section 411, which allows for the modification or termination of a trust, even if the modification or termination is inconsistent with a material purpose of the trust, as long as the living settlor and all

beneficiaries agree. The trusts contained specific choice of law provisions selecting the law of the original situs of the trusts to govern administration. A Delaware corporate trustee as serving at the time the Petition was filed in order to establish a jurisdictional nexus with Delaware. No steps were taken before the Petition was filed to change the law governing the administration of the trusts to Delaware. The Petition sought a near re-write of the administrative provisions of the trusts, including the addition of a Delaware choice of law provision and the creation of the positions of Investment Adviser, Trust Protector and a Special Powerholder (with the authority to amend the administrative provisions of the trusts in the future). The Petition argued that (1) by consenting to the relief requested in the Delaware Petition, the parties had effectively complied with all requirements under the law of the other jurisdiction to transfer the place of administration of the trusts and change the law governing the administration of the trusts to Delaware, and (2) even if the Court believed law of the other jurisdiction still governed the administration of the trusts, such law allowed for an extensive modification of the trusts. The Court granted the relief requested in each Petition in chambers without comment. Alternatively, the parties could also have entered into a non-judicial settlement agreement before the Petition was filed which changed the law governing the administration of the trust, but for several reasons this approach was not taken.

- (c) The Petition must have attached to it as an exhibit a copy of the trust instrument, amendments thereto and any Orders relating to the trust instrument.
- (d) Unless the relationship of those with a beneficial interest in the trust to the settlor is self-evident, the filing attorney must enclose with the cover letter accompanying the Petition or attached as an exhibit to the Petition a family tree or other document showing the relationship of those having a beneficial interest in the trust to the settlor.
- (e) The Petition must include, as exhibits, consents or statements of non-objection ("Consents") to the relief requested in the Petition from all interested parties. This may include, but it is not limited to (i) trustees and other fiduciaries (unless they have otherwise signified their consent to the Petition by acting as a Petitioner or accepting a fiduciary position); (ii) the trust beneficiaries; (iii) all other persons having an interest in the trust pursuant to the express terms of the trust instrument (such as, but not limited to, power holders and persons having other rights and powers, held in a non-fiduciary capacity, with respect to trust property). Rule 101(a)(7).

- (f) For purposes of filing Consent Petitions, trust beneficiaries are defined as those with a present interest in the trust and those whose interest in the trust would vest, without regard to the exercise or non-exercise of a power of appointment, if the present interest in the trust terminated on the date the Petition is filed.
- (g) A trust beneficiary's Consent must be executed by (i) the beneficiary personally; (ii) the beneficiary's attorney ad litem; (iii) a person authorized to virtually represent the beneficiary pursuant to 12 Del. C. § 3547 or any successor statute; or (iv) a person authorized by applicable law to represent the beneficiary with respect to the Petition (such as, but not limited to, the beneficiary's attorney-in-fact or the Attorney General in the case of certain charitable beneficiaries).
- (h) Consents executed pursuant to 12 Del. C. § 3547 (Delaware's virtual representation statute) must include reference to the statute, state the relationship of the person signing the Consent to those virtually represented and include in the signature block the name of the person signing the Consent and the class of those virtually represented.
- (i) Pursuant to Rule 103, any Consents executed under 12 Del. C. § 3547 must include a certification from the representative that no material conflict of interest exists between the consenting party and the person or persons represented. Including with respect to any of the factors that are now codified in 12 Del. C. § 3547e, as noted above in Section I.B.2(a) of this outline.
- (j) Migration of Trusts. The rulings in the *Peierls* cases effectively ended (at least for the time being) the ability to utilize the Consent Petition process as the mechanism for completing the migration of a trust to Delaware. Long-standing practice frequently involved the Delaware trustee's acceptance of its appointment as trustee contingent upon an order from the Delaware Chancery Court confirming such appointment, which effectively allowed the migration of the trust to Delaware and the modification of the trust (often to make it a directed trust under Delaware law) to occur simultaneously. *Peierls Inter Vivos Trusts* held that if the trust provisions permit the appointment of a successor trustee, to confirm such appointment would constitute an impermissible advisory opinion because no actual controversy is present. *See Peierls* at 477. As such, best practice is to ensure that, prior to filing the Petition, the Delaware trustee has been appointed and has acceptance its appointment with no remaining contingencies. This

establishes a jurisdictional nexus with Delaware and may also allow for the application of Delaware law to the administration of the trust pursuant to 12 Del. C. § 3332(b), provided the Petition at issue is sufficiently distinguished from the facts of the *Peierls* cases.

(k) Trust Reformation. A trust “reformation” differs from a trust “modification” under Delaware law, in that a reformation seeks a change to the trust effective at the time of the creation of the trust, as opposed to a modification of a trust, which only changes the terms of a trust moving forward. *See In re the Ethel F. Peierls Charitable Lead Unitrust*, 59 A.3d 464 (Del. Ch. 2012).

(i) The Delaware Chancery Court has authority to reform a trust, since “reformation is an equitable remedy and an ordinary remedy for mistake in the terms of a trust instrument.” 90 C.J.S. Trusts § 92.

