11th Annual Delaware Trust Conference

October 25 – 26, 2016

"SILENCE IS GOLDEN" - THE BEST WAY TO SETUP A QUIET TRUST

ROADMAP TO NAVIGATING THE ISSUES

and

PRE-MORTEM VALIDATION

By

Jocelyn Margolin Borowsky, Esq.

William H. Lunger, Esq.

Gregory J. Weinig, Esq.

I. Silent Trusts – General Background.

A. Default Law.

Delaware has not adopted Section 813 of the Uniform Trust Code ("UTC"), and instead, follows the common law with respect to the duty to inform and report. Under Delaware common law, in default of any contrary provision in the trust agreement, a trustee must communicate essential facts to a beneficiary, and furnish information to a beneficiary about the trust upon reasonable request. *McNeil v. McNeil*, 798 A.2d 503, 510 (Del. 2002). The existence of the trust, its basic terms and that a person is a current beneficiary are essential facts. *Id*. The prevailing practice in Delaware, based in part on *McNeil*, is for the trustee to send notice to the current beneficiary of the beneficiary's interest in the trust when the beneficiary reaches the age of majority (18 years).

B. Silent Trusts in Delaware.

Unfortunately, the default law of notice can lead to possible negative effects for young (or otherwise susceptible) beneficiaries. What happens when an eighteen (18) year old beneficiary learns that he or she has a large trust set aside for his or her primary benefit? As a result, under Delaware law the settlor of a trust may waive the duty to inform and report, for a period of time, by the terms of the trust agreement. 12 *Del. C*. Section 3303(a). Section 3303 was amended in 2015 to provide a set of guidelines for determining the period of time during which the duty to inform and report is waived. The guidelines provide that the period of time may be related to [i] the age of a beneficiary, [ii] the lifetime of each settlor and/or spouse of a settlor, [iii] a term of years or specific date, or [iv] a specific event that is certain to occur. 12 *Del. C*. Section 3303(c). These guidelines are not exclusive or mandatory, but are intended to be illustrative of the types of periods of time that could be enforceable.

C. Surrogates under Delaware law.

The Delaware Code was amended in 2015 to permit a surrogate (a "designated representative") to represent and bind beneficiaries during the time that the duty to inform and report is waived (referred to herein as the "confidential period"). 12 *Del. C*. Section 3303(d). If a designated representative is appointed, the designated representative shall represent and bind a beneficiary for the duration of the confidential period. The representation extends to judicial proceedings and non-judicial matters, as defined in a new subsection (e) of Section 3303. The designated representative is deemed to act in a fiduciary capacity, unless otherwise provided in the trust agreement, and has standing to sue on behalf of the beneficiary. A designated representative is a person who is described in the new definitional section of the Delaware Code, who delivers a written acceptance of the office to the trustee. 12 *Del. C*. § 3339. Under § 3339, the settlor can appoint a designated representative by [i] expressly appointing the designated representative under the terms of the trust agreement; [ii] appointing a person to represent and bind other beneficiaries in connection with any judicial proceeding or non-judicial matter, under the terms of the trust agreement; [iii] expressly granting the power to a person under the terms of the trust agreement to appoint a designated representative; or [iv] if living, by separately appointing a designated representative. Similar to UTC § 813, a beneficiary may separately appoint a designated representative to act on his or her behalf.

II. Common Questions Regarding Silent Trusts.

A. General Questions Regarding the Revised Silent Trust Statute and New Designated Representative Statute.

(1) Can the settlor appoint a designated representative under Section 3339 even if the settlor has appointed a different person as a designated representative under an existing irrevocable trust?

(2) Section 3339(a)(5) states that a designated representative may be a person appointed by the settlor to act as designated representative for 1 or more beneficiaries. Does this provision apply even if the trust instrument doesn't provide for a "quiet" period in which notice to a beneficiary or beneficiaries is restricted or eliminated? Even if the trust instrument does provide for a quiet period, doesn't this provision allow a settlor to, on his or her own, create a brand new fiduciary position for the trust that did not previously exist?

(3) Can a beneficiary make the appointment of a designated representative irrevocable?

(4) When a trust is migrated into Delaware, is it reasonable for a trustee to take the position that the trust may become "silent" (if so desired) without the need for modification since Delaware law will govern the administration?

(5) Can a settlor allow a beneficiary to receive some information about a trust, such as the fact that he or she has a beneficial interest, but indefinitely preclude that beneficiary from other information, like the identity of other beneficiaries or the principal balance of the trust? What if there is a designated representative for that beneficiary?

(6) Does the Designated Representative have authority to bind beneficiaries if the trust is not a silent trust, in the case where the trust was in existence prior to enactment of the amendments?

(7) Does the Designated Representative have authority to bind beneficiaries if the trust is not a silent trust, in the case where the trust was executed after enactment of the amendments?

(8) Can the Designated Representative be another beneficiary of the trust who may have a presumed conflict of interest under § 3547?

B. Questions Regarding Internal Policies for Handling Silent Trusts.

(1) What internal safeguards do/should corporate trustees put in place to minimize accidental disclosure to the beneficiaries during the silent period?

(a) drafting stage;

(b) intake stage; and

(c) administrative stage.

(2) What is a trustee to say to a screened-off beneficiary who directly asks whether he or she is a beneficiary?

(3) Should Designated Representatives who were in office prior to the amendment of the statute affirm their acceptance of the office?

C. Questions About Enforceability/Liability.

(1) What are the risks in decanting a trust that is not silent into a silent trust? Are other methods available?

(2) Would it be effective if a trust's governing instrument specified that a Designated Representative was not to be a fiduciary?

(3) Are the various safe harbors set forth in Section 3303(c) still subject to a reasonableness standard? For example, Section 3303(c)(2) allows notice to beneficiaries to be restricted for a period of time related to the lifetime of the settlor. If a settlor lives until 100 years old, does this mean the notice to beneficiaries can effectively be restricted until such beneficiaries are 70-80 years old? Would a court enforce such a restriction?

(4) Does the disclosure of information to beneficiaries when the trustee receives a direction from a third party (e.g. trust protector) satisfy the "period of time" condition set forth in Section 3303(a)(1)? Is the lifetime of a beneficiary a period of time?

(5) Can you provide any general guidance as to what constitutes a "reasonable period" for which a trust may remain silent? Does it need to be reasonable?

D. Questions Arising from Inadequate Drafting.

(1) Trust agreement states that the trustee is not to send trust statements while a Trust Protector ("TP") is serving but beneficiary will be told about trust at age 35. If TP is then serving does this mean that trustee cannot send statements to the beneficiary after age 35?

(2) Trust agreement provides that beneficiary has a right to request a distribution at age 30 but TP controls whether trustee can disclose existence of trust. How can beneficiary exercise his/her right if trust is not disclosed?

(3) How should trustee deal with beneficiaries being informed at different times? Confidentiality agreement necessary? Is there a possible breach of duty of impartiality?

(4) What should trustee do if the trust agreement waives the duty to disclose but does not affirmatively direct the trustee not to disclose?

(5) What should trustee do if the trust agreement waives the duty to disclose but does not waive the duty to send a report upon request?

III. Delaware Code Section References for Silent Trusts.

§ 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 any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to:

(1) 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, as set forth in subsection (c) of this section;

(2) The grounds for removal of a fiduciary;

(3) The circumstances, if any, in which the fiduciary must diversify investments; and

(4) 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 wilful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful misconduct. The rule that statutes in derogation of the 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.

(b) In furtherance of and not in limitation of the provisions of subsection (a) of this section, the terms of a governing instrument of a trust established and existing for religious, charitable, scientific, literary, or educational purposes or for noncharitable purposes shall not be modified by the court to change the trust's purposes unless the purposes of the trust have become unlawful under the Constitution of this State or the United States or the trust would otherwise no longer serve any religious, charitable, scientific, literary, educational, or noncharitable purpose, in which case the court shall proceed in the manner directed by § 3541 of this title. A settlor may maintain an action to enforce a charitable or noncharitable trust under this section and may designate a person or persons, whether or not born at the time of such designation, to enforce a charitable or noncharitable trust under this section. For purposes of this subsection, a "noncharitable purpose'' is a purpose within the meaning of § 3555 or § 3556 of this title.

(c) The terms of a governing instrument may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of the beneficiary's interest in a trust for a period of time, including but not limited to:

(1) A period of time related to the age of a beneficiary;

(2) A period of time related to the lifetime of each trustor and/or spouse of a trustor;

(3) A period of time related to a term of years or specific date; and/or

(4) A period of time related to a specific event that is certain to occur.

(d) During any period of time that a governing instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary's interest in a trust, unless otherwise provided in the governing instrument, any designated representative (as defined in § 3339 of this title) then serving shall represent and bind such beneficiary for purposes of any judicial proceeding and for purposes of any nonjudicial matter, and shall have the authority to, and is a proper party to, initiate a proceeding relating to the trust before a court or administrative tribunal on behalf of any such beneficiary.

(e) For purposes of this section, "judicial proceeding'' means any proceeding before a court or administrative tribunal, including but not limited to, a proceeding that involves a trust whether or not the administration of the trust is governed by the laws of this State, and "nonjudicial matter'' includes, but is not limited to, the grant of consents, releases or ratifications pursuant to § 3588 of this title and the receipt of a report for purposes of measuring the limitation period described in § 3585 of this title.

§ 3339 Designated Representatives of Trusts

(a) For purposes of this title, the term "designated representative'' means a person who is authorized to act as a designated representative in the manner described in at least 1 of the following paragraphs of this subsection (a) and who delivers to the trustee such person's written acceptance of the office of designated representative. A person who is authorized to act as a designated representative in the manner described in this subsection:

(1) Is expressly appointed under the terms of a governing instrument as a designated representative or by reference to this section;

(2) Is authorized or directed under the terms of a governing instrument to represent or bind 1 or more beneficiaries in

connection with a judicial proceeding or nonjudicial matter, as those terms are defined in § 3303(e) of this title;

(3) Is a person appointed by 1 or more persons who are expressly authorized under a governing instrument to appoint a person who is described in paragraph (a)(1) or (2) of this section;

(4) Is a person appointed by a beneficiary to act as a designated representative of such beneficiary; and/or

(5) Is a person appointed by the trustor to act as designated representative for 1 or more beneficiaries.

(b) A designated representative shall be presumed to be a fiduciary.

IV. Pre-Mortem Validation.

Loud Trusts (The Opposite of Silent Trusts):
Pre-Mortem Trust Contests Under 12 *Del. C.* § 3546

A. History of Delaware's Statute (12 *Del. C.* § 3546).

(1) The statute began as a statute merely measuring when, after the death of a trustor, a trust that had been revocable at the trustor's death could be challenged. Its measuring period began only "Upon the death of the trustor."[1] Thus, that previous version of the statute could not be used to force a challenge of a revocable trust while the trustor was still alive. It was therefore similar to the current Uniform Trust Code provision.[2]

(2) 2003: key changes.

(a) The qualifier "Upon the death of the trustor" was removed, so that the language merely read: "A judicial proceeding to contest whether a trust was validly created may not be initiated later than (four possible measuring periods)."[3] This is the most important change – it meant that the statute could now be used for pre-mortem contests as well as post-mortem ones.

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[1] 12 *Del. C.* § 3546(a) (2000), as enacted at 72 Del. Laws, ch. 388, § 2. For the full version of the statute in 2000 (and also an illustration of the changes to the statute in later years), see Appendix I.

[2] UTC § 604. To see just how similar the 2000 version of 12 *Del. C.* § 3546 and the current version of UTC § 604 are, see Appendix II, which shows the UTC provision as the underlying document with the original version of the Delaware statute as the new document. Both were formally enacted at around the same time (the Delaware statute on June 30, 2000, and the UTC at its annual conference held from July 28-August 4, 2000). As an aside, though there does not seem to be much doubt that the UTC provision can be used only to trigger contests post-mortem (and not pre-mortem), the UTC provision does not state that as clearly as it might.

[3] 12 *Del. C.* § 3546(a) (2003), as enacted at 74 Del. Laws, ch. 81, § 5. See Appendix I, illustrating 2003 changes to statute.

(b) Because of the ability to trigger pre-mortem contests, the statute included a limitation of liability for trustees. Trustees thus had (and have) no duty to give a pre-mortem notice, and no liability for failing to do so.[4]

(c) The statute amended one of the four measuring periods for the deadline to contest a trust, further clarifying that challenges to any trust could be triggered during the trustor's lifetime. The wording changed from "If the trust was specifically referred to in the trustor's last will…" to "If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will…"[5] The addition of that distinguishing language was necessary because other portions of the statute now could also be used to trigger challenges to irrevocable trusts before the trustor's death.

The above 2003 legislative history — and particularly the specific changes that allowed the statute to be used to trigger a pre-mortem contest — should give the trust professional even greater confidence about using the statute to do so.

(3) 2005 changes: further clarifications.

(a) Amendments to trusts were included expressly, to clarify that a pre-mortem contest could be triggered as to an amendment to a trust instrument as well.[6]

(b) A clarification was added that "For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person."[7]

(4) 2011 change: the statute's application to irrevocable trusts was further clarified, by changing the wording "trust, or any amendment thereto" to "revocable trust or any amendment thereto, or an irrevocable trust."[8]

(5) 2014 change: a new subsection (d) was added to the statute to clarify that notice sufficient to trigger the 120-day period to challenge a trust will be deemed given to a person when given to the person's virtual representative[9] (under Delaware's virtual representation statute[10]).

(6) 2015 change: in the wake of the *Ravet* decision (covered later in this outline), the phrase "it shall be presumed that delivery to the last known address of such person constitutes

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[4] 12 *Del. C.* § 3546(a)(1) (2003), as enacted at 74 Del. Laws, ch. 81, § 5.
[5] 12 *Del. C.* § 3546(a)(3) (2003), as enacted at 74 Del. Laws, ch. 81, § 5.
[6] 12 *Del. C.* § 3546(a) (2005), as enacted at 75 Del. Laws, ch. 97, § 7. See Appendix I, illustrating 2005 changes to statute.
[7] 12 *Del. C.* § 3546(a)(1) (2005), as enacted at 75 Del. Laws, ch. 97, § 7.
[8] 12 *Del. C.* § 3546(a) (2011), as enacted at 78 Del. Laws, ch. 117, § 9. See Appendix I, illustrating 2011 changes to statute.
[9] 12 *Del. C.* § 3546(d) (2014), as enacted at 79 Del. Laws, ch. 197, (part of) § 2. See Appendix I, illustrating 2014 changes to statute.
[10] 12 *Del. C.* § 3547.

receipt by such person" was clarified to "it shall be presumed that notice mailed or delivered to the last known address of such person constitutes receipt by such person."[11]

B. Breaking down how the current statute works:

§ 3546. Limitation on action contesting validity of trusts.

