RECENT DEVELOPMENTS IN DELAWARE TRUST LITIGATION: NOTABLE DECISIONS ADDRESSING ADULT ADOPTIONS, MIGRATION, MODIFICATION, CONSTRUCTION, PAYMENT OF COUNSEL FEES, AND TIME-BARRED CLAIMS

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I. ABSTRACT

Over the last eighteen months or so, Delaware courts have issued several noteworthy trust law decisions. Most significant among them is the trio of Delaware Supreme Court decisions involving the Peierls trusts. A key takeaway from those decisions is that Delaware law will govern the administration of a trust moved to Delaware unless the trust instrument expressly provides otherwise. But the Peierls decisions weren't the only ones of interest. Other notable opinions involved adult adoptions and several others clarified key provisions of the trust code. What follows are summaries and analysis of the most significant recent decisions in Delaware trust law.

II. CASE SUMMARIES

A. Migration and Modifications

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

Historically, parties attempting to move trusts to Delaware often filed petitions with the Court of Chancery. Those petitioners typically sought the confirmation of the appointment of a Delaware corporate trustee, acceptance of jurisdiction over the trust, and the modification or reformation of the trust at issue. Under that practice, the Delaware corporate trustee's acceptance of appointment was often contingent upon the order from the court.

In 2012, the Peierls family sought to move several trusts to Delaware and appoint one corporate trustee for all the trusts in an effort to administer the trusts in an efficient manner.[1] The various trusts had broad dispositive and administrative provisions, were sitused in different jurisdictions, and were not served by the same corporate trustee.[2] Moreover, most of the trusts had two individual trustees and a corporate trustee.[3]

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1. *See* In re Peierls Family Inter Vivos Trusts, 77 A.3d 249, 254 (Del. 2013).

2. *See id.*

3. *See id.*

The petitioners in Peierls filed several petitions with the Delaware Court of Chancery relating to five inter vivos trusts, seven testamentary trusts, and one charitable lead unitrust.[4] Each petition requested that the Court: (i) approve the resignation of individual trustees; (ii) confirm the appointment of the Delaware corporate trustee; (iii) accept jurisdiction over the trusts so that Delaware would be the situs of the trusts and Delaware law would govern the administration of the trusts; and (iv) reform/modify certain administrative provisions of the trusts, including the addition of the positions of Investment Direction Adviser and Trust Protector, as well as the modernization of other administrative provisions.[5]

The Court of Chancery denied the petitions on several grounds. First, the Court denied the five inter vivos trusts petitions on the grounds that Delaware law did not govern the trusts and would not govern the trusts even if the Delaware corporate trustee accepted its appointment as successor corporate trustee.[6] The Court reasoned that because Delaware law did not govern the trusts, it could not consider the proposed modifications.[7] The Court of Chancery also denied the seven testamentary trust petitions because other states retained jurisdiction over those trusts.[8] The Court of Chancery held that to consider those petitions would violate interstate comity principles.[9] Finally, the Court of Chancery denied the charitable lead unitrust petition because, according to the Court of Chancery, the petitioners could change the situs and the law governing administration of the trust without court action, that Washington law still governed the administration of the trust, and that the ability to reform or modify the trust was, therefore, a matter of Washington law.[10]

Additionally, the Court of Chancery held that because the resignation and appointment of trustees was provided for in the trust instruments, it could not rule upon the resignation and appointment of trustees because doing so would constitute as an impermissible advisory opinion.[11] The petitioners appealed.

The Delaware Supreme Court analyzed three key issues in its opinions: (i) when does Delaware law govern the administration of a trust,[12] (ii) when can/should a court exercise jurisdiction over a trust,[13] and (iii) whether the relief requested constituted an impermissible advisory opinion.[14]

The Supreme Court concluded that where a trust contains a choice of law provision, even one that references "administration," the law governing the administration of a trust will change when the location of administration of the

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4. *See id.*at 252.

5. *See* In re Peierls Charitable Lead Unitrust, 77 A.3d 232, 234 (Del. 2013).

6. *See Peierls Inter Vivos Trusts*, 77 A.3d at 260.

7. *See id.*at 255.

8. *See id.* at229-30.