(ii) The Delaware Supreme Court has expressly supported the general principle that unilateral mistake on the part of a settlor of a trust is sufficient to warrant the reformation of such trust. *Roos v. Roos*, 203 A.2d 140, 142 (Del. Ch. 1964) (citing Scott on Trusts § 333.4; Restatement of Trusts, § 333; *In re Trust Estate of LaRocca*, 411 Pa. 633, 192 A.2d 409; *Kiser v. Lucas*, 170 Md. 486, 185 A.441; *Wright v. Goff*, 22 Beav. 207, 52 Reprint 1087).

2. Civil Actions. In the event one more beneficiaries, powerholders or fiduciaries refuse or simply decline to execute a waiver consenting or not objecting to the relief requested in the Petition, the Petition may be filed as a civil action in the Delaware Court of Chancery. After filing, the Court will typically set a hearing date between 30-60 days, during which time any interested parties that have not signed a Waiver must be properly notified of the Petition and the hearing date. If the interested party has been properly notified and has not responded or appeared on the date of the hearing, the Court grant the relief requested in the Petition provided the Petition complies with the Court Rules noted above and any jurisdictional and governing law issues have been resolved. Rule 104(b) provides that Rules 100-104 shall apply to “any matter before the Court of Chancery in which the relief sought includes a modification of a trust, whether by means of a consent petition, civil action, court approved settlement or otherwise.”

B. Decanting

1. Delaware’s Decanting Statute. Delaware law authorizes a trustee that has

authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a portion of the principal subject to the power of invasion in favor of a trustee under a separate instrument (a second trust). 12 Del. C. § 3528(a). Implicit in the statute is the concept that, if a trustee may invade principal for a beneficiary under the terms of the trust agreement, the trustee may, in the exercise of its principal invasion power, appoint the principal to a new trust for the benefit of some or all of the beneficiaries of the first trust.

2. Requirements for Use of Delaware's Decanting Statute. There are several requirements that must be satisfied in order to utilize Delaware's decanting statute:
 - (a) The trust instrument must not prohibit the trustee from distributing assets in further trust for a beneficiary. 12 Del. C. § 3528(a).
 - (b) The trustee must have the ability to invade principal for the benefit of one or more of the beneficiaries of the trust. 12 Del. C. § 3528(a).
 - (c) The beneficiaries of the second trust must also be beneficiaries of the first trust. 12 Del. C. § 3528(a)(1).
 - (d) The second trust may not alter the beneficial interests of beneficiaries of the first trust that are not proper objects of the exercise of the power of invasion. 12 Del. C. § 3528(a)(1).
 - (e) The second trust must comply with any standard that limits the trustee's authority to make distributions from the first trust (i.e., if the first trust provides that distributions to the beneficiaries can only be made pursuant to an ascertainable standard the second trust cannot provide that distributions can be made to the beneficiaries for any purpose). 12 Del. C. § 3528(a).
3. Delaware's decanting statute is available to any trust that is administered in Delaware. 12 Del. C. § 3528(f). This suggests that (i) regardless of whether the trust contains a choice of law provision which chooses the law of a jurisdiction other than Delaware to govern the trust, and (ii) regardless of whether, either pursuant to the application of 12 Del. C. § 3332(b). As such, decanting has become a popular method to modify a trust that is administered in Delaware if the facts are not conducive to a Consent Petition. Decanting is also available to a trustee if Delaware law governs the administration of a trust.
4. A written "decanting instrument" must be signed and acknowledged by

the trustee and filed with the records of the trust. 12 Del. C. § 3528(b).

5. Other Aspects of Delaware's Decanting Statute. Unlike Consent Petitions, the trustee does not need the consent of the beneficiaries or any other interested party to exercise its decanting power. However, it is common practice in Delaware to have the beneficiaries consent to the decanting and release and indemnify the trustee from any liability in connection with the decanting. While the second trust may not have beneficiaries who are not also beneficiaries of the first trust, the decanting statute specifically permits the second trust to grant a beneficiary of the first trust a limited or general power of appointment thereby allowing the beneficiary to appoint trust property to a person who is not a beneficiary of the first trust. 12 Del. C. § 3528(a). A trustee's exercise of its decanting power is considered the exercise of a power of appointment and is subject to the provisions of Chapter 5 of Title 25 of the Delaware Code relating to the time at which the permissible period of the rule against perpetuities begins and the law which determines the permissible period of the rule against perpetuities. 12 Del. C. § 3528(c).
5. Tax Issues Associated with Decanting. The following analyzes some of the more common tax-related questions and issues that arise in conjunction with decanting.

(a) Generation-Skipping Transfer (GST) Tax.