> (a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust, was validly created may not be initiated later than the first to occur of:
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> > (1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery notice mailed or delivered to the last known address of such person constitutes receipt by such person.
>
> > (2) Two years after the trustor's death;
>
> > (3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or
>
> > (4) The date the person's right to contest was precluded by adjudication, consent or other limitation.
>
> (b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding

[11] 12 *Del. C.* § 3546(a)(1) (2015), as enacted at 80 Del. Laws, ch. 153, (part of) § 4. See Appendix I, illustrating 2015 changes to statute. The 2015 iteration of the statute — which is the current iteration as of 2016 — actually reads "delivery notice mailed or delivered" rather than "notice mailed or delivered" as stated above, but comparing the draft bill sent to the legislature versus the actual bill enacted by the legislature confirms that the word "delivery," which had appeared in the statute's previous iteration, was supposed to be deleted (and, in fact, was to be replaced with the words "notice mailed or delivered"). In other words, the word "delivery" is a typographical error, and is expected to be corrected in 2017.

to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

(d) For purposes of paragraph (a)(1) of this section, a person is deemed to have been given any notice that has been given to any other person who under § 3547 of this title may represent and bind such person.

(1) The current version of section 3546 expressly states that the limitation period applies to "a revocable trust or any amendment thereto, or an irrevocable trust."[12] Separate statutes (of more recent vintage than section 3546) control pre-mortem will contests and pre-mortem exercises of a power of appointment.[13]

(2) The earliest of four limitation periods applies to time-bar the would-be contestant's suit. At least one — and in certain circumstances, surely a second — can be used pre-mortem.

(a) 120 days after written notice to the would-be contestant.[14]

(i) Such a notice must disclose the trust's existence, and state the trustee's name and address, whether the would-be contestant is a beneficiary, and the time allowed for contesting the trust under this statute.

(ii) Notice is given when received by the would-be contestant, and "absent evidence to the contrary, it shall be presumed that notice mailed or delivered to the last known address of such person constitutes receipt by such person."[15]

(3) "The date the person's right to contest was precluded by adjudication, consent or other limitation."[16] Note that this element of the statute can also be used to bar contests after the trustor's death.

(a) "Adjudication" presumably means something like res judicata (claim preclusion) or collateral estoppel (issue preclusion). "Consent" is presumably self-explanatory. But what does "other limitation" mean? Generally speaking, arguably it refers to the sorts of

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[12] 12 *Del. C.* § 3546(a).

[13] *See* 12 *Del. C.* §§ 1311 (addressing pre-mortem will contests and pre-mortem contests of exercises of powers of appointment within a will or codicil) and 1312 (addressing pre-mortem contests of exercises of powers of appointment within instruments other than a will or codicil). Section 1312 largely mirrors section 3546, while section 1311 somewhat differs from both, mainly due to the different body of laws governing wills. Both statutes were enacted in 2015.

[14] 12 *Del. C.* § 3546(a)(1).

[15] Again, the typographical error "delivery," which is expected to be corrected in 2017, has been deleted from this quote.

[16] 12 *Del. C.* § 3546(a)(4).

equitable defenses that can bar a lawsuit based on elements such as knowledge, notice, timing, or some combination thereof.

(b) One example of "other limitation" is the equitable defense of laches. This defense has been used by the Delaware Court of Chancery to time-bar a suit by a would-be contestant — though post-mortem, and without reference to section 3546 or the "adjudication, consent or other limitation" language. In *Matter of Moor*,[17] the Court of Chancery used facts supporting the application of the equitable defense of laches as "[t]he most compelling justification for upholding" the trustor's trust instruments.

(i) In *Moor*, the contestant challenged his stepmother's ability to amend a trust (where its title indicated revocability, one of its recitals indicated irrevocability, and it contained no express statement of irrevocability).

(ii) After finding that the trustor's reserved powers to (among other things) withdraw any and all assets at any time meant that the trust was revocable, the Court also applied laches against the contestant to bar his suit challenging the trust after her death in April, 2002. Laches is a defense applied against a litigant who knows of his claim or right, and whose unreasonable delay in bringing that claim, or maintaining that right, prejudices the party against whom that claim or right is asserted.[18]

(iii) Despite contending that the instrument originally creating the trust had been irrevocable, the challenger had signed (under penalty of perjury) a later amendment to the original instrument (in his capacity as an appointed successor trustee under that amendment, which appointment was later revoked in still another amendment). The amendment that the challenger had signed expressly stated that the trust was revocable.

(iv) The Court of Chancery found that the challenger had known, since at least the date of the amendment he signed, that the trustor believed her trust to be fully revocable — thus satisfying the "knowledge of the claim" element of laches.

(v) The challenger then waited thirteen years and, most critically, until after the trustor's death, to bring his challenge — thus satisfying the "unreasonable delay in bringing the claim, causing prejudice to the person against

[17] Del. Ch., C.A. No. 2231-S (Strine, V.C., June 8, 2005) at pp. 35-39. A copy of this decision is included at the end of these materials. (Note: this is one of two decisions issued in this case on the same day. This decision is not reported on Westlaw, but its Lexis citation is 2005 Del. Ch. LEXIS 88. The other decision, addressing the effectiveness of a tangible personal property memorandum, is found at 879 A.2d 648, 2005 WL 2000459, and 2005 Del. Ch. LEXIS 78.)

[18] *See, e.g., Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000).

whom the claim is asserted" element of laches. This "prejudice" element of laches is presumed when a key party has died.[19]

(vi) The Court of Chancery played out what would have happened had the challenger raised his claim before the trustor's death: she could then have withdrawn all the assets from the trust (as she was allowed to do) and put them into a new trust she created, whose governing instrument would clearly provide for its revocability. The Court found it very significant that, because the challenger had not raised this claim before her death, she was foreclosed from taking these steps that she could otherwise have easily taken.

(c) While it is important to note that Court of Chancery did not specifically tie its use of laches to the "adjudication, consent or other limitation" language of section 3546,[20] the way the Court applied the laches defense in *Moor* seems to fit very nicely with the "other limitation" concept in the statute.

(d) Accordingly, other possible defenses under Delaware law having a "notice," "knowledge," and/or "timing" element to them, or otherwise potentially fitting within the "other limitation" concept under section 3546, include:

(i) Acquiescence. This differs from laches, as the proponent of an acquiescence defense does not need to demonstrate that she does not know the truth or that she relied on the other party's failure to object to her actions. Acquiescence has been defined in one case as:

> When a man with full knowledge, or at least sufficient notice or means of knowledge of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with his repudiation, or lies by for a considerable time, and knowingly and deliberately permits another

[19] *Fike, supra*; *Cooch v. Grier*, 59 A.2d 282, 287 (Del. Ch. 1948).

[20] Incidentally, because the decedent in *Moor* died in April, 2002, the suit challenging her will and trust instruments was filed in November 2002 — in other words, before the 2003 changes to section 3546 that modified the language from "consent, adjudication or limitation" to "consent, adjudication or other limitation." See Appendix I, illustrating 2003 changes to statute. The addition of the word "other" in 2003 would seem to have greatly expanded the statute's utility. "Limitation" suggests a specific statute of limitations defense, while "other limitation" instead suggests that any other defense limiting the ability of a challenger to file suit could be sufficient to trigger that subsection. In any event, even putting aside possible retroactivity issues (because the case was filed before the "other limitation" change was made, although that change occurred before briefing), whether the laches defense would have fallen within the ambit of the statute's "other limitation" language was not briefed or argued in that case — because although the timing elements, and the challenger's knowledge, were stressed in the briefing, it was the Court of Chancery itself that used those elements to apply the laches defense (albeit without tying it to the "other limitation" language in the statute).

> to deal with property, or incur expense, under the belief that the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.[21]

(ii) Equitable estoppel. Equitable estoppel may be defined as "a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it *otherwise would have been entitled."*[22]

(iii) Waiver. This is "the voluntary and intentional relinquishment of a known right."[23] However, this is presumably very similar, or identical, to "consent," which is already specifically mentioned in section 3546.

(iv) Consider what other kinds of equitable defenses may be available as well.

(e) Of course, equitable defenses can be raised in almost any Court of Chancery action. The key here, though, is that section 3546's "other limitation" language is practically inviting the use of equitable defenses to bar a trust contest, so it is worth focusing on the candidates (among the many types of equitable defenses) that will best fit what the "other limitation" language seems to contemplate.

(f) Finally, it is worth repeating here that this "adjudication, consent or other limitation" element under section 3546 can *also* be used to bar contests *after* the trustor's death.

(4) The other two limitation periods under section 3546 apply *only* after the trustor's death:

(a) Two years after the trustor's death.[24]

(b) For revocable trusts referred to in the trustor's last will, the deadline for a post-mortem[25] (and post-proof[26]) will contest[27] — which date is "within 6 months after the entry of the order of probate."[28]

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[21] *Staples v. Billing*, 1994 WL 30548 at *11-12 (Del. Ch.).
[22] *Genencor Intern., Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 28, at 453 (2000)) (emphasis in original is deleted here).
[23] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982).
[24] 12 *Del. C.* § 3546(a)(2).
[25] As stated, pre-mortem probate is permitted under 12 *Del. C.* § 1311. That proceeding would not trigger this limitation period under this statute.
[26] It is also possible in Delaware to contest a will after death, but before the will is proved. This proceeding is called a caveat, and in this era of self-proved wills, it comes up only occasionally in Delaware. The deadline for a caveat proceeding is the completion of proof of the will. 12 *Del. C.* § 1308(a) (a caveat proceeding may be commenced "at any time prior to the entry of an

Delaware law requires that any "document purporting to be a last will and testament and intended to take effect upon the death of the testator therein named" must be filed with the appropriate county's Register of Wills within ten days of learning of the testator's death.[29] Merely delivering a will, however, without petitioning for administration as well, will not result in an order of probate automatically issuing. Fortunately, the New Castle County Register of Wills will enter an order of probate upon written request, even if administration is not also being sought; the other two Delaware counties would surely follow New Castle County's lead. Thus, after a trustor's death, promptly filing a will that refers to the trust with the appropriate county's Register of Wills, and simultaneously requesting in writing that an order of probate be issued, will start the running of the six-month deadline to challenge that will — and, therefore, by extension, the six-month deadline to challenge any trust referenced in that will.

C. The *Ravet* decision.

(1) Summary: to date, this is the only case in Delaware addressing pre-mortem trust contests. The Court of Chancery applied the statute and found that the contestant's suit was time-barred.[30] The Delaware Supreme Court affirmed the decision without an opinion.

(2) Facts and Issue: The contestant-petitioner filed an action challenging his mother's trust, based on an allegation of undue influence, evidently on July 26, 2012. The statute contemplates that if a suit to challenge a trust is filed more than 120 days after the contestant receives notice (within the meaning of the statute) of the trust, the suit is time-barred. Thus, if the petitioner had the requisite notice more than 120 days before he filed suit on July 26, 2012, his suit was time-barred. Measuring the 120-period backwards from that date, if he received notice on or after March 28, 2012, his suit was not time-barred. The issue, therefore, was whether the petitioner had notice by or before March 27, 2012 —or, as the Court of Chancery phrased it, March 27, 2012 was "the last day on which such notice would effectively time-bar this action" under the statute.

(3) More specifically, concerning the notice issue, the challenger asserted that the statutory language in question at that time — "For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person."[31] — meant that if he could proffer *any* evidence at all that he had not received notice by March 27, 2012, his action would not be time-barred. The trustee, on the other hand, asserted that the challenger instead merely had to show that the notice was not delivered to the challenger's last known address. Put differently, the challenger contended that

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order of probate"). But like a pre-mortem probate proceeding, a caveat proceeding would not trigger this limitation period under this statute.

[27] 12 *Del. C.* § 3546(a)(3).

[28] 12 *Del. C.* § 1309(a).

[29] 12 *Del. C.* § 1301(a).

[30] *Matter of Ravet*, Del. Ch., C.A. No. 7743-VCG (Glasscock, V.C., June 4, 2014). A copy of this decision is included at the end of these materials. Its Westlaw and Lexis citations are 2014 WL 2538887 and 2014 Del. Ch. LEXIS 98, respectively.

[31] 12 *Del. C.* § 3546(a)(1) (2005), as enacted at 75 Del. Laws, ch. 97, § 7.

"absent evidence to the contrary" modified the concept of his receipt of the notice generally, such that any evidence he could muster to suggest that he had not received the notice would be sufficient to overcome the statutory presumption, while the trustee contended that the phrase instead modified only the concept of whether the notice was in fact delivered to the challenger's last known address.

(4) The trustee's evidence of receipt was that: (1) the notice was mailed, via first class mail, to the challenger's last known address and his P.O. Box on February 23, 2012; (2) the notice was also mailed, via certified mail, return receipt requested, to those same two addresses on that same date, but both returned unclaimed after delivery was attempted twice and two package slips were left for the challenger; and (3) the notice was overnighted to the challenger and delivered on March 27, 2012.

(5) The court, in an earlier bench ruling, held that the challenger's raw statements that he did not receive any of these notices was not credible, because too many mailings, notices of certified mailings, and other deliveries had to go missing to tally with the challenger's claims. The court therefore ruled in favor of the trustee.

(6) The challenger filed various motions to attempt reargument, introduce new evidence, and the like. In the written opinion addressing these motions, the court held that in this particular case, it did not matter whether "absent evidence to the contrary" modified overall receipt or specific delivery to the last known address — because either way, the challenger's evidence had to be credible, which it was not. The challenger also contended that his post-trial discovery of envelopes postmarked March 26, 2012, but containing letters from the trustee's counsel dated February 23, 2012, somehow impeached the testimony of the trustee's counsel. The court, however, instead found that the challenger's receipt of these mailings in fact impeached the challenger's earlier testimony that he had never received *any* mailings relating to the trust (and merely evidenced that the trustee's counsel had sent mailings *in addition to* those about which the trustee's counsel had testified).