9. *See id.*at 227.

10. *See id.*at 237-38.

11. *See id.*at 237.

12. *See id.*at 256.

13. *See id.*at 228.

14. *See id.*at 237.

trust changes via a proper appointment of a successor trustee, unless the settlor specifically states her intent that a state's law shall *always* govern the administration of that trust.[15]

In analyzing what trust matters properly constitute "administration" such that they would be governed by the administrative law that applies to a trust, the Supreme Court ruled that all of the items of relief requested in the petitions - the change of existing trustees, the acceptance of jurisdiction over the trusts, the change of trust situs and administrative law, and the modifications of the trusts, including the creation of the positions of Investment Direction Adviser and Trust Protector - were "administrative matters."[16] The Supreme Court suggested that the analysis of the effect of a change in the place of administration of a trust on the law governing the administration of a trust may be different when "the trustee has become subject to the continuing jurisdiction of a particular court to which the trustee is thereafter accountable."[17]

The Supreme Court, relying heavily on the *Restatement (Second) Conflict of Laws*, also analyzed the issue of when a Court can properly exercise jurisdiction over a trust.[18] The Court noted that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction "[o]nly when a beneficiary or trustee brings a suit over the trust," and that this situation is distinguishable from the situation where the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.[19] The Supreme Court determined that the Court of Chancery did have jurisdiction to adjudicate issues of administration of the testamentary trusts because all parties, including the trustee, had consented to the jurisdiction of the Court of Chancery, which satisfied the Due Process Clause.[20]

The Supreme Court further concluded that, although the out-of-state order accepted jurisdiction over the trusts, there was no evidence that the Texas court exercised active control over the trusts and, therefore, it did not have exclusive jurisdiction or primary supervision over the trusts.[21] Thus, the fact that a court at some point exercised jurisdiction over a trust does not mean a subsequent court order is needed for the court to relinquish jurisdiction; the key issue is whether the court specifically retained jurisdiction or is exercising ongoing control over the trust.[22]

The Supreme Court upheld the Court of Chancery's holding that because no case or controversy existed with respect to the resignation or appointment of trustees of the unitrust, to rule upon such matters would constitute an impermissible advisory opinion.[23] Further, the Court instructed parties to play "pitch and catch" in situations where a foreign court has jurisdiction.[24] In other words, parties are advised to ask permission from the court to which the trust is accountable for the trust to leave the state and to ask the court which will assume jurisdiction to accept it.

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15. *See id.*at 258-59.

16. *Id.* at 256.

17. *Id.* at 258 (quoting Restatement (Second) of Conflict of Laws § 272 cmt. e. (1971)).

18. *See Peierls Inter Vivos Trusts*, 77 A.3d at 258.

19. *See id.*

20. *See id.*at 231.

21. *See id.*at 231.

22. *See id.*

23. *See id.*at 235.

24. *See id.*at 231.

2. *In re Latimer Trust*, 78 A.3d 875 (Del. Ch. 2013)

In this case, the Court of Chancery denied a petition that sought to modify a trust under the *cy pres* doctrine.[25] The trustee and a cemetery filed joint petitions to modify a trust established for the maintenance of two burial lots.[26] The settlor had established the trust at issue in 1924 for the benefit of two burial plots and their immediate surroundings in the cemetery.[27] Specifically, the trust "instructs that excess net income … be used (i) 'for the renewal and replacement … of the vaults, monuments, [and] iron fence railing,' (ii) 'for the defence [sic], if needful, against any attempt to condemn the property for any purpose whatsoever,' and (iii) if that defense is unsuccessful, 'to remove the bodies' from the Burial Lots 'to another location.'"[28]

The petitioners brought this action because the cemetery was in jeopardy of draining its endowment, and as a result, needed more money to maintain the property.[29] The trust had principal well in excess of what was needed to maintain the two burial plots.[30] The petitioners argued that the trust's application of income and/or principal provisions could be read broadly to include surrounding areas of the cemetery and asked the Court to modify the trust to permit the trustee to distribute a unitrust amount to the cemetery annually.[31] In support of their request for modification, the petitioners argued that the doctrine of *cy pres*, as reflected