- (i) Treas. Reg. § 26.2601-1(b)(1) provides that a trust can lose GST exempt status if an actual or constructive addition is made to the trust after the effective date. With respect to decanting, the concern is that the decanting may be viewed as an addition or modification to a trust that causes it to lose its GST exempt status.
- (ii) Many states that have adopted decanting statutes, treat the power to decant as the exercise of a limited power of appointment. Delaware's decanting statute specifically notes that the exercise of a trustee's decanting power shall be considered to be the exercise of a limited power of appointment. 12 Del. C. § 3528(c).
- (iii) Treas. Reg. § 26.2601-1(b)(1)(v)(B) provides that the exercise of a limited power of appointment over the assets of a grandfathered trust will not cause a trust to lose its GST exempt status unless the exercise of the power of appointment violates the federal perpetuities period.

- (iv) However, the IRS concluded in PLRs 9848043 and 9849007 that Treas. Reg. § 26-2601-1(b)(1)(v)(B) was not directly relevant when considering a trustee's decanting power under This is unfortunate because, as we will see, Treas. Reg. § 26-2601-1(b)(1)(v)(B) would allow for broader changes in the decantee trust than allowed under the safe harbors contained in the other relevant Treasury Regulations.
- (v) Treas. Reg. § 26.2601-1(b)(4)(i)(A) is sometimes known as the "discretionary distribution" safe harbor and provides guidelines for determining when the distribution of trust assets from a grandfathered trust to a new trust could cause the loss of GST exempt status. The discretionary distribution safe harbor essentially provides that decanting will not cause a grandfathered trust to lose GST exempt status if the following three requirements are met:
 - (1) When the trust became irrevocable, either the terms of the trust instrument or local law (i.e., a statute or common law) authorized the trustee to distribute trust property to a new trust;
 - (2) Neither beneficiary consent nor court approval is required for the trustee's exercise of such power; and
 - (3) The new trust will not delay the vesting an interest in the trust beyond the permissible perpetuities period under federal law. For purposes of this Treasury Regulations, the federal perpetuities period is (1) a life in being when the trust became irrevocable plus 21 years; or (2) 90 years from the date the trust became irrevocable.
- (vi) in order to comply with the discretionary distribution safe harbor, if the terms of the trust do not authorize distribution to a new trust, you would need to rely on the common law of the state in which the trust is located to authorize the decanting. Some commentators suggest that most, if not all, states authorize decanting via common law principles, but only the courts of Florida and New Jersey have explicitly recognized common law authority to decant. The second requirement does not appear to prohibit a trustee from obtaining beneficiary consent or court approval of the decanting. Delaware's decanting statute does not require beneficiary consent or court approval for the trustee's

exercise of its decanting power, although the trustee and other parties involved may choose to obtain beneficiary consent or court approval before decanting to a new trust. With respect to the third requirement, when utilizing Delaware's decanting statute to decant the assets of a grandfathered trust, the attorney drafting the decantee trust (or the trust officer reviewing such trust on behalf of the trustee) should be as careful as possible to ensure that the new trust contains a provision limiting the vesting period to comply with the federal perpetuities period described in the Treasury Regulations.

- (vii) Under the discretionary distribution safe harbor, what changes can be made without jeopardizing the trust's GST exempt status? If decanting only changes administrative terms of the trust, there should be no loss of GST exempt status (PLR 200607015). However, it is important to consider what provisions are merely administrative in nature and what changes may be viewed as affecting the substantive or beneficial terms of the trust.
- (viii) Treas. Reg. § 26-2601-1(b)(4)(i)(D), is sometimes known as the "trust modification" safe harbor. The trust modification safe harbor is seen as a "catch-all" that applies when all of the requirements set forth in the discretionary distribution safe harbor cannot be met. The trust modification safe harbor provides that a modification to grandfathered trust will not cause loss of GST exempt status as long as:
 - (1) The modification will not shift a beneficial interest in the trust to a beneficiary occupying a lower generation than the persons holding the beneficial interest in the original trust; and
 - (2) The modification will not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.
- (ix) Regarding the first requirement, note that beneficial interests can be shifted across the same generational level or to a higher generational level than the persons holding the interest in the original trust. However, it is important to be extremely careful when shifting beneficial interests, because the Treasury Regulations and their attendant examples provide that if a trust modification results in either an increase in the amount of a GST transfer or

creates a new GST transfer, there is deemed to be a shift in a beneficial interest to a lower generation beneficiary. Additionally, if the effect of a modification cannot be determined immediately after the modification is made, there is a deemed to be a shift in a beneficial interest to a lower generation.

- (x) There are no Code sections or Treasury Regulations that deal directly with the decanting or modification of non-grandfathered trusts. However, the IRS suggested in PLR 200743028 that the Treasury Regulations for grandfathered trusts should apply to non-grandfathered trusts. An interesting example would involve a trust to which the grantor allocated GST exemption after the state in which the trust is situated enacted a decanting statute. If the Treasury Regulations that apply to grandfathered trusts also apply to this non-grandfathered trust, then presumably a Delaware trustee could decant pursuant to Delaware's decanting statute, and the decantee trust could shift beneficial interests in the trust to lower generations as long as no beneficiary consent or court approval is required (per the discretionary distribution safe harbor).
- (xi) If the IRS ultimately decides that the GST Regulations for grandfathered trusts should not apply to non-grandfathered trusts (a result most commentators find unlikely), one could argue that Treas. Reg. § 26-2601-1(b)(1)(v)(B) relating to limited powers of appointment should apply.
- (xii) PLR 9522032 suggests that if a trust loses its GST exempt status, there are no immediate gift tax implications, but the grantor of the trust will become the transferor for GST tax purposes.
- (xiii) Logically, although there is no authority directly on point, the loss of GST exempt status should not result in all future distributions from the trust being subject to GST tax. A GST tax should only be imposed when a distribution is made to someone that could not have received a distribution from the original trust without being subject to GST tax.