(7) The Court of Chancery therefore rejected the challenger's various motions and, by extension, reaffirmed its earlier bench rulings.

(8) On appeal, the Delaware Supreme Court affirmed the Court of Chancery's decision, without issuing a substantive opinion.[32]

D. Takeaways.

(1) Consider using section 3546's pre-mortem notice procedure as to any family members (or as to any others who might otherwise have standing to challenge documents, or who might have potential claims for other reasons) whom the trustor feels could be difficult.

(2) When providing notices under the statute, be scrupulous about record-keeping, just as the trustee's counsel were in the *Ravet* case.

[32] *Ravet v. The Northern Trust Co. of Delaware*, Del. Supr., No. 369, 2014 (Holland, J., Feb. 12, 2015). A copy of this (non-substantive) decision is included at the end of these materials. Its Westlaw citation is 2015 WL 631588.

(3) Whether or not the notice procedure was used pre-mortem, be creative in using defenses against challengers that might fit within the "adjudication, consent or other limitation" language under section 3546. Pay particular attention to facts tending to show that the challenger had notice or other knowledge of key facts, as well as facts tending to show delay, inaction, active consent, or the like. Put differently, ask: "What did the challenger know, and when did he know it?"

APPENDIX I

APPENDIX I: CHANGES TO 12 *DEL. C.* § 3546 OVER TIME

ORIGINAL VERSION (2000):

Section 3546. Limitation on Action Contesting Validity of Revocable Trusts

(a) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, a judicial proceeding to contest the validity of the trust may not be initiated later than the first to occur of:

(1) Ninety days after the date the trustee notified the person of the trust's existence, of the trustee's name and address, of whether the person is a beneficiary, and of the time allowed for initiating a judicial proceeding to contest the trust;

(2) Two years following the trustor's death;

(3) If the trust was specifically referred to in the trustor's last will, the time in which a petition for review of the will could be filed; or

(4) The date the person's right to contest was precluded by adjudication, consent or limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

2003 CHANGES:

§ 3546. Limitation on action contesting validity of trusts.

(a) A judicial proceeding to contest whether a trust was validly created may not be initiated later than the first to occur of:

1. One hundred twenty days after the date of the trustee notified the person of the trust's existence, of the trustee's name and address, of whether the person is a beneficiary, and of the time allowed for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have a duty to provide any such notice and no trustee shall have any liability under the governing instrument or to any third party for the trustee's failure to provide any such notice;

2. Two years after the trustor's death;

3. If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

4. The date the person's right to contest was precluded by adjudication, consent or other limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

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2005 CHANGES:

§ 3546. Limitation on action contesting validity of trusts.

(a) A judicial proceeding to contest whether a trust, or any amendment thereto, was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

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2011 CHANGES:

§ 3546. Limitation on action contesting validity of trusts.

(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust, was validly created may not be initiated later than the first to occur of:

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(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

2014 CHANGES:

§ 3546. Limitation on action contesting validity of trusts.

(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust, was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

(d) For purposes of paragraph (a)(1) of this section, a person is deemed to have been given any notice that has been given to any other person who under § 3547 of this title may represent and bind such person.

2015 CHANGES (NOTE: THIS IS ALSO THE CURRENT VERSION):

§ 3546. Limitation on action contesting validity of trusts.

(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust, was validly created may not be initiated later than the first to occur of:

(1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery notice mailed or delivered to the last known address of such person constitutes receipt by such person.

(2) Two years after the trustor's death;

(3) If the trust was revocable at the trustor's death and the trust was specifically referred to in the trustor's last will, the time in which a petition for review of a will could be filed under this title; or

(4) The date the person's right to contest was precluded by adjudication, consent or other limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

(d) For purposes of paragraph (a)(1) of this section, a person is deemed to have been given any notice that has been given to any other person who under § 3547 of this title may represent and bind such person.

APPENDIX II

APPENDIX II: COMPARISON OF UTC § 604 (AS THE "ORIGINAL DOCUMENT") WITH 12 *Del. C.* § 3546 AS IT WAS FIRST ENACTED IN 2000 (AS THE "NEW DOCUMENT")

Section 3546. Limitation on Action Contesting Validity of Revocable Trusts

(a) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, a judicial proceeding to contest the validity of the trust may not be initiated later than the first to occur of:

(1) Ninety days after the date the trustee notified the person of the trust's existence, of the trustee's name and address, of whether the person is a beneficiary, and of the time allowed for initiating a judicial proceeding to contest the trust;

(2) Two years following the trustor's death;

(3) If the trust was specifically referred to in the trustor's last will, the time in which a petition for review of the will could be filed; or

(4) The date the person's right to contest was precluded by adjudication, consent or limitation.

(b) Upon the death of the trustor of a trust that was revocable at the time of the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending judicial proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days of such notice.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

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MOOR OPINION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE LAST WILL AND TESTAMENT AND TRUST AGREEMENT OF BETTY R. MOOR a/k/a ISABELA ELIZABETH MOOR, DECEASED.	)))))	C.A. No. 2231-S

MEMORANDUM OPINION

Date Submitted: April 29, 2005
Date Decided: June 8, 2005

David Nicol Williams, Esquire, and John Legaré Williams, Esquire, THE WILLIAMS LAW FIRM, P.A., Wilmington, Delaware, *Attorneys for Petitioners Robert Cooper Moor, Jr. and Marilyn M. Moor.*

Charles J. Durante, Esquire, and Gregory J. Weinig, Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware, *Attorneys for Respondents April L. Hudson and Richard S. McCann, Esq.*

STRINE, Vice Chancellor

This opinion denies an untimely motion for reargument filed by the stepson and granddaughter of the settlor of various trusts. Having now moved for reargument three times, each time in a tardy fashion, I conclude that the stepson is too late. So is his daughter, who belatedly joined him as a co-petitioner and presents identical arguments. As important as the untimeliness of their joint motion is the failure of the petitioners to demonstrate that the court erred in previous ruling: 1) that the settlor had the power to amend a key trust to substantially disinherit the stepson, and 2) that the stepson's decision to wait until after the testator's death to claim that she lacked the power to amend her trust constituted laches. Therefore, their motion for reargument is denied in all respects.

I. Factual Background

Betty R. Moor ("Mrs. Moor") died on April 5, 2002. Mrs. Moor was survived by her stepson, petitioner Robert Cooper Moor, Jr. ("Cooper"), and his daughter, Mrs. Moor's granddaughter, Marilyn Moor ("Marilyn"),[1] but predeceased by her stepdaughter, Cooper's sister, Judith Teal ("Judith"). Mrs. Moor left a valid will (the "1998 Will"), along with numerous other instruments.

Mrs. Moor's overall approach to estate planning can be fairly described as unusually active. Over the years, she created several trusts and as many as five wills, and executed numerous other estate planning documents, including amendments to and full revisions of her various trusts and codicils to her wills. For present purposes, the most important among Mrs. Moor's various estate planning documents are: 1) a trust that she created in 1985 (the "Main Trust"); 2) an amendment to the Main Trust executed in 1989

[1] Cooper and Marilyn shall be referred to collectively as "the Moors" in this opinion.

(the "1989 Main Trust Amendment"); 3) a second trust specifically governing the disposition of a residence in the Bon Ayre development in Hockessin, Delaware (the "Residence Trust"); and 4) an amendment to the Residence Trust executed in 2001 (the "Residence Trust Amendment"). Most but not all of those instruments, by virtue of express choice of law clauses, are governed by the law of the state of Florida, where Mrs. Moor lived from 1982 to 2000.

Mrs. Moor's pattern of amending her estate planning documents reflects a strained relationship between Cooper and herself. From the inception of the Main Trust, Mrs. Moor contemplated an unequal division of her estate between Cooper and Judith. The original Main Trust instrument instructed that "sixty percent (60%) of the Trust assets be set aside and known as the "JUDITH TRUST," and the balance of forty percent (40%) of the said Trust assets shall be set aside and designated the "COOPER TRUST." The original Trust instrument also included the caveat that the trustees could withhold distributions to Cooper if he was unemployed or debilitated due to drug or alcohol abuse.

Mrs. Moor changed the allocation to the "Cooper Trust" over time. Mrs. Moor amended the Main Trust for the first time in 1989, apparently motivated by the birth of her granddaughter, Marilyn. The 1989 Main Trust Amendment reallocated Trust assets from the "Judith Teal Trust" and the "Cooper Trust" to the newly-created "Marilyn Trust" for the benefit of Marilyn Moor. Notably, Cooper acknowledged his awareness of the 1989 Main Trust Amendment, and Mrs. Moor's expectation that the Trust was subject to amendment, by signing the instrument that effected that amendment. Mrs. Moor amended the Main Trust again in 1993 following the death of Judith. The 1993

Amendment reallocated Trust assets from the "Judith Trust," which was deleted entirely, to the "Cooper Trust," increasing that allocation to eighty percent of the Trust assets.

In 1994, however, Mrs. Moor amended the Main Trust again to disinherit Cooper entirely, stating "I have amply taken care of him during my life on a regular basis, and he has failed to show the necessary appreciation for the monies given to deserve additional bequests hereunder." Mrs. Moor's final amendment to the Main Trust in 2002 granted Cooper only a specific bequest of $10,000, but included a clause that would disinherit him entirely if he challenged any of her estate planning instruments. At the time of Mrs. Moor's death, Cooper was also a beneficiary of the Residence Trust that Mrs. Moor created in 1998, under which he was granted a right to occupy the Bon Ayre residence for his lifetime, subject to his payment of current expenses. The Residence Trust was also subject to the no-contest clause of the Main Trust.

On November 12, 2002, Cooper initiated this lawsuit challenging many aspects of Mrs. Moor's estate planning instruments, as well as the administration of her estate. The respondents in this lawsuit include the co-executors of Mrs. Moor's estate — Mrs. Moor's niece, April Hudson,[2] and Mrs. Moor's attorney, Richard McCann — and several beneficiaries of the estate. Although Cooper was represented by counsel when he first filed this lawsuit, his counsel withdrew on June 12, 2003, and Cooper pressed on as a pro se litigant.[3]

[2] Cooper has argued that Ms. Hudson is not, in fact, Mrs. Moor's niece. The court need not and does not make any finding on this issue.

[3] The litigation of this case to date has been marked by a number of redundant and prolix filings, discovery disputes, confidentiality disputes, and departures from stipulated scheduling orders.

II. Litigation Background

A. The November 29, 2004 Hearing

This case was partially resolved by a bench opinion following oral argument on various motions before the court on November 29, 2004. The primary issues that were then considered were: 1) whether or not the Main Trust was revocable, and 2) whether Cooper's failure to pay current expenses on the Bon Ayre residence had caused a forfeiture of his interest in the Residence Trust.

As to the first issue, Cooper argued that the original Main Trust instrument executed by Mrs. Moor in 1985 created an irrevocable Trust, that the Trust was properly amended with the consent of all trustees and beneficiaries in 1989 but all amendments to the Trust after the 1989 Amendment were invalid, that the 1989 Amendment controls administration of the Trust, and that, in accordance with the 1989 Amendment, he was entitled to thirty percent of the Trust assets.

By contrast, the respondents argued that the Main Trust was fully revocable, that all amendments made by Mrs. Moor over the years were effective, and that Mrs. Moor's final amendment in 2002 controls administration of the Trust. The respondents also argued that Cooper's challenge to Mrs. Moor's estate planning documents had caused the forfeiture of his interest in the Main Trust, in accordance with the no-contest provision of that Trust.

Mostly, this has resulted from Cooper's abrasive, overzealous, and yet frequently tardy submissions. Although he has felt free to make hurtful accusations of serious wrongdoing by the respondents, Cooper has not been shy about asking for leeway from his adversaries and the court in excusing his own non-compliance with court rules.

As to the Residence Trust, the respondents argued that Cooper's failure to pay current expenses on the Bon Ayre residence terminated his interest in the Residence Trust, and that Cooper's challenge to Mrs. Moor's estate had violated the applicable no-contest provision, causing the forfeiture of his interest in that Trust. Cooper did not respond to the respondents' main arguments. Instead, he alleged that the trustees of the Residence Trust had withdrawn excessive funds from that Trust for the payment of estate taxes.

Cooper raised additional issues for the first time during oral argument. Although, technically, those issues were improperly raised, the court entertained them in consideration of Cooper's pro se status. Those issues included the failure of the trustees to distribute a Uniform Gift to Minors Account (the "UGMA Account") that Mrs. Moor established in 1994 for the benefit of Marilyn, and the effectiveness of a memorandum that Mrs. Moor had annexed to her Will.

I ruled from the bench on November 29 on the issues of revocability of the Main Trust and the status of the Residence Trust.

In brief, I held that, as to the Main Trust: 1) Mrs. Moor created a revocable Trust in 1985; 2) Mrs. Moor was entitled to amend the Main Trust, in accordance with the powers that she reserved for herself in the Main Trust instrument and in accordance with her intent as inferred through her course of conduct in frequently amending the Main Trust over the years; 3) all of the amendments made to that Trust were effective; 4) Cooper's participation in Mrs. Moor's amendment of the Main Trust in 1989 — particularly in light of the fact that he signed the instrument that effected that amendment

— and his failure to contest Mrs. Moor's power to amend the Trust during her lifetime constituted laches, which prevented him from contesting her power of amendment after her death; and 5) in accordance with Florida law, the no-contest provision of the Main Trust was unenforceable.

As to the Residence Trust, I held that: 1) both the Residence Trust and the 2001 Residence Trust Amendment are effective; 2) in accordance with Florida law, the no-contest provision applicable to the Residence Trust was unenforceable; 3) despite his failure to pay current expenses, Cooper should not yet forfeit his interest in the Bon Ayre residence;[4] and 4) Cooper's continued interest in the Residence Trust — and his occupancy of the Bon Ayre residence — are contingent upon his ongoing payment of current expenses.

The parties were instructed to submit a form of order implementing that bench ruling. The respondents' counsel submitted a form of order to the court on December 8, 2004. On the same day, however, Cooper filed a motion for reargument (the "December 8 Motion"), contending that the court's November 29 bench ruling misapprehended and misapplied relevant Florida law. Cooper hoped to persuade the court that Florida law supported his original argument that the Main Trust was irrevocable and that all amendments that followed the 1989 Main Trust Amendment were invalid.