(b) Gift Tax Issues.

- (i) It is possible through a decanting to reduce, or in some cases eliminate, a beneficiary's interest in the original trust.

Delaware's decanting statute can be used to eliminate a fixed income right with respect to a trust that does not qualify for the marital deduction. 12 Del. C. § 3528(a)(3). Delaware's decanting statute can also be used to eliminate a beneficiary's power to withdraw trust assets provided such power is not presently exercisable. 12 Del. C. § 3528(a)(5). An issue that often arises is whether a beneficiary has made a taxable gift to the new trust when the beneficiary's interest in the old trust is reduced pursuant to the decanting.

- (ii) In order for a gift to occur there must be an act of transfer. In the decanting context a beneficiary is not affecting the transfer of the assets from the original trust to the new trust. The trustee causes the transfer of the assets from the original trust to the new trust. The beneficiary therefore should not be treated as having made a taxable gift when a trustee exercises the decanting power to reduce the beneficiary's interest in the trust unless the beneficiary has a legal right to object to the exercise of the authority to decant. Under Delaware's decanting statute it is not necessary to obtain a beneficiary's consent to decant the trust assets or even to notify the beneficiary of the decanting. The beneficiary's mere acquiescence to the decanting should not rise to the level of a taxable gift.\
- (iii) A more difficult issue involves whether the beneficiary's consent to a decanting which eliminates or reduces a beneficiary's interest in the old trust rises to the level of a taxable gift. For instance, assume the terms of the governing instrument permit the trustee to distribute income and principal to A for any purpose and provide that any attaining the age of thirty-five (35) all of the assets are to be distributed outright and free of trust to A. Further assume that the trustee decants all of the assets to a new trust which extinguishes the trustee's requirement to distribute the remaining trust assets to A upon her attaining the age of thirty-five (35) and instead provides that all of the trust assets shall remain in further trust for A's lifetime. If A consents to the decanting, the IRS could argue that A's right to receive the assets upon attaining the age of thirty-five (35) is equivalent to a general power of appointment and A's consent to the decanting is a lapse or release of a general power of appointment. This would result in the new trust becoming a self-settled trust with respect to A

either upon the decanting or upon A attaining the age of thirty-five (35).

- (iv) In certain situations a beneficiary may be serving as a co-trustee of the trust and participate in the decanting. Typically if a beneficiary is serving as a trustee, the trustee will be restricted in how the trust assets may be distributed to the beneficiary. For instance, the trustee/beneficiary will only be permitted to distribute trust assets to the trustee/beneficiary for his or her health, education, maintenance and support. A distribution in further trust which continues to restrict how the assets may be utilized for such beneficiary should not result in any negative gift tax consequences to the trustee/beneficiary. Delaware law makes it clear that the trustee's exercise of the decanting power must comply with any standard imposed by the first trust. 12 Del. C. § 3528(a)(5). If a trustee is constrained in making distributions pursuant to an ascertainable standard under the terms of the first trust, the new trust must also limit distributions pursuant to an ascertainable standard.

C. Merger

1. Delaware's merger statute, 12 Del. C. § 3325(29), grants the trustee of a Delaware trust the authority to: "Merge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger **would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.**" (emphasis added).
 - (a) Although beneficial provisions will need to remain largely intact in the new trust following the merger, the new trust could contain new administrative provisions, including the addition of direction or consent advisers. As such, merger can be utilized to obtain many of the modifications to administrative provisions that may be possible via the Consent Petition process or Decanting.
 - (b) Even if the trustor of the first trust is deceased, Delaware's merger statute would allow the trustee, for example, to declare the new trust into which the first trust will merge.
2. With respect to the migration of trusts to Delaware, it is important to note that there are 35 states (including Delaware) plus the District of Columbia that allow for trust mergers without judicial involvement, having adopted Section 417 of the UTC or a similar statute. *See* Flubacher, Todd A., *What's Good for the Goose is Good for the Gander*, Delaware Banker, 28-

30 (Spring 2013). There are other states which may allow for trust merger under common law.

3. Similar to decanting, the merging of two trusts under Delaware's merger statute is an exercise of discretion on the part of the trustee. As such, although not required under the statute, the trustee may seek the consent of the trust beneficiaries and other interested parties before effectuating the merger. At a minimum, the trustee may desire to provide notice of the merger to the trust beneficiaries in order to start the running of the applicable statute of limitations.
4. Some of the same tax questions arise with merger as they do with decanting. With respect to GST tax issues, an example in the Treasury Regulations contains a safe harbor which provides that a judicially-approved merger will not cause a trust to lose GST-exempt status as long as there is no shift in beneficial interests or delay in vesting of beneficial interests. *See* Treas. Reg. § 26.2601(b)(4)(i)(E) Example 6. Even more on point for Delaware is PLR 201042004, in which the IRS found that a merger authorized by state statute did not cause the trust to lose GST-exempt status.