[4] This ruling was the hardest to justify as a matter of pure legal reasoning, and I confess that it represents a desire by this court of equity to avoid reducing Cooper and his family to a state of homelessness. The ruling gave Cooper a chance to correct his failure to comply with the terms of the Residence Trust while making the point that future non-compliance would jeopardize his entitlement to live in the Bon Ayre residence.

B. The December 20, 2004 Hearing

The court was not prepared on November 29 to consider matters that Cooper had raised for the first time, namely the status of Marilyn's UGMA Account and the effectiveness of the memorandum annexed to Mrs. Moor's Will. The parties appeared before the court again on December 20 in connection with Cooper's December 8 Motion and for argument of matters that remained following the November 29 ruling.

I denied Cooper's December 8 Motion as untimely, and for failing to advance any misunderstanding of fact or legal principle that would have changed the outcome of the November 29 bench ruling. I also explained to Cooper that the only outstanding issue related to the November 29 ruling that he was entitled to argue at that time was whether the form of order submitted by counsel for the respondents faithfully implemented that ruling.[5] Cooper made no argument on that issue.

In accordance with Chancery Court Rule 59(f), a motion for reargument may be filed "within 5 days after the filing of the Court's opinion or the receipt of the Court's decision." The Supreme Court of Delaware addressed the event that triggers the five-day period in *Pinkert v. Wion*, holding that:

> Court of Chancery Rule 59(f) provides that a motion for reargument may be filed "within 5 days after the filing of the Court's opinion or the receipt of the court's decision." . . . While the opinion needs to be implemented by an order, the opinion itself under the express language of Rule 59(f) is effective to commence the period permitted for a motion to reargue.[6]

[5] December 20, 2004 Tr. at 5.
[6] 431 A.2d 1269, 1270-1 (Del. 1981).

Under the rule announced in *Pinkert*, for purposes of evaluating the timeliness of a motion for reargument, the pronouncement of a court's opinion is the event that sets the five-day period running. Accordingly, an opinion announced from the bench will commence the period permitted for filing a motion to reargue, and the period during which Cooper could have filed a motion for reargument began to run on November 29, 2004, the date of the first bench ruling.

Under Court of Chancery Rule 6(a), Cooper's motion for reargument would have been timely if filed by December 6. Cooper was in court on November 29 and he received the court's decision at that time, yet he did not order the transcript promptly and did not file his motion for reargument until December 8, two days after the five-day period had elapsed. His December 8 Motion was, therefore, untimely. Cooper's failure to order a transcript of the November 29 ruling is no excuse for his late filing. Had he wished to obtain a copy of the ruling immediately, he could have gotten one within 24 hours. All he had to do was ask.

Although Cooper's December 8 Motion was untimely, I considered the merits of that Motion, applying the relevant standard under Rule 59(f), in reaching my decision to deny it. Rule 59(f) requires that the moving party demonstrate that the court overlooked a decision or principle of law, or the court misapprehended the law or the facts, so that the outcome of the decision would be affected.[7] Attempts to relitigate claims already

[7] *See Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995); *see also Mainiero v. Microbyx Corp.*, 699 A.2d 320, 321-22 (Del. Ch. 1996) (noting that "[r]econsideration of issues already presented and decided rarely serves the parties' interests or the public's interest").

asserted and considered are inconsistent with the purpose of Rule 59,[8] however, and motions for reargument are not intended "to rehash arguments already decided by the court."[9]

Cooper's December 8 Motion raised only two issues: 1) the validity of Mrs. Moor's Main Trust; and 2) the revocability of that Trust. The first issue was never a matter of dispute in this case, and bears no further mention. In seeking reargument of the second issue, Cooper cited no legal principle or factual matter that was not previously considered by the court. More importantly, Cooper failed to raise any issue that would have changed the outcome of the court's November 29 decision.

After denying Cooper's motion for reargument from the bench on December 20, I restated, for the record, the critical bases for my November 29 ruling that Mrs. Moor's Main Trust was revocable. Noting initially that the key question was the intent of the settlor, I recounted that: 1) the overwhelming evidence demonstrates Mrs. Moor's intent that the Main Trust be revocable and amendable; 2) the only evidence favoring Cooper's assertion that the Main Trust was irrevocable was a single inconsistent use of the term "irrevocable" in the original Trust instrument, and that inconsistency did not raise a genuine issue of material fact in view of the overwhelming evidence supporting Mrs. Moor's intent to create a revocable trust; 3) Cooper himself, during Mrs. Moor's lifetime, signed a very important document indicating his belief and acceptance that the trust was

[8] *See In re Will of Mansfield*, 1990 WL 176795, at *1 (Del. Ch. Nov. 5, 1990) (noting that this principle "is well established").
[9] *McElroy v. Shell Petroleum, Inc.*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992).

revocable and subject to amendment; and 4) laches barred Cooper's claim that the Main Trust was irrevocable, because he did not raise it while Mrs. Moor was still living, prejudicing Mrs. Moor by denying her the opportunity during her lifetime to refute that contention or to implement her clear intent to reduce his share by any of several options (including withdrawing all of the Main Trust assets) that were indisputably available to her.[10]

At the December 20 hearing, Cooper also orally argued that the 2001 Residence Trust Amendment was invalid because it was witnessed by respondent Richard McCann. That argument was not raised at the November 29 hearing or in his December 8 Motion, nor had it been fairly presented in Cooper's previous briefing on the merits of his claims.[11] I therefore declined to hear any argument on that issue. Cooper also sought to argue that the trustees of the Residence Trust had withdrawn excessive cash from that Trust. I ruled that Cooper lacked standing to contest transactions involving trusts in which he had no interest.[12]

Concluding the December 20 hearing, I strongly encouraged the respondents to turn over control of the UGMA Account to Marilyn, and instructed that an amended form of order implementing the November 29 ruling be submitted. I further ruled that the order ultimately filed would become effective thirty days after the UGMA Account was

[10] December 20, 2004 Tr. at 3-4.
[11] Cooper had previously raised only vague, nonspecific arguments that the 2001 Residence Trust Amendment was somehow invalid because McCann was the sole witness to its execution. He did not cite 12 *Del. C.* § 3545, as he does now, as a basis for his argument in his past briefing or orally on December 20. Thus, he had never fairly presented the argument he now advances. *See* Pet'r Br. in Supp. of Summ. J. at 50-53; Pet'r Exceptions to Inventory & Mot. for Sanctions at 5-10.
[12] December 20, 2004 Tr. at 16.

turned over to Marilyn.[13] The remaining issue in the case — the effectiveness of one clause from the personal property memorandum annexed to Mrs. Moor's 1998 Will — was reserved for consideration at a later hearing.[14]

C. Events Following The December 20, 2004 Hearing

I executed an order implementing the November 29 bench ruling on January 31, 2005 (the "January 31 Order").[15] On February 8, 2005, however, Cooper again filed a motion for reargument of the court's November 29, 2004 bench ruling (the "February 8 Motion"). Cooper's February 8 Motion was identical to his December 8 Motion in every respect.

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[13] Although it was the sincere hope of this court that at least one act of benefit to all parties in this case could proceed without contention, the transfer of control over the UGMA Account was greatly complicated. Merrill Lynch, the holder of the Account, was reluctant to distribute the Account absent a court order to do so. Merrill Lynch's reluctance was not unreasonable, given the volume of litigation that Mrs. Moor's estate had already generated and the fact that the Moors had previously brought a civil suit concerning the UGMA Account against the trustees of that Account, including Merrill Lynch, and even Mrs. Moor herself, in 2001. The court accommodated Merrill Lynch by reopening the civil matter, which had been closed in January 2002, for the limited purpose of issuing an order for distribution of the UGMA Account. Cooper created further delay by objecting to any requirement that Marilyn sign a release favoring Merrill Lynch. The order for distribution of the UGMA Account was entered on February 7, 2005, stipulating that distribution was contingent upon Marilyn's signing releases in favor of Merrill Lynch and the Custodian of the Account, April Hudson. In an accompanying letter to the parties, the court noted the impropriety of Cooper's attempts to represent Marilyn, he not being a lawyer and she no longer being a minor, and the court's belief that Marilyn's best interests would be served by signing the required releases.

[14] That remaining issue is resolved in a separate opinion issued on the same date as this opinion.

[15] In addition to the holdings described above, the January 31 Order required Cooper to reimburse the Residence Trust for arrearages in the payment of current expenses for the Bon Ayre residence. The arrearage was to be satisfied in part with the specific bequest of $10,000 that Cooper was entitled to receive from the Trust fund in accordance with the Main Trust instrument as revised and amended. The right of the trustees to distribute the Residence Trust to residuary beneficiaries in the future if Cooper failed to pay current expenses for the residence going forward was explicitly reserved. Tangible personal property listed in the Property Memo was to be distributed, but the remaining issue in the case — the effectiveness of a clause in the Property Memo calling for the disbursement of proceeds from the sale of personal property not listed in the Memo — was to be resolved after briefing on a schedule to be submitted.

On February 9, 2005, attorneys David N. Williams and John L. Williams filed an entry of appearance on behalf of Marilyn, stating their intent to file a motion for reargument of the January 31 Order on her behalf. On February 23, 2005, the same attorneys filed a second entry of appearance on behalf of both Cooper and Marilyn. Finally, Cooper and Marilyn, through their new attorneys, filed an "amended motion for reargument" on April 8, 2005 (the "April 8 Amended Motion"). Although the timing of the Moors' various motions for reargument was, to put it mildly, questionable, I permitted the parties to brief those motions. Oral arguments on those motions, and on the personal property memorandum dispute, were heard on April 29, 2005. This is the court's opinion on the Moors' motions for reargument.

III. Motions For Reargument

I hesitate to delve too deeply into the Moors' various motions for reargument of issues that were resolved, at the time of this writing, more than six months ago, as my consideration may inspire future litigants to believe that they may be able to exploit this court's patience to get two, three, or even more bites at the apple. Although this court has on at least one past occasion considered "a motion for reargument of a motion for reargument,"[16] such indulgence is the exception and not the rule. The grant of reargument under Rule 59(f) continues to be, as it always has been, a matter of the court's discretion in preventing injustice.[17] I address these motions and the issues raised in some

[16] *Quigley v. State Bd. of Pension Tr.*, 1987 WL 10529, at *1 (Del. Ch. Apr. 29, 1987).
[17] *See McElroy*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992) ("A decision on a motion for reargument will be affirmed unless it involves an abuse of discretion."); *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000) ("Rule 59

depth *only* because Cooper's relentless attempts to reargue my bench rulings of November 29, 2004 persuade me that a reiteration of those rulings should be commemorated in a more formal written opinion, and because it seems prudent to provide as complete a record as possible for review, should Cooper later seek to appeal this decision.

A. Cooper's February 8 Motion And The Moors' April 8 Amended Motion Are Both Untimely

On February 8, 2005, Cooper filed a motion for reargument that was identical to his December 8 Motion, which had already been heard and denied for the reasons described above. On April 8, 2005, the Moors filed a motion purporting to amend Cooper's February 8 Motion.

The Moors argue that Cooper's re-filing of the December 8 Motion on February 8 occurred within five days of the court's entry of its January 31 Order, and was thus timely under Rule 59(f). In their briefs, the Moors seem to suggest that by re-filing his December 8 Motion, Cooper somehow "cured" his previous failure to file within the five-day period, although they have cited no legal authority suggesting that "cure" of a late-filed Rule 59 motion is possible. The April 8 Amended Motion was filed more than two months after the January 31 Opinion. Although that filing was certainly not within the

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relief is available to prevent injustice. . . ."); *St. Thomas African Union Methodists Protestant Church v. Conference of African Union Methodists Protestant Church*, 1996 WL 361513, at *2 (Del. Ch. June 24, 1996) ("[T]he granting of a motion for a new trial or for reargument is addressed to the judicial discretion of this Court. . . . The rationale behind granting a motion for a new trial or for reargument is to prevent injustice."); *Filasky v. Von Schnurbein*, 1992 WL 187619 at *1 (Del. Ch. July 29, 1992) (denying a motion for reargument that was not "required here to prevent an injustice"); *Matter of Weir*, 1981 WL 88254 at *1 (Del. Ch. Feb. 20, 1981) ("A motion for reargument is addressed to the sound judicial discretion of the Court.").

five-day period, the Moors contend that, as an amendment to Cooper's February 8 Motion, the April 8 Amended Motion relates back to February 8 and is therefore timely filed under Rule 59(f).

At any rate, in accordance with Rule 6(a), the five-day period for filing a motion to reargue an order executed on Monday, January 31, 2005 would have ended on Monday, February 7, 2005, and Cooper's motion, filed on February 8, was untimely. The Moors' arguments concerning timeliness of their various motions for reargument, at least to the extent that reargument of issues decided in the November 29 bench ruling is sought, are frivolous. Each argument relies in the first instance upon the validity of Cooper's December 8 Motion — an untimely motion that was nevertheless considered, but denied and disposed of on December 20, 2004. The court will not tolerate yet another belated attempt to revive those previously-decided issues.

Furthermore, the Moors misunderstand the range of issues that could have been contested in a timely motion for reargument challenging the January 31 Order. In such a motion, they could only have challenged the Order's fidelity in implementing the November 29 bench ruling. The time for seeking reargument of the November 29 bench ruling itself had expired on December 6, 2004.

B. Marilyn's Tardy Entrance Does Not Cure The Untimeliness Of The Motions

The Moors' counsel first stated their intent to seek reargument of the January 31 Order on Marilyn's behalf in a letter filed on February 9, 2005, asserting that Marilyn had never received any notice in this matter. I permitted briefing on the Moors' most recent

motion for reargument, but expressed concern about Marilyn's tardy attempt to enter this litigation after having chosen not to participate at earlier stages.

Contrary to the intent stated in counsel's February 9 letter, neither Cooper's February 8 Motion nor the Moors' April 8 Amended Motion address any failure of the January 31 Order to correctly implement the court's earlier bench rulings. Instead, both Motions sought to reargue issues that were initially heard on November 29, 2004. The April 8 Amended Motion also sought to raise additional issues that were not raised previously. Further, despite my prompting on the issue, the Moors did not attempt to establish any basis for reargument on Marilyn's behalf — beyond counsel's initial assertion that Marilyn received no notice in this matter.