D. Nonjudicial Settlement Agreements

1. Delaware's Trust Act 2013, signed into law on August 6, 2013, includes new Section 3338 of Title 12 of the Delaware Code, which is Delaware's Nonjudicial Settlement Agreement statute ("Delaware's NJSA Statute").
2. Delaware's NJSA statute is modeled after Section 111 of the UTC.
3. Delaware's NJSA statute requires the agreement of all "interested persons" whose consent would be needed to achieve a binding settlement in the Delaware Court of Chancery. 12 Del. C. § 3338(a). As noted above in the discussion regarding Consent Petitions, Rule 104(b) provides that Rules 100-104 shall apply to "any matter before the Court of Chancery in which the relief sought includes a modification of a trust, whether by means of a consent petition, civil action, **court approved settlement or otherwise.**" (emphasis added). Therefore, the parties noted in Rule 101(a)(7) are likely required to be included in order for a non-judicial settlement agreement to be effective with respect to the trust at issue.
4. What is the functionality of Delaware's NJSA statute and how broad is its scope? The language of the statute suggests that its application can be quite broad. The interested persons may enter into a binding agreement "with respect to **any matter** involving a trust..." (except with respect to charitable trusts and purpose trusts described in 12 Del. C. § 3541). 12 Del. C. § 3338(b) (emphasis added). The phrase "any matter" is inclusive

rather than restrictive, suggesting that the presumption should be that any matter does fall within the proper subject matter of a nonjudicial settlement agreement rather than not.

- (a) Delaware's NJSA Statute provides a list of six matters that may be resolved by a nonjudicial settlement agreement, which are:
 - (i) the interpretation of construction of the terms of the trust
 - (ii) the approval of a trustee's report or accounting
 - (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power
 - (iv) the resignation or appointment of a trustee and the determination of a trustee's compensation
 - (v) the transfer of a trust's principal place of administration
 - (vi) the liability of a trustee for an action relating to the trust

12 Del. C. § 3338(d)

- (b) Comments to the UTC version of the nonjudicial settlement agreement (which contains a list identical to 12 Del. C. § 3338(d)) make clear that the list is nonexclusive. As such, Delaware's NJSA Statute could be a powerful tool to resolve trust matters, including the bifurcation of trustee responsibilities among a trustee and direction or consent advisers.
- (c) The only major restriction appears to be that a nonjudicial settlement agreement is "only valid 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." 12 Del. C. § 3338(c). The phrase "material purpose" is not defined under Delaware's trust code, and there is no direct guidance in the model UTC provisions or the UTC's commentary. However, reference to the intent of the settlor in creating the trust, express or implied, would seem to be appropriate.

- 5. An interest person may seek judicial determination to interpret, apply, enforce or determine the validity of a nonjudicial settlement agreement. 12 Del. C. § 3338(e).

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: AMENDMENTS TO COURT OF CHANCERY RULES, SECTION XII,
RULE 100, RULE 101, RULE 102, AND RULE 103.

This 12th day of April, 2012, IT IS HEREBY ORDERED that Court of Chancery

Rules, Section XII, Rule 100 shall be amended by substituting in its entirety the following language for existing Section XII, Rule 100, effective May 1, 2012.

XII. PROCEEDINGS TO MODIFY TRUSTS BY CONSENT

Rule 100. Contents of a petition to modify a trust by consent.

(a) A party seeking to modify a trust by consent shall file a petition with the Register in Chancery.

(b) Every petition to modify a trust by consent shall address each of the following matters:

(1) The factual circumstances under which the trust was settled or created, the reasons for its settlement, how the trust has operated since its settlement including any material amendments since its settlement, and the events leading to the relief sought in the petition;

(2) Whether the trust was settled or created in a state other than Delaware or contains a choice of law provision in favor of the law of a jurisdiction other than Delaware; and

(3) The basis for this Court's jurisdiction over the trust and, to the extent jurisdiction is based on Delaware being the principal place of administration, a description of the administrative tasks and duties carried out by the Delaware trustee or other Delaware fiduciaries and a comparison of those tasks and duties to those entrusted to fiduciaries or proposed fiduciaries domiciled outside Delaware.