The record does not support that assertion, however. In fact, the argument that Marilyn was unaware of this litigation and not given a prior chance to protect her interests is, frankly speaking, entirely false. Marilyn was aware of this litigation at an earlier stage when her deposition testimony was requested. Marilyn refused to be deposed and refused to otherwise participate in this lawsuit at that time.[18] Marilyn also disclosed her awareness of this lawsuit in an August 21, 2003 letter to respondent April Hudson, in which she wrote: "My father has informed me that he has a lawsuit in Chancery Court regarding my trusts and some other things regarding [Mrs. Moor's]

[18] Resp't Br. in Supp. of Resp't Mot. for Summ. J. & in Opp'n to Pet'r Mot. for Partial Summ. J. at 34, n. 8.

estate."[19] Marilyn also knew that her father was raising arguments on her behalf, particularly that her UGMA Account should be released.

Marilyn is not a small child; she is a young adult. Although one might fear that she has, perhaps too easily for her own best interests, acceded to her father's unusual approach to litigating this case,[20] she has at all time aligned herself with him, never taken the opportunity to voice a different perspective, or to engage counsel of her own. There is no basis in law or in equity to excuse her late, tactically-driven decision to enter as a party. Having declined to give testimony earlier when asked, Marilyn's application — undoubtedly inspired by counsel's and Cooper's desire to resurrect their tardily asserted arguments — comes with ill grace.

Marilyn's recent decision to become an active participant in this litigation does not create a basis for her to seek reargument of resolved issues. Her motion seeking reargument of those issues is as untimely as Cooper's motions are.

C. The Moors' Amended Motion For Reargument Is Improper Under Rule 59 Because It Rehashes Old Arguments And Raises New Arguments

Cooper's original untimely December 8 Motion and his identical untimely February 8 Motion raised only two issues: 1) the validity of Mrs. Moor's Main Trust; and 2) the revocability of that Trust. The Moors' April 8 Amended Motion, in contrast, raised four issues: 1) the withdrawal of funds from the Residence Trust by its trustees for payment of estate taxes; 2) the validity of the 2001 Amendment to the Residence Trust;

[19] Resp't Ans. Br. Regarding Mot. for Reargument App. B-460.
[20] One might also fear that Marilyn's personal funds, recently received from her UGMA account, are now the sole source being used to fund her father's ardent litigation strategy.

3) the appointment of a new trustee to the Residence Trust; and 4) the amendability of the Main Trust. The April 8 Amended Motion attempts not only to reargue issues that have already been resolved, but also to raise issues that were not raised in the untimely February 8 Motion — which it purports to amend — and issues that were not raised in Cooper's previous briefs or at any prior hearing.

A court will grant reargument under Court of Chancery Rule 59(f) when "the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[21] But "a motion for reargument is not intended to rehash the arguments already decided by the court."[22] Likewise, new arguments that were not previously raised cannot be considered for reargument.[23] The Moors' April 8 Amended Motion is therefore not only time-barred; it seeks to rehash old arguments and raises several new issues that are not proper for reargument under Rule 59(f), and for those further reasons, it must be denied.

D. The Moors' Arguments Fail On The Merits

The Moors have filed untimely motions that raise arguments that are not cognizable under Rule 59. I could, and perhaps should, stop the analysis at that. I am persuaded, however, in large part due to Cooper's litigiousness, that I should again explain why the Moors' arguments lack legal merit.

[21] *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).
[22] *McElroy*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992).
[23] *See Kern v. NCD Indus., Inc.*, 316 A.2d 576, 584 (Del. Ch. 1973).

1. Withdrawal Of Funds From The Residence Trust

The Moors argue that the trustees of the Residence Trust withdrew more cash from the Trust than was required to satisfy the Trust's proportional estate tax obligation, and seek to have $77,201 returned to that Trust. Cooper raised this issue in his briefs and during oral argument both on November 29 and on December 20.[24] Cooper did not raise this issue, or any other issue related to the Residence Trust, in his December 8 Motion or February 8 Motion, however.

At oral arguments on November 29, I noted that two charities, the Union Hospital and the Meeting Ground, are the only residual beneficiaries of the Residence Trust; that Cooper has no interest in the Residence Trust other than a right to occupy the Bon Ayre residence; and that, absent an interest in the cash assets of the Residence Trust, Cooper lacks standing to object to any act of the trustees affecting those assets.[25] At oral arguments on December 20, Cooper tried to raise this same issue again, despite not having raised the issue in his December 8 Motion. I refused to consider that issue, reiterating my November 29 comments concerning standing to challenge the administration of trusts on that occasion.[26] I reiterate once again that, because Cooper's

[24] Strangely, Cooper argued solely for the return of those withdrawn funds to the Residence Trust, making no reply to the respondents' arguments that by failing to pay current expenses on the Bon Ayre residence or that, in light of the no-contest provisions of the Residence Trust, by challenging Mrs. Moor's estate planning instruments, Cooper had triggered a forfeiture of his beneficial interest in the Residence Trust — arguments that, if successful, would have left Cooper and his family homeless. As adverted to previously, the court sua sponte exercised its equitable powers as flexibly as possible to protect Cooper (and his family) from the dire consequences that might have resulted from his own failure to pay expenses on the home his family occupies. *See supra* note 4.

[25] November 29, 2004 Tr. at 90-93.

[26] December 20, 2004 Tr. at 5-9, 16.

beneficial interest in the Residence Trust is limited to a right to occupy the Bon Ayre residence, Cooper lacks standing to challenge any disposition of funds held by the Residence Trust.

The Moors' April 8 Amended Motion raises no issue of law or fact that the court misapprehended in reaching this conclusion, and the court will not reconsider that issue. The residual beneficiaries of the Residence Trust have been given notice of the allegedly improper withdrawal of funds by the trustees and have not chosen to challenge any act of the trustees in the administration of that Trust. Cooper has no standing to challenge the trustees on the behalf of the residual beneficiaries.

2. Validity Of The 2001 Residence Trust Amendment

The Moors argue that the 2001 Residence Trust Amendment is void for failure to comply with the required formalities of execution set forth in 12 *Del. C.* § 3545. That argument was hinted at — vaguely, and without reference to any specific legal principle — in Cooper's briefs,[27] but was not raised at oral arguments concerning the Residence Trust on November 29. Cooper's December 8 Motion also neglected to raise this issue, although Cooper did approach the issue at oral argument on December 20 — again, without logic or evidence.[28] That argument was finally fleshed out and placed in the more concrete legal context of § 3545 for the first time in the Moors' briefs in support of their April 8 Amended Motion.

[27] See Supra note 11.
[28] December 20, 2004 Tr. at 7.

Mrs. Moor created the Residence Trust in 1998, granting Cooper and Marilyn a right of occupancy in the Bon Ayre residence, contingent upon Cooper's payment of current expenses, and granting Marilyn a right of appointment. In 2001, Mrs. Moor executed an amendment to the Residence Trust that removed Marilyn as a beneficiary. Noting that this amendment operated to take away Marilyn's remainder interest in the residence when she was only 17 years old, the Moors argue that the amendment was not executed in accordance with § 3545, which requires that the modification of a trust instrument be witnessed by at least one disinterested person or two credible persons. The execution of the 2001 Residence Trust Amendment was witnessed only by Richard McCann. The Moors argue that Mr. McCann is not a disinterested person because: 1) he was Mrs. Moor's attorney; 2) he had been appointed co-executor of Mrs. Moor's estate; 3) he had a "questionable professional reputation," 4) he drafted the 2001 Residence Trust Amendment instrument; and 5) he was paid to draft that instrument.

The evidence that the Moors adduce of Mr. McCann's interest in the Residence Trust has no relation to the type of disqualifying interest contemplated by § 3545. That section explicitly defines "disinterested person" for the purposes of that statute as "one who has no beneficial interest in the trust, that would be materially increased or decreased as a result of the creation, modification or revocation of the trust." Mr. McCann has no such beneficial interest in the Residence Trust, and accordingly, the Moors' argument fails.

The Moors cite the case of *Stegemeier v. Magness*[29] for the proposition that an attorney serving as an estate administrator is not per se disinterested, even when he has no financial interest in the estate. *Stegemeier* considered the validity of a self-dealing transaction by an interested co-administrator of an estate that was ratified by the other co-administrator — an attorney whose firm represented the estate and had in the past worked for the decedent. The court held that the attorney's "independence and/or disinterest is . . . a material fact issue that must be determined at a factual hearing."[30]

Notably, the context in which disinterestedness was assessed in *Stegemeier* is materially different from the context in which disinterestedness is questioned here. The sensitive nature of the approval of a self-dealing transaction by a fellow fiduciary was what motivated the *Stegemeier* court's ruling that the disinterestedness and independence of an estate administrator must be determined through a factual inquiry. Here, we are addressing solely the question of whether an attorney who is a co-executor of an estate can witness the execution of a trust amendment. Further, the test for determining disinterestedness here, unlike in *Stegemeier*, is statutorily defined.

Respect for the General Assembly requires that the disinterestedness inquiry here begin and end with the language of § 3545. That section explicitly states that the type of interest necessary to disqualify a witness to the execution of a trust instrument be a "beneficial interest in the trust." McCann had no such interest, and § 3545 does not consider him disqualified from being a witness.

[29] 1996 WL 549832 (Del. Ch. Sept. 20, 1996).
[30] *Id.* at *4.

Frankly, a contrary ruling would cause great inconvenience and cost to individuals executing estate plans. It is common practice for lawyers and their office staff to witness wills and other instruments. Indeed, the Moors' attorneys admit that is what they do in their practice. They suggest that McCann could have had one of his employees witness the signature and that would have been sufficient to satisfy § 3545. But, of course, Delaware is an at-will employment state. If McCann was interested, under § 3545, and therefore disqualified as a witness to Mrs. Moor's Residence Trust Amendment because he was to be an executor of Mrs. Moor's will, why would one of his employees be disinterested? Would not his employees fear McCann's wrath if they refused to be witnesses?

To go down that path would be to disrespect common sense. McCann stood to gain nothing by witnessing Mrs. Moor's Residence Trust Amendment. To put in place a rule that would require clients to schlep in witnesses with them would waste the valuable time of friends and family, and cause delays in legal practice, with no compensating increase in integrity.

3. Appointment Of A New Trustee To The Residence Trust

The Moors' April 8 Amended Motion argues that a new trustee to the Residence Trust should be appointed. This issue is raised for the first time, and is therefore an improper ground for reargument. Further, the contention has no grounding in law. This issue seems to have been prompted by the court's suggestion during the November 29 hearing that Ms. Hudson, the current trustee of the Residence Trust, consider stepping

down from that position for her own sake.[31] This suggestion was made as an observation of the no-win situation Ms. Hudson would find herself in vis-à-vis the Residence Trust in the context of a hypothetical enforcement, by the Trust's residual beneficiaries, of Cooper's obligation to pay the current expenses on the Bon Ayre residence. As Ms. Hudson has no economic interest in the Residence Trust, I suggested that perhaps one of the residual beneficiaries would be a better choice for all concerned. This suggestion was in no way an invitation for the Moors to argue for a court order replacing Ms. Hudson as the trustee of the Residence Trust.

4. The Effectiveness Of Mrs. Moor's Amendments To The Main Trust

Cooper argued on November 29, 2004 that the Main Trust, in accordance with the terms of the instrument executed to create that Trust in 1985, was irrevocable under Florida law. He made the same argument in his December 8 and February 8 Motions. Cooper never argued that Mrs. Moor lacked, specifically, a power to *amend* the Main Trust. Nevertheless, the Moors' April 8 Amended Motion raises the new argument that the Main Trust was revocable, but not amendable. The Moors' briefing on that Motion attempts to explain this departure from Cooper's past arguments, stating: "Contrary to the court's understanding, Mr. Moor did not argue that the Main Trust was 'irrevocable' in all respects. His argument when read in context was that the Main Trust was 'unammendable,' [sic] although he, as a layman, chose the word 'irrevocable.'"[32]

[31] November 29, 2004 Tr. at 91.
[32] Pet'r Reply Br. in Supp. of Mot. for Reargument on Interpretation of Main Trust & Residence Trust at 6.

This explanation mischaracterizes Cooper's past arguments. Cooper always maintained that the Main Trust was irrevocable. He never claimed that the Trust was unamendable. To the contrary, he always explicitly maintained that the Main Trust was amendable with the consent of all the original beneficiaries. Indeed, Cooper has always argued that the 1989 Amendment of the Main Trust, and not the original 1985 Main Trust instrument, controls the administration of Mrs. Moor's estate.[33] Cooper did not present his arguments in terms of revocability for lack of understanding the concept of amendability — he always believed, or at least always maintained, that the Main Trust was amended by the consent of Mrs. Moor, his late sister Judith, and himself, as the original named beneficiaries. The argument raised in the April 8 Amended Motion — that the Main Trust was revocable but not amendable — is new, and therefore improper under Rule 59(f).[34]

I ruled on November 29 that the Main Trust, as a matter of Florida law, was revocable. I found nothing in Cooper's December 8 Motion or his February 8 Motion to persuade me that this ruling was reached in error. Likewise, I find nothing in the reformulated and untimely April 8 Amended Motion to convince me that my

[33] Pet'r Mot. for Partial Summ. J. ¶¶ 5 and 8(A); Pet'r Mot. for Default J. ¶ 4(A); Pet'r Br. in Supp. of Partial Summ. J. at 1, 3, 16-17, 21-22, 29-30, 54; Pet'r Exceptions to Inventory & Mot. for Sanctions at 8, 13.
[34] *See Kern*, 316 A.2d at 584.