(c) Every petition to modify a trust by consent shall address each of the following matters with particularity:

(1) The nature and status of any filed, pending, or threatened action, suit, or proceeding, whether civil, criminal, administrative, arbitral, or regulatory, relating to the subject matter of the trust, or among any of the petitioners or trust beneficiaries;

(2) Any prior determination or judgment on the merits in any action, suit, or proceeding involving any living person who is either a petitioner or a person who will serve as a fiduciary if the relief requested in the petition is granted, resulting in a criminal conviction, an adjudicated breach of the fiduciary duty of loyalty, or a determination reflecting on the honesty or integrity of such person;

(3) The nature of the relief sought in the petition and the reasons why such relief is being sought;

(4) The role(s) of the petitioner(s) in the existing trust (whether beneficiary, fiduciary, adviser, protector, etc.) and the proposed role(s) of the petitioner(s) in the trust if the relief sought in the petition is granted;

(5) How the proposed relief will affect the interests of current, vested future, and contingent beneficiaries;

(6) Any personal interest of any petitioner, or person who will serve as a fiduciary if the relief requested in the petition is granted, creating an actual or potential conflict between the interests of such person and the interests of the current, vested future, or contingent beneficiaries relating to the relief requested in the petition, including but not limited to conflicts relating to differing investment horizons, an interest in present income versus capital growth, or any limitation on, exculpation from, or indemnification for any existing or potential future liability;

(7) Whether any petitioner or beneficiary has a familial, personal, or financial relationship with any person who, as a result of the relief requested in the petition, will be appointed to a fiduciary or nonfiduciary office or role relating to the trust or will receive greater authority, broader discretion, or increased protection, including but not limited to any limitation on, exculpation from, or indemnification for existing or potential future liability;

(8) Whether the relief sought in the petition would lead to any limitation on, exculpation from, or indemnification for any existing or potential future liability on the part of any fiduciary; and

(9) Whether any required consents are being given on behalf of any beneficiaries by representation under 12 Del. C. § 3547. Any petition which relies upon such consents also must conform with the requirements of Rule 103.

(d) In addition to the foregoing, any petition to modify a trust by consent that seeks to confirm a change of situs of a trust from another jurisdiction to Delaware, or that seeks to apply Delaware law to a trust despite a choice of law provision selecting the law of another jurisdiction, also shall address:

(1) Whether the trust instrument contains a provision expressly allowing the situs of the trust or the law governing the administration of the trust to be changed;

(2) If the trust was settled or created in a jurisdiction other than Delaware or contains a choice of law provision in favor of the law of a jurisdiction other than Delaware, whether or under what circumstances the law of the other jurisdiction authorizes changing the situs of the trust or the law governing the administration of the trust;

(3) Whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change of situs to Delaware for approval of the transfer of situs of the trust to Delaware, and the status of the application, or if no application was made, why such approval need not be sought;

(4) Whether Delaware law governs the administration of the trust, and, if so, why. To the extent that the petition relies upon the domicile of the trustee as support for a determination that the trust situs is Delaware or that Delaware law governs the administration of the trust, the petition shall explain why Delaware is the principal place of trust administration, taking into account the administrative tasks and duties that will be carried out by the trustee, any tasks and duties assigned to advisers, trust protectors, or other persons, and any other factors counting in favor of or against Delaware jurisdiction, such as the ability of the Delaware trustee to resign automatically or under specific circumstances; and

(5) Whether a court of any other jurisdiction has taken any action relating to the trust.

IT IS FURTHER ORDERED that Court of Chancery Rule 101 shall be amended by substituting in its entirety the following language for existing Section XII, Rule 101, effective May 1, 2012.

Rule 101. Appendix of exhibits to consent petition.

(a) The party submitting the consent petition shall file contemporaneously an appendix of exhibits containing all documents relevant to the Court's review of the petition, including but not limited to:

- (1) The trust instrument;
- (2) The terms of any proposed modification of the trust's governing instrument;
- (3) A blacklined version of the proposed modified trust instrument or other appropriate document indicating plainly in what respect the proposed modified trust instrument differs from the current trust instrument;
- (4) Any orders relating to the trust instrument;
- (5) A family tree or other document showing the relationship to the trustor of those having a beneficial interest in the trust; and

(6) Consents or statements of non-objection to the relief sought in the petition from all whose interest in the trust is affected by the petition, which may include, but shall not be limited to, consents from:

(i) Trustees and other fiduciaries, unless they have otherwise signified their consent or non-objection to the petition by acting as a petitioner or accepting a fiduciary position;

(ii) Trust beneficiaries, who will generally be those with a present interest in the trust and those whose interest in the trust would vest, without regard to the exercise or non-exercise of a power of appointment, if the present interest in the trust terminated on the date the petition is filed;

(iii) The trustor of the trust, if living; and

(iv) All other persons having an interest in the trust according to the express terms of the trust instrument (such as, but not limited to, holders of powers and persons having other rights, held in a nonfiduciary capacity, relating to trust property).

IT IS FURTHER ORDERED that Court of Chancery Rule 102 shall be amended by substituting in its entirety the following language for existing Section XII, Rule 102, effective May 1, 2012.

Rule 102. Form of consents to the relief sought in the petition.

(a) Consents to the relief sought in the petition shall be submitted in the following form:

(1) Each consent shall have a signature line with the name of the individual signing the consent typed or printed underneath.

(2) Each consent shall be executed by (i) the beneficiary personally; (ii) the beneficiary's attorney *ad litem*; (iii) a person authorized to represent the beneficiary under 12 Del. C. § 3547 or any successor statute; or (iv) a person authorized by applicable law to represent the beneficiary as to the petition (such as, but not limited to, the beneficiary's attorney-in-fact or the Attorney General in the case of certain charitable beneficiaries).

(3) Each consent shall be acknowledged by a person authorized to notarize documents (or a similar official if a document is signed in a foreign jurisdiction) unless there is justifiable cause why the consents cannot be acknowledged and the Court waives the requirement of an acknowledgment by separate order.

(4) Each consent shall affirm that the party executing the consent has been provided with the petition and all disclosures and documents required by Court of Chancery Rules 100(b), 100(c),

and 101, and has received, read, understood, and been provided with an opportunity to consult with counsel regarding the consent and the materials provided.

(5) A consent may, but need not, waive notice of draft reports, reports, hearings or other matters relating to the petition.

(6) Each consent shall include a statement in which the consenting party consents to the jurisdiction of the courts of this State as a proper forum for (i) the resolution of all matters pertaining to the administration of the trust for so long as the situs of the trust is Delaware and (ii) any future matters arising out of or relating to the subject matter of the petition.

(b) A statement of non-objection is deemed a consent for purposes of this Rule.

IT IS FURTHER ORDERED that Court of Chancery Rule 103 shall be amended by substituting in its entirety the following language for existing Section XII, Rule 103, effective May 1, 2012.

Rule 103. Consent petitions appending consents under 12 Del. C. § 3547.

(a) In addition to complying with Rules 100-102, every petition to modify a trust by consent that includes one or more consents being given on behalf of any beneficiaries by representation under 12 Del. C. § 3547, or any successor statute, shall address with particularity the process used to obtain the required consents, including the information provided to the parties giving consent.

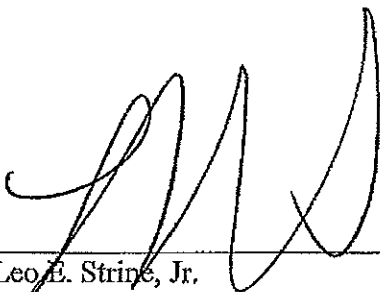
(b) Each consent executed under 12 Del. C. § 3547, or any successor statute, shall include a reference to the statute, state the relationship of the person signing the consent to those represented, certify that no material conflict of interest exists between the consenting party and the person(s) represented, including any of the factors set forth in subsection (c) of this Rule, and include in the signature block the name of the person signing the consent, the class of those persons represented, and the relationship between the person signing the consent and the class of persons represented.

(c) Any petition falling under this Rule shall contain a certification, signed by the senior Delaware attorney involved in the matter and the senior out-of-state attorney, if any, involved in the matter, certifying to the best of their knowledge that, after good faith investigation, the person purporting to consent for others by representation:

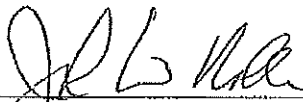
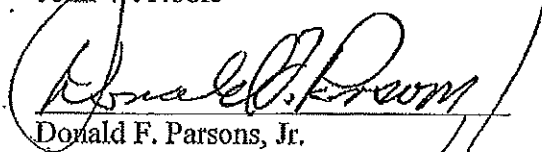

(1) Will not, as a result of the relief sought in the petition, be appointed to a fiduciary or nonfiduciary office or role relating to the trust;

(2) If already serving in a fiduciary or nonfiduciary office or role relating to the trust, will not as a result of the relief sought in the petition receive greater authority, broader discretion, or increased protection, including but not limited to any limitation on, exculpation from, or indemnification for any existing or potential future liability; and

(3) Does not have an actual or potential conflict of interest with those persons represented relating to the relief sought in the petition, including but not limited to conflicts relating to differing investment horizons or an interest in present income over capital growth.


Leo E. Strine, Jr.

Respectfully advised,


John W. Noble
Donald F. Parsons, Jr.
J. Travis Laster
Sam Glasscock, III

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: AMENDMENTS TO COURT OF CHANCERY RULES, SECTION XII,
RULE 101 AND RULE 104.

This 31st day of Oct, 2012, IT IS HEREBY ORDERED that Court of Chancery
Rules, Section XII, Rule 101 shall be amended effective Dec 1, 2012.

Rule 101. Appendix of exhibits to consent petition.

Rule 101 shall be amended as follows:

(a) The party submitting the consent petition shall file contemporaneously an appendix of exhibits containing all documents relevant to the Court's review of the petition, including but not limited to:

- (1) The current trust instrument;
- (2) The terms of any proposed modification of the trust's governing instrument;
- (3) A blacklined version of the proposed modified trust instrument ~~or other appropriate document~~ indicating plainly in what respect the proposed modified trust instrument differs from the current trust instrument;

(4) A clean version showing how the proposed modified trust instrument will read if the consent petition is granted;

- (5) Any orders relating to the trust instrument;
- (6) A family tree or other document showing the relationship to the trustor of those having a beneficial interest in the trust; and

(7) Consents or statements of non-objection to the relief sought in the petition from all whose interest in the trust is affected by the petition, which may include, but shall not be limited to, consents from:

(i) Trustees and other fiduciaries, unless they have otherwise signified their consent or non-objection to the petition by acting as a petitioner or accepting a fiduciary position;

(ii) Trust beneficiaries, who will generally be those with a present interest in the trust and those whose interest in the trust would vest, without regard to the exercise or non-exercise of a power of appointment, if the present interest in the trust terminated on the date the petition is filed;

(iii) The trustor of the trust, if living; and

(iv) All other persons having an interest in the trust according to the express terms of the trust instrument (such as, but not limited to, holders of powers and persons having other rights, held in a nonfiduciary capacity, relating to trust property).