November 29 ruling was in error. Moreover, none of the Moors' motions for reargument attack the equitable considerations that form an independent basis for my November 29 ruling.[35]

In the discussion that follows, I revisit and reaffirm my prior ruling that, under Florida law, the Main Trust was fully revocable. First, I review the Moors' past and present arguments why the Main Trust was either irrevocable or unamendable. Next, I explain why Florida law did not prevent Mrs. Moor from amending the Main Trust, even though the original Main Trust instrument does not enumerate a specific power of amendment. Finally, I explain why, under Florida law, equitable considerations and the doctrine of laches require that all of Mrs. Moor's amendments to the Main Trust during her lifetime be given force.

a. The Moors' Argue That The Main Trust Was Irrevocable Or Unamendable And That Mrs. Moor's Clear Intentions Should Be Disregarded

Cooper has consistently maintained that the Main Trust was irrevocable, and asserted two theories to support that contention. First, Cooper argued that the Main Trust is expressly irrevocable, looking to the second sentence of the first page of the original 1985 instrument, which states: "WHEREAS, the settlor desires to create an *irrevocable* trust . . . ."[36] Second, Cooper argued that, under Florida law, a valid trust is presumed to be irrevocable. In support of the second theory, Cooper cited Florida case law that adopts language from the Restatement (Second) of Trusts § 330(1), holding that: "[t]he settlor

[35] *See Silver Lake*, 1998 WL 157370, at *1 (Del. Ch. Mar. 20, 1998) (ruling that a motion for reargument that fails to attack an independent basis for a prior decision cannot be outcome-determinative, and therefore must be denied).
[36] Emphasis added.

has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power."[37] Both of those arguments fail for similar reasons.

Although the term "irrevocable" appears on the first page of the original Main Trust instrument, the use of that term appears to be a scrivener's error. The title of the instrument, located at the top of the same page, expresses precisely the opposite intent: "BETTY R. MOOR'S REVOCABLE TRUST AGREEMENT." The term "irrevocable" included in a "whereas" clause of the instrument is the only reference in the entire document that supports Cooper's contention that the Main Trust is expressly irrevocable. Given that the first page of the instrument announces two inconsistent statements concerning revocability of the Trust, the presence of the term "irrevocable" cannot be viewed as determinative; at best it creates ambiguity.[38]

It is a well-established principle of Florida law that "the intent of the settlor of a trust is controlling."[39] The intent of the settlor should be ascertained from the expression of the trust instrument itself when the instrument is unambiguous.[40] When a trust instrument fails to unambiguously express the settlor's intent, however, a court may consider extrinsic evidence in order to determine the settlor's intent.[41] When a trust

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[37] *See Florida Nat'l Bank of Palm Beach County v. Genova*, 460 So.2d 895, 896 (Fla. 1985); *Macfarlane v. First Nat'l Bank of Miami*, 203 So.2d 57, 60 (Fla. Dist. Ct. App. 1967).
[38] *See First Union Nat'l Bank of Florida v. Frumkin*, 659 So.2d 463, 464 (Fla. Dist. Ct. App. 1993) (ruling that ambiguity exists in a trust instrument that contains two conflicting provisions).
[39] *Knauer v. Barnett*, 360 So.2d 399, 405 (Fla. 1978).
[40] *See id.; see also Reid v. Barry*, 112 So. 846, 873 (Fla. 1927) ("[In construing a trust,] the donor's or grantor's intention is to be collected from the words used by him.").
[41] *See Frumkin*, 659 So.2d at 464; *Reid*, 112 So. at 874 ("[W]here it is impossible to ascertain the intention of the trustor from the language used, the court will consider all the surrounding circumstances of the case, and, when proper and necessary, it will receive parol evidence for the purpose of ascertaining the intent of the parties.").

instrument fails to explicitly reserve a power of revocation, that power will nevertheless be found to exist when the intent of the settlor to create a revocable trust is inferable.[42] Further, powers may be validly reserved in a trust instrument even when a method of exercise is not defined.[43]

Although the term "irrevocable" appears on the first page of the original 1985 Main Trust instrument, all other language contained within the four corners of that instrument controverts Cooper's theory that the term "irrevocable" is the determinative expression of Mrs. Moor's intent in creating that Trust. As noted above, the title of the instrument itself specifies that the Trust is revocable. Further, Mrs. Moor reserved powers for herself under the Main Trust that would permit her to revoke the Trust. The reserved powers include the right to withdraw any or all of the Trust's assets at any time and the complete power of appointment over the Trust's assets. Mrs. Moor also made herself the sole trustee of the Main Trust. In short, Mrs. Moor was entitled to exercise powers by which she could have revoked the Trust by removing all of the Trust assets. Her reservation of these powers is inconsistent with the reference to irrevocability that Cooper cites as indicative of her intent in creating the Main Trust. In fact, the single use of the term "irrevocable" on the first page of the Trust instrument is the only evidence within the four corners of the instrument that suggests Mrs. Moor intended to create an

[42] The case of *Genova* is instructive. In concluding that a settlor had reserved a power of revocation, the Florida Supreme Court looked beyond the explicit language of the trust instrument that purported to enumerate reserved powers, relying instead on manifestations of the settlor's intent that the trust be revocable as expressed in general language of the instrument. The Court found that the language ". . . unless this Trust Agreement shall have been otherwise revoked or amended . . ." expressly manifested the settlor's intention to create a revocable trust. *See* 460 So.2d at 896.

[43] *See id.; see also Macfarlane*, 203 So.2d at 60.

irrevocable Trust. All of the other text of the Main Trust points to the contrary conclusion: that Mrs. Moor intended to create a revocable Trust.

To the extent that the contradictory use of the terms "revocable" and "irrevocable" on the first page of the 1985 instrument creates residual ambiguity that cannot be resolved by reference to the document itself, extrinsic evidence of Mrs. Moor's intent in creating the Main Trust may be considered. And *all* of the extrinsic evidence points to the conclusion that Mrs. Moor intended to create a revocable Trust. All evidence of Mrs. Moor's behavior as toward the Trust suggests that she intended to retain absolute control and exercise unlimited powers over the Trust, including the power to add or remove the Trust's assets, the power to reallocate or reapportion assets among the Trust's intended beneficiaries, and the power to amend the Trust in any way she wished. It is undisputed that Mrs. Moor did, in fact, exercise all of those powers during her lifetime. Accordingly, the argument that Mrs. Moor intended the Main Trust to be irrevocable is simply not persuasive.

Cooper's argument that the Main Trust was expressly irrevocable fails because Mrs. Moor's intent, as expressed within the four corners of the 1985 instrument itself and as inferred from Mrs. Moor's behavior toward the Trust over the next seventeen years, was that the Main Trust be revocable. Although Florida law holds that a trust may be presumed irrevocable, the presumption applies only when the settlor fails to reserve a power of revocation. Here, Mrs. Moor's power of revocation was adequately and obviously reserved, and the presumption of irrevocability does not apply.

Although Cooper attaches great significance to the single use of the word "irrevocable," that use is the only shred of evidence supporting his theory that Mrs. Moor intended to create an irrevocable trust. The evidence in support of the contrary conclusion — that Mrs. Moor intended to create a revocable trust — is so substantial that no rational fact-finder could conclude that the Main Trust was irrevocable, and therefore, the respondents were entitled to summary judgment.[44] Likewise, no rational fact-finder could conclude that Mrs. Moor did not intend to reserve for herself both the greater power to revoke the trust and the lesser power to amend its terms. For the foregoing reasons, I ruled on November 29 that, as a matter of Florida law, the Main Trust was revocable.

The Moors' April 8 Amended Motion attempts to recharacterize Cooper's previous arguments, acknowledging that the Main Trust is revocable, but arguing that the Main Trust was not amendable. The main thrust of the present argument, as stated in the text of the April 8 Amended Motion, is that: 1) the 1985 Main Trust instrument reserved Mrs. Moor's power of appointment and power of withdrawal, but no power of amendment; 2) applying the two prong analysis set forth in *Macfarlane v. First National Bank*, which proceeds by looking first at whether a trust agreement prescribes a method of revocation, and second, whether the prescribed method was exercised,[45] Mrs. Moor's attempts to amend the Main Trust instrument were not in conformity with the two

[44] Summary judgment is appropriate where no rational finder of fact could find in favor of the non-moving party. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150-1151 (Del. 2002).
[45] 203 So.2d at 60.

specific methods of revocation — withdrawal and appointment — granted under the terms of the Trust and are therefore invalid; and 3) the Main Trust could only be altered by Mrs. Moor's exercise of her power of appointment in a will or by withdrawing funds from the Trust account.

Distilled to its essence, the Moors' new version of their argument as to why the Main Trust could not be amended goes as follows: Florida trusts and estates law is very technical. We now concede that Mrs. Moor could have effectively revoked the entire Main Trust by exercising her explicitly-reserved powers of withdrawal and appointment. As a practical matter, therefore, Mrs. Moor could have achieved exactly the *ends* reflected in her various amendments. But, because Florida law demands precise technical formality, she had to do so through the proper *means*. Having failed to use the proper *means* to accomplish the *ends* that were within her power to accomplish, Mrs. Moor (in the sense of effecting her intended wishes) must lose. By disregarding Mrs. Moor's plainly-expressed wishes and exacting a toll on someone who has been silenced by death, this court can send a strong message to the living about the painstaking estate planning scrupulosity expected of them by the powers that be in Tallahassee.

The problem with this argument is that it fails both as a matter of law and as a matter of equity. I now explain why.

b. Under Florida Law, Mrs. Moor Retained An Implied Power To Amend The Main Trust As A Lesser Component Of Her Reserved Power Of Revocation

The Moors' argument fails as a matter of law because it relies on a mischaracterization of Florida trust law. Florida law does not cling to the hyper-technical

approach the Moors propound. Rather, Florida courts have consistently adopted the more flexible approaches set forth in the Restatements (Second and Third) of Trusts. This flexibility embraces the general principles that the terms of a trust may be ascertained by manifestation of a settlor's intent as well as by written expression;[46] that a settlor's powers, if not limited to a specific manner of exercise, may be exercised in any manner that sufficiently manifests the settlor's intention to do so;[47] and that a reserved power of revocation may be used to revoke a trust in whole or in part.[48] This flexible approach also reflects the additional principles that a power of modification may be inferred to have been reserved by a trust settlor;[49] and most importantly, that a settlor who has reserved the greater power of revoking a trust may exercise the lesser power of amending the trust.[50]

The Moors improperly characterize Mrs. Moor's powers under the Main Trust as being limited to a single power to revocation, the exercise of which is limited to two enumerated methods — withdrawal of Trust assets or appointment in a will. The Moors

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[46] *See* Restatement (Second) of Trusts § 330 cmt. a; Restatement (Third) of Trusts § 63(2); *Genova*, 460 So.2d at 896.

[47] *See* Restatement (Second) of Trusts § 330 cmt. i; Restatement (Third) of Trusts § 63(3); *Genova*, 460 So.2d at 896-897; *Macfarlane*, 203 So.2d at 60.

[48] *See* Restatement (Second) of Trusts § 330, cmt. n; Restatement (Third) of Trusts § 63 cmt. e; *Genova*, 460 So.2d at 897.

[49] *See* Restatement (Second) of Trusts § 330 cmt. a, § 331 cmt. a; Restatement (Third) of Trusts § 63 cmt. c ("If [ ] the settlor has failed expressly to provide whether the trust is revocable or amendable but has retained an interest in the trust . . . the presumption is that the trust is revocable and amendable by the settlor.").

[50] *See* Restatement (Second) of Trusts § 331 cmt. g ("It is a question of interpretation to be determined in view of the language used and all the circumstances whether a power to revoke the trust includes a power to modify it."); Restatement (Third) of Trusts § 63 cmt. g ("A power to revoke the trust includes the power to modify the terms of the trust, and a power to modify a portion of the trust includes the power to modify that portion."). *Accord Preston v. City Nat'l Bank of Miami*, 294 So.2d 11, 14 (Fla. Dist. Ct. App. 1974).

contend that, under *Macfarlane*, the Main Trust prescribes two methods of revocation, but the prescribed methods were not exercised. But, the Moors' assumption that Mrs. Moor's Main Trust prescribes methods of revocation is incorrect. Neither the plain language of the original Main Trust instrument nor Florida law governing the reservation of powers under a trust agreement support that assumption.

The Moors characterize references to rights of withdrawal and appointment in the Main Trust instrument as the prescribed methods for the exercise of Mrs. Moor's power of revocation. That characterization is not supported by a plain reading of the Trust instrument. Mrs. Moor's power of revocation is reserved in the title of the instrument. Mrs. Moor's rights of withdrawal and appointment are discussed in Article IV(F) of the instrument, which states that:

> Settlor expressly reserves the right at any time and from time to time to withdraw from the principal of the trust any and all of the assets held by the trust at such time and by specific provision in the Last Will and Testament of Settlor to withdraw any or all of the assets of the trust by specific reference thereto.

In Article IV(F), Mrs. Moor reserved rights of withdrawal and appointment without reference to any other power, neither expressly nor inferably designating methods by which any other powers should be exercised. Article IV(G) of the Main Trust further emphasizes that the rights described in Article IV(F) were not intended as limitations on the exercise of Mrs. Moor's more general power of revocation, stating that:

> It is an express condition and term of this trust that any of the powers which the Settlor reserves to herself are to be exercised by her only at her personal discretion, and not as a power to be subject to exercise by any other person or under any process of law . . . .

A plain reading of the original Main Trust instrument shows that Mrs. Moor reserved a power of revocation, the exercise of which was not limited in any way.

Florida law does not require that Mrs. Moor's rights of withdrawal and appointment be read as limiting the exercise of her right of revocation. In *Macfarlane*, Florida's Third District Court of Appeal stated, with respect to powers of revocation, that "[n]o magic art is necessary to revoke a trust. Where the right to revoke is reserved and no particular mode is specified in the trust agreement, any mode sufficiently manifesting an intention of the trustor to revoke is effective."[51] Most important, the Supreme Court of Florida announced the same rule in *Genova*: "If the settlor reserves the power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust."[52] Both *Macfarlane* and *Genova* express the policy of the state of Florida to permit revocation of a trust by the broadest possible range of methods. This is entirely consistent with the well-established principle of Florida law that the intent of the settlor of a trust is controlling.[53] Given that, under Florida law, Mrs. Moor had the flexibility to revoke the Main Trust in its entirety by *any* manner that reasonably expressed that intention, it is not at all difficult to conclude that she could permissibly do so by taking the lesser step of amending the terms of the Main Trust.

[51] *Macfarlane*, 203 So.2d at 60 (citing 54 Am. Jur. *Trusts* § 77).
[52] *Genova*, 460 So.2d at 896-897 (citing Restatement (Second) of Trusts § 330 cmt. i).
[53] *Knauer*, 360 So.2d at 405.

The best legal thinking on this question supports the proposition that a reserved power of revocation implicitly confers a power of amendment. The Restatement (Third) of Trusts § 36 comment g states, in part, that:

> A power to *revoke* the trust includes the power to modify the terms of the trust, and a power to revoke only a portion of the trust includes the power to modify that portion. It is not necessary for the settlor first to revoke the trust (or part thereof) and then to create a new one.[54]

Scott on Trusts § 331.1 sets forth a similar rule with greater emphasis on the reasoning that supports the existence of an implicit power of amendment:

> Where the settlor reserves power to revoke the trust, he can revoke it and immediately create a new trust of the property, designating the trustee of the old trust as trustee of the new. It would seem, however, that it is unnecessary to go through the formality of compelling the trustee to reconvey the property to him and making a new conveyance to the trustee. It is enough that the settlor, by an instrument sufficient for the revocation of the trust, directs the trustee to hold the property on the terms designated in the instrument. Thus it is held that where the settlor reserved a power of revocation, the execution of a new trust instrument declaring a trust on different terms from those specified in the original instrument is a sufficient revocation of the earlier trust.[55]

Although Florida case law has not explicitly held that a settlor's greater power to revoke a trust implicitly includes a lesser power to amend, Florida courts have recognized the logic that supports this general concept. The court in *Preston v. City National Bank* considered the amendment of an expressly irrevocable inter vivos trust that was modified with the consent of all of the trust beneficiaries. Although the factual context of *Preston* is different from this case, the *Preston* court expressed an important principle concerning

[54] Emphasis in original.
[55] 4 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 331.1 (4th ed. 1989).

lesser powers subsumed under a broad power to terminate a trust, which is fully applicable here: "Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old."[56] In other words, *Preston* holds that whoever has the power to terminate a trust, be it an individual or a group of persons, also has the lesser power to amend it.

Accordingly, I can find nothing in Florida law to support the Moors' contentions that Mrs. Moor lacked the power to revoke her trust, or that her numerous amendments to the Trust were not valid exercises of her power of revocation.

c. Cooper's Current Attempt To Undermine Mrs. Moor's Clear Intent Is Barred By Laches

The most compelling justification for upholding Mrs. Moor's amendments to the Main Trust, in my mind, is equitable. Even if Florida law did not permit Mrs. Moor to exercise her power to revoke the Main Trust by amending it, Mrs. Moor could have effected all of her desired changes by exercising powers explicitly reserved in the Main Trust at any time during her lifetime, without limitation and at her whim, with no possibility of a successful legal challenge. That is, Mrs. Moor could have revoked or withdrawn all of the funds from the Main Trust and created a new Trust without being bound in any way by the original Main Trust. Had Cooper confronted Mrs. Moor at any time while she was still living, asserting that she could not amend the Trust, she could have exercised her reserved powers to effect her desired amendments by other means. Indeed, Cooper is only able to challenge Mrs. Moor's amendments to the Main Trust at

[56] *Preston*, 294 So.2d at 14.

this time because she is no longer alive, and thus no longer able to implement her testamentary intent through the exercise of her reserved powers. Under these circumstances, Cooper's present challenge, seeking essentially to limit Mrs. Moor's estate planning options after her death, is manifestly unfair. As a matter of equity, Cooper's late challenge to his mother's Main Trust Amendment must fail as barred by laches.

Laches is an equitable principle that operates to preclude the assertion of claims by one who has unreasonably delayed asserting them, particularly when the delay is detrimental to the opposing party.[57] "Unreasonable delay" warranting an application of laches has been characterized as "[d]elay in the assertion of a right under circumstances that make it unconscionable for a court of equity to lend aid to its enforcement . . . ."[58] A party is guilty of laches where: 1) a party had knowledge of a right that could be asserted, and 2) prejudice to the party against whom the right is asserted resulted from the unreasonable delay of the party asserting the right.[59]

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[57] *See Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992) ("[Laches] operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."); *Appalachian, Inc. v. Olson*, 468 So.2d 266, 269 (Fla. Dist. Ct. App. 1985) ("Laches is based upon an unreasonable delay in asserting a known right which causes undue prejudice to the party against whom the claim is asserted.") (citations omitted).

[58] *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922). *See also Ft. Pierce Bank & Trust Co. v. Sewall*, 152 So. 617, 618 (Fla. 1934) ("[To constitute laches], the delay must have been such as practically to preclude the Court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible . . .").

[59] *See Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000); *see also McCray v. State*, 699 So.2d 1366, 1368 (Fla. 1997) ("[Laches] requires proof of (1) lack of diligence by the party against whom [laches] is asserted, and (2) prejudice to the party asserting [laches].") (quotations and citations omitted).

In concluding that laches applies to bar Cooper's challenge to Mrs. Moor's power to amend the Main Trust, I assign considerable weight to Cooper's actions in conjunction with the 1989 Amendment of the Trust. The 1989 instrument is the first unambiguous expression of Mrs. Moor's intent that the Main Trust be revocable. That instrument, titled "REVOCABLE TRUST AGREEMENT," makes no reference to a desire to create an irrevocable trust. The opening sentence corrects the error in the original Main Trust instrument, stating: "WHEREAS, the Settlor desires to amend her *revocable* trust as originally dated April 10, 1985 . . . ."[60] Critically, Cooper explicitly acknowledged Mrs. Moor's unilateral amendment by signing the amendment and accepting appointment as a successor trustee to the Main Trust.

Application of laches requires that a party have knowledge of a right that could be asserted. Here, Cooper had knowledge at least since 1989 that Mrs. Moor understood that she could amend the Main Trust. By signing the amendment, Cooper acknowledged, under penalty of perjury, his understanding that the Trust was amendable, and indicated his acceptance of that understanding. To the extent that Cooper had a right to challenge Mrs. Moor's power to amend the Trust, he had knowledge of the need to exercise that right in 1989. But Cooper did not voice his contrary understanding of Mrs. Moor's powers under the Main Trust, or challenge specifically her power to amend the trust, at that time, or for nearly fifteen years thereafter. Mrs. Moor continued to amend the Main Trust as many as ten times, secure in her belief that her amendments were valid.

[60] Emphasis added.

Application of laches also requires an unreasonable delay in the assertion of a right, causing prejudice to the party against whom the right is asserted. Cooper's delay in challenging Mrs. Moor's power to amend the Trust was unreasonable, most obviously because he waited until after Mrs. Moor passed away, and could no longer argue on her own behalf or exercise any of her powers under the Trust, to make that challenge.[61] Mrs. Moor was prejudiced by Cooper's failure to act. She continued to amend the Main Trust freely over her lifetime, having no reason to suspect that Cooper would challenge her power to do so after her death. More importantly, because her lesser power to amend the Trust was not challenged, she did not exercise other greater powers that she explicitly reserved for herself in the Trust to achieve the same results that her amendments were intended to achieve.

The latter point, in my view, is critically important. One might imagine Mrs. Moor's response if Cooper had challenged the amendments to her Trust while she was living. If, for example, Cooper had objected in 1994 to Mrs. Moor's amendment to the Main Trust that disinherited him entirely, alleging that the original 1985 instrument failed to reserve a power of amendment, his "Gotcha" gambit would have had little, if any, force as a chess opening. Confronted with Cooper's clumsy frontal attack, Mrs. Moor could have exercised her power to withdraw all of the assets from the Main Trust and created a new trust exactly like the Main Trust in every way, except that it left Cooper

[61] *See Cooch v. Grier*, 59 A.2d 282, 287 (Del. Ch. 1948) ("It has been said that laches will apply where there is an unexplained delay in prosecuting the claim until death has closed the lips of the interested parties.") (quoting *Thrasher v. Ocala Mfg. Ice & Packing Co.*, 15 So.2d 32 (Fla. 1943)).

nothing. She could say "Gotcha back!" and implement her desire to disinherit Cooper using the powers that she explicitly reserved. That would have been checkmate for Cooper. As a matter of practical reality, Mrs. Moor's failure to explicitly reserve a power of amendment could never have prevented her from altering the Main Trust by other means in response to such a challenge. Cooper avoided checkmate only because he never challenged Mrs. Moor's power to amend the Main Trust during her lifetime, even though he knew in 1989 that she believed she had a power of amendment. Instead, Cooper sat on his right to contest Mrs. Moor's power of amendment until after her death, when her power to implement her desires by other means was extinguished.

The Moors' counsel, during oral argument, asserted the strange theory that Florida does not recognize laches. That claim is not consistent with Florida case law. The court in *Preston v. City National Bank* applied laches, on facts roughly analogous to those presented here, to bar repudiation of a trust amendment by a trust beneficiary who had signed and ratified the amendment ten years earlier.[62] And the court in *Clement v. Charlotte Hospital* ruled that the doctrine of laches does not bar claims against a trust by a beneficiary simply on the basis of the passage of time, but that laches could apply in "circumstances which would require such beneficiary to take timely action."[63] Because Florida courts have not hesitated to apply the doctrine of laches when appropriate in trust cases, the argument raised by the Moors' counsel does not persuade me that laches cannot or should not be applied here.

[62] *Preston*, 294 So.2d at 13.
[63] *Clement v. Charlotte Hosp. Ass'n, Inc.*, 137 So.2d 615, 617 (Fla. Dist. Ct. App. 1962).

IV. Conclusion

For the foregoing reasons, Cooper's February 8 Motion and the Moors' April 8 Amended Motion are DENIED as: 1) untimely; 2) raising arguments not properly the subject of a Rule 59 motion; and 3) lacking in legal and equitable merit. The January 31 Order of this court therefore remains in force. IT IS SO ORDERED.

RAVET OPINION (CHANCERY)

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Date Submitted: May 8, 2014
Date Decided: June 4, 2014

Harold W. T. Purnell, II
David W. Carickhoff, Jr.
Archer & Greiner, P.C.
300 Delaware Avenue, Suite 1370
Wilmington, Delaware 19801

William M. Kelleher
Gordon, Fournaris & Mammarella
1925 Lovering Avenue
Wilmington, Delaware 19806

Re: *In the Matter of Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated February 9, 2012*,
Civil Action No. 7743-VCG

Dear Counsel:

This Letter Opinion addresses the Petitioner's outstanding Motion to Alter or Amend Judgment or, in the Alternative, to Reconsider the Judgment, or, in the Alternative, for Relief from Judgment. The judgment in question is my bench decision of January 29, 2014, in which I found that the Petitioner's claims are time-barred. The Petitioner in this action is the son of Shirley Ravet, settlor of the Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated February 9, 2012 (the "Trust"). He brings this action to contest the validity of the Trust on the basis that it was the product of his sisters' exercise of undue influence over their mother, the settlor. On January 29, 2014, the Court conducted an evidentiary hearing on the limited issue of whether

the Petitioner had been given written notice of the Trust by March 27, 2012, the last day on which such notice would effectively time-bar this action pursuant to 12 *Del. C.* § 3546, Delaware's pre-mortem validation statute. That Section provides:

> (a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:
>
> > (1) One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, *notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery to the last known address of such person constitutes receipt by such person*.[1]

At that hearing, the parties disputed the meaning of the italicized language above: the Respondent contended that, absent evidence demonstrating that written notice was not delivered to the Petitioner's *last known address*, delivery of that notice was effective to trigger a presumption of receipt, while the Petitioner argued that "absent evidence to the contrary" refers to any evidence—including the Petitioner's own self-serving testimony—indicating that he had not *actually received* the notice. If the statutory language refers to mailing notice to the last

[1] 12 *Del. C.* § 3546(a) (emphasis added).

known address, it is unquestionable that the Respondent is entitled to the statutory presumption of receipt; if it refers to receipt itself, my decision must turn on a review of the "evidence to the contrary" of receipt.

Evidence presented at the January 29 hearing included testimony from Daniel Hayward, counsel for the Trust's co-trustees, indicating that written notices were mailed to the Petitioner's last known address and P.O. Box by first class mail on February 23, 2012; that notices were mailed to the Petitioner's last known address and P.O. Box by certified mail on the same day, February 23, 2012, but that, after delivery was twice attempted and two package slips left, those letters were returned to Hayward; and that a Federal Express package containing notice of the Trust was delivered to the Petitioner's home address on March 27, 2012. At the conclusion of the hearing, I issued a bench ruling, in which I explained:

> So the question is, given the fact that there was first class mail that did not come back, sent to the correct address, and that there were more than 30 days for that to have been delivered sufficient to toll this suit, whether I should find that there has been delivery to the last known address under the statute. It seems clear to me that the evidence is overwhelming here that there was delivery during that time, prior to March 28. Why do I say that? Because the only evidence that that wasn't delivered is the testimony of the Petitioner here. He obviously has an interest in this matter, but that doesn't necessarily make his testimony less than credible. However, to believe him, I would have to believe that the first class mail to his home went missing; the notice of certified mail to his home went missing; the first class mail sent to his post office box went missing; the notice of certified mail to his post office box went missing; two more notices of certified mail, one to his home and one to the post office box, went missing; all these things went missing. And yet the certified mail obviously went

> through because we have the returns. So it seems incredible to me that all of these things can have gone missing, at least three of them in a post office box to which no one but the Petitioner had access, and that they simply disappeared. More than that, he testified that the Fed Ex, which we know was delivered to his house on the 27th, also went missing. I don't find that to be "evidence to the contrary of delivery," assuming that phrase modifies the delivery requirement [rather than the requirement that notice be sent to the "last known address"], because it's simply not credible evidence. It's absolutely not credible to me. . . . But in any event, I find no credible evidence that the first class mail was not delivered to this residence, to the extent that modifier applies. To the extent the modifier doesn't apply, I simply make a positive finding that given the two first class mailings and the two contemporaneous certified mailings, which we clearly know reached his two addresses, that it is extremely likely that delivery was made before the 27th of March.[2]

On February 7, 2014, the Petitioner filed a Motion to Open Judgment to Allow Ruling on Motion in *Limine* and to Alter or Amend Judgment or, in the Alternative, to Reconsider the Judgment. On March 17, the Petitioner moved to amend that Motion to include a motion for relief from judgment, on the basis that:

> While preparing a letter to trustees of the various trusts involved in this action and actions pending in California, on March 3, 2014, Petitioner discovered first class mail envelopes from counsel for the Co-trustees—one envelope addressed to his residence and one envelope addressed to his P.O. Box. The postage stamp on each envelope indicates that it was mailed on March 26, 2012—more than a month after counsel for the Co-trustees, Mr. Hayward, testified that he had sent such first class mailings. Upon opening the envelopes, Petitioner found in each of the two envelopes . . . an original cover letter signed and dated February 15, 2012 (with original signatures in blue ink) . . . .[3]

[2] Trial Tr. 125:13-128:13.
[3] Pet'r's Op. Br. in Supp. of Mot. to Amend at 2.