Rule 101 in its entirety shall now provide:

(a) The party submitting the consent petition shall file contemporaneously an appendix of exhibits containing all documents relevant to the Court's review of the petition, including but not limited to:

- (1) The current trust instrument;
- (2) The terms of any proposed modification of the trust's governing instrument;
- (3) A blacklined version of the proposed modified trust instrument indicating plainly in what respect the proposed modified trust instrument differs from the current trust instrument;
- (4) A clean version showing how the proposed modified trust instrument will read if the consent petition is granted;
- (5) Any orders relating to the trust instrument;
- (6) A family tree or other document showing the relationship to the trustor of those having a beneficial interest in the trust; and
- (7) Consents or statements of non-objection to the relief sought in the petition from all whose interest in the trust is affected by the petition, which may include, but shall not be limited to, consents from:
 - (i) Trustees and other fiduciaries, unless they have otherwise signified their consent or non-objection to the petition by acting as a petitioner or accepting a fiduciary position;
 - (ii) Trust beneficiaries, who will generally be those with a present interest in the trust and those whose interest in the trust would vest, without regard to the exercise or non-exercise of a power of appointment, if the present interest in the trust terminated on the date the petition is filed;
 - (iii) The trustor of the trust, if living; and
 - (iv) All other persons having an interest in the trust according to the express terms of the trust instrument (such as, but not limited to, holders of powers and persons having other rights, held in a nonfiduciary capacity, relating to trust property).

IT IS FURTHER ORDERED that the Court of Chancery Rule 104 shall be amended by substituting in its entirety the following language for existing Section XII, Rule 104, effective

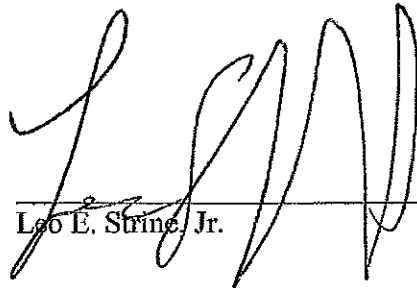
December 1, 2012.

Rule 104. Consent petition proposed orders and application of rules.

(a) The party submitting the consent petition shall file contemporaneously a separate order for each request sought in the consent petition. Proposed orders for multiple individuals, beneficiaries, or other interested parties are not permissible and a separate proposed order for each individual, beneficiary, or interested party must be submitted with the consent petition. The initial filing fee for a consent petition will include the cost of filing one proposed order. If more than one proposed order is submitted with a consent petition, an additional fee equal to the fee charged for filing one proposed order shall be charged for each additional proposed order submitted.

(b) Rules 100 through 104 of Section XII shall apply to any matter before the Court of Chancery in which the relief sought includes a modification of a trust, whether by means of a consent petition, civil action, court approved settlement or otherwise. For purposes of this rule, "modification of a trust" shall not include the severance or division of a trust, the merger of a trust, a distribution from a trust, or the appointment of a fiduciary of a trust if, by the terms of the

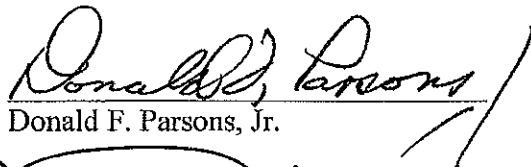
trust instrument or applicable law, such action is permissible without court intervention, unless the parties seek court approval of such action.

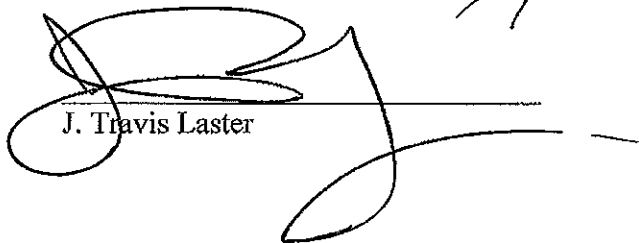


Leo E. Strine, Jr.

Respectfully advised,

John W. Noble



Donald F. Parsons, Jr.

J. Travis Laster

Sam Glasscock, III

trust instrument or applicable law, such action is permissible without court intervention, unless the parties seek court approval of such action.

Leo E. Strine, Jr.

Respectfully advised,



John W. Noble



Donald F. Parsons, Jr.

J. Travis Laster

Sam Glasscock, III

trust instrument or applicable law, such action is permissible without court intervention, unless the parties seek court approval of such action.


Respectfully advised,

Leo E. Strine, Jr.

John W. Noble

Donald F. Parsons, Jr.

J. Travis Laster



Sam Glasscock, III