The Petitioner contends that the March 3 first class mailings constitute newly discovered evidence justifying relief from my January 29 ruling.

On May 8, 2014, I heard oral argument on all pending motions in this action. After argument, I issued a bench ruling denying the Petitioner's Motion to Open Judgment to Allow Ruling on Motion in *Limine*. This Letter Opinion addresses the Petitioner's pending Motion to Alter or Amend, Motion for Reconsideration, and Motion for Relief.

I. Analysis

The Petitioner moves (1) to alter or amend the January 29 judgment, (2) for reconsideration of the judgment, and (3) for relief from the judgment. I address those Motions in turn, below.

1. Motion to Alter or Amend

The Petitioner brings his Motion to Alter or Amend pursuant to Court of Chancery Rule 59(e). "Under Rule 59(e), a motion to alter an Order may be granted if the plaintiff demonstrates (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."[4]

The Petitioner suggests that his Motion to Alter or Amend is appropriate to correct several clear errors of law made in my January 29 bench ruling. Although

[4] *Nash v. Schock*, 1998 WL 474161, at *1 (Del. Ch. July 23, 1998).

the Petitioner's Motion to Alter or Amend seeks merely to restate arguments presented at trial, and to express disagreement with my resolution of those issues addressed at trial, I nevertheless address his contentions in turn. First, the Petitioner contends that in interpreting 12 *Del. C.* § 3546, I erred by "giving the Co-trustees the benefit of the statute's presumption of receipt even though the Co-trustees had no evidence to prove that their alleged first class mailings were actually delivered to Petitioner's home or P.O. Box."[5] Despite the Petitioner's suggestion, however, I determined in my bench ruling that "the evidence [presented at trial was] overwhelming . . . that there was delivery . . . ."[6] To the extent the Petitioner suggests I misunderstood the statute's presumption of receipt to require only that notice be mailed, as opposed to delivered, therefore, that argument must fail.

Second, the Petitioner suggests that I erred as a matter of law by "giving the Co-trustees the benefit of the statute's presumption of receipt even though 'evidence to the contrary' of receipt was presented."[7] The Petitioner fails to acknowledge, however, that in my January 29 bench ruling, I found that the Petitioner had presented "no credible evidence that the first class mail was not

[5] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 5.
[6] Trial Tr. 125:20-21.
[7] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 5.

delivered to this residence . . . ."[8] Next, the Petitioner contends that I erred by "injecting the common law presumption concerning mailing into the statute's limited presumption of receipt . . ." and by "creating a burden of rebuttal for the Petitioner that does not exist under the statute . . . ."[9] In fact, my bench ruling made no reference to that common law presumption, nor did I implicitly adopt or rely on it; instead, I construed only the language of the statute, determining that, to the extent the statute could be interpreted, as the Petitioner argued, to create a presumption of delivery (or receipt) rebuttable by "evidence to the contrary," such evidence must at a minimum be *credible* evidence. I found, and continue to find, that no such credible evidence was presented.[10] Importantly, I addressed the parties' interpretations of the statutory presumption *in the alternative*: I did not determine whether "evidence to the contrary" modified mailing to the last known address *or* receipt, but explained that under *any* standard, evidence must be credible, and that such evidence is lacking here.

Finally, the Petitioner argues that I committed error because:

> The Court's decision effectively imposes a burden of diligence upon a notice party that does not exist under the statute. Specifically, under the Court's ruling, a notice party now has a burden to diligence whether he could be presumed to have received notice sooner than

[8] Trial Tr. 128:5-8 (emphasis added).
[9] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 5.
[10] The Petitioner contends that I failed to consider evidence apart from the Petitioner's self-serving testimony, including evidence of communications between the Petitioner and the settlor's legal counsel. In fact, I did consider that evidence, but determined it was not credible evidence "to the contrary" of delivery.

> when he actually received notice. However, this burden does not exist under the plain reading of the statute, which focuses on the party's receipt.[11]

Though expressing disagreement with my holding, that argument does not suggest *error*, and in fact runs contrary to the statutory presumption that "delivery to the last known address . . . constitutes receipt . . . ."[12] Of course, any presumption of receipt—anything short of a requirement that a respondent prove actual receipt—would result in the "burden of diligence" to which the Petitioner refers. For the reasons explained above, the Petitioner's Motion to Alter or Amend is denied.

2. Motion for Reconsideration

In addition to his Motion to Alter or Amend, the Petitioner brings a Motion for Reconsideration pursuant to Court of Chancery Rule 59(f). "A court may grant reargument under Rule 59(f) when it appears that 'the [c]ourt has overlooked a decision or principle of law that would have controlling effect or the [c]ourt has misapprehended the law or the facts so that the outcome of the decision would be [affected].'"[13]

The Petitioner contends that "the Court either erred as a matter of law in reaching its decision or misapprehended the facts or the law such that the outcome

[11] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 7-8.
[12] 12 *Del. C.* § 3546(a).
[13] *Chrin v. Ibrix, Inc.*, 2005 WL 3334270, at *1 (Del. Ch. Nov. 30, 2005) (citing *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).

is different than it would be without such misapprehension."[14] The Petitioner's arguments that the Court erred as a matter of law under Rule 59(e), and that I misapprehended the law under Rule 59(f), are coterminous, and have therefore been addressed and rejected above. The Petitioner's contention that I misapprehended the facts of this case must similarly be rejected. The Petitioner suggests that the "Co-trustees have no evidence to prove that their alleged first class mailings were actually delivered to Petitioner's home or P.O. box."[15] Despite that contention, I decline to reconsider my finding, based on Hayward's testimony, that "given the two first class mailings and the two contemporaneous certified mailings, which we clearly know reached [the Petitioner's] two addresses, that it is *extremely likely* that delivery was made before the 27th of March."[16] The Petitioner also disputes my factual finding that his testimony provided no credible evidence to the contrary of delivery, and indicates that he "has produced 'evidence to the contrary' that he never *received* notice of the Trust until March 29, 2012 . . . ."[17] The substance of the Petitioner's testimony at trial was that he never received three mailings and four notices left at his home. That is the testimony I

[14] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 3.
[15] *Id.* at 8.
[16] Trial Tr. 128:9-13 (emphasis added). The Petitioner also contends that I misapplied the applicable evidentiary burden, and that the evidentiary standard contemplated by the statute is clear and convincing evidence of delivery. Oral Arg. Tr. 18:9-10. Even if a showing of clear and convincing evidence is required by the statute, however, my finding that it was "extremely likely" that delivery was made satisfies such a standard.
[17] Pet'r's Op. Br. in Supp. of Mot. to Open J. at 9.

found not credible, and I continue to find it not credible. The Petitioner's Motion for Reconsideration is therefore denied.

3. Motion for Relief

Finally, the Petitioner brings a Motion for Relief from Judgment pursuant to Court of Chancery Rule 60(b), which permits this Court to relieve a party from a judgment under the following circumstances:

> (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.[18]

The Petitioner contends that relief from judgment is appropriate under subsections (2), (3), and (6) of Rule 60(b). I address those contentions below.

A. Newly Discovered Evidence

In support of his Motion for Relief, the Petitioner primarily relies on Rule 60(b)(2), which provides that the Court may relieve a party from judgment based on newly discovered evidence. In order to obtain relief on that basis,

> the moving party must demonstrate that: (1) the newly discovered evidence has come to his knowledge since the trial; (2) that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; (3) that it is so material and relevant that it will

[18] Ct. Ch. R. 60(b).

> probably change the result if a new trial is granted; (4) that it is not merely cumulative or impeaching in character; and (5) that it is reasonably possible that the evidence will be produced at the trial.[19]

The "newly discovered" evidence presented by the Petitioner consists of two first class envelopes, postmarked March 26, 2012, providing the Petitioner with written notice of the Trust. According to the Petitioner, Hayward's failure to testify at trial that, in addition to first class and certified mailings sent on February 23, 2012, Hayward mailed first class letters on March 26, 2012, demonstrates (1) that Hayward's testimony that first class letters were mailed on February 23 was false, and (2) that the first class letters described by Hayward at trial must have been mailed on March 26 rather than February 23.

The Petitioner's production of the March 26 mailings provides an insufficient basis for relief from judgment for at least two reasons. First, despite the Petitioner's contention that, "[a]s the envelopes had fallen between hanging file folders [in a box he used as a file cabinet] and out of sight, they could not in the exercise of reasonable diligence have been discovered for use at the January 29, 2014 hearing," I believe that with any minimal diligence the Petitioner would have discovered the March 26 mailings, which had been in his possession for almost two years prior to the January hearing. Perhaps more importantly, even if I were to admit those mailings as evidence, they would not alter my prior determination.

[19] *99-Year Lease Tenants of Lynn Lee Vill. v. Key Box 5 Operatives, Inc.*, 2005 WL 5756435, at *3 (Del. Ch. Aug. 4, 2005).

Notably, the Petitioner contends that the March 26 mailings demonstrate that Hayward testified falsely, an argument that relies solely on the mailing's impeachment value. I find, however, that the facts that the Petitioner actually received the mailings and *never opened them*, but instead filed them away with other trust-related documents, and that he claims to have had no memory of those mailings until their re-discovery nearly two years after receipt, serve to further discredit the Petitioner's testimony that he never received any February 23, 2012 mailings. As a result, I deny the Petitioner's Motion on the basis of newly discovered evidence.

B. Fraud or Misrepresentation

The Petitioner also claims that his Motion for Relief is appropriate under Rule 60(b)(3) on the basis of fraud, misrepresentation, or other misconduct. The Petitioner suggests that "[t]he newly discovered evidence indicates that Mr. Hayward's testimony concerning his attempts at noticing Petitioner of the Trust was, at best, a mistaken misrepresentation."[20] I find that it does not. The March 26 mailings indicate only that the Petitioner received at least one notice from Hayward. Those mailings indicate that it was the *Petitioner's* testimony at trial—that he never received any mailings providing notice of the Trust—that was false.[21]

[20] Pet'r's Op. Br. in Supp. of Mot. to Amend at 13.

[21] *See, e.g.*, Trial Tr. 59:1-5. I find unpersuasive the Petitioner's contention that, because the letters contained in the March 26 mailings were notarized and dated in February, those mailings

Those mailings do *not* require the Court to find a misrepresentation in Hayward's credible testimony that he "recall[ed] at the time [in February 2012] having the stacks of the certified mailing packages and stacks of the first class mailing packages laid out in [his] office and outside of [his] office, along with [his] paralegal, to make sure that [they] weren't missing anything when these went out,"[22] and that, "knowing that the first class mailings were picked up and sent out on the 23rd, there [was] no doubt in [his] mind that the first class mailings were sent at that same time because those packages would have been together."[23] The fact that a first class mailing accompanied the Federal Express mailing in March 2012 does not, to my mind, impeach Hayward's testimony that a prior mailing was sent on February 23 of that year. The Petitioner's Motion for Relief on the basis of fraud or misrepresentation is therefore denied.

C. "Any Other Reason"

Relief under Court of Chancery Rule 60(b)(6) is appropriate under circumstances constituting "an 'extreme hardship,' or [where] 'manifest injustice'

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must have been sent instead of, rather than in addition to, the February first class mailings. That the notices contained in the "newly discovered" March mailings were notarized in February is unsurprising given the credible representation of Respondent's counsel that multiple copies of the notice letter were notarized in February for convenience. Oral Arg. 37:12-14. Further, the fact that the notice letters were notarized in February serves only to bolster the Trustee's testimony that notices were in fact first sent in February.

[22] Trial Tr. 9:17-22.

[23] *Id.* at 10:2-6.

would occur if relief were not granted."[24] The Petitioner submits that "[t]he newly discovered information reveals that extraordinary circumstances exist in that the critical unsubstantiated testimony the Court relied upon in reaching its decision was unreliable and, at best, a mistaken misrepresentation."[25] However, in support of his contention that "extraordinary circumstances" exist, the Petitioner suggests only that the March 26 mailings demonstrate a misrepresentation by Hayward. That argument has been rejected above, and accordingly does not provide an appropriate basis for relief under Rule 60(b)(6).

II. Conclusion

For the foregoing reasons, the Petitioner's outstanding Motions are denied. However, because I find that the Motions were not brought in bad faith, I deny the Respondent's request to shift fees. To the extent an Order is necessary for the foregoing to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[24] *Saito v. McCall*, 2004 WL 3048949, at *1 (Del. Ch. Aug. 18, 2004), *aff'd sub nom. Saito v. McKesson HBOC, Inc.*, 870 A.2d 1192 (Del. 2005).
[25] Pet'r's Op. Br. in Supp. of Mot. to Amend at 13-14.

RAVET OPINION (DELAWARE SUPREME COURT)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY RAVET,	§	
	§	No. 369, 2014
Petitioner Below,	§	
Appellant,	§	
	§	
v.	§	Court Below—Chancery Court
	§	of the State of Delaware
THE NORTHERN TRUST	§	C.A. No. 7743-VCG
COMPANY OF DELAWARE and	§	
BARRY C. FITZPATRICK, in their	§	
capacity as co-trustees,	§	
	§	
Respondents Below,	§	
Appellees.	§	
	§	
In re: Restatement of Declaration of	§	
Trust Creating the Survivor's Trust	§	
Created Under the Ravet Family	§	
Trust Dated February 9, 2014	§	

Submitted: February 11, 2015
Decided: February 12, 2015

Before **HOLLAND**, **VALIHURA**, and **VAUGHN**, Justices.

O R D E R

This 12th day of February, 2015, the Court having considered this matter after oral argument and on the briefs filed by the parties has determined that the final judgment of the Chancery Court should be affirmed on the basis of and for the reasons assigned by the Chancery Court in its bench ruling dated January 29, 2014 and letter opinion dated June 4, 2014.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Chancery Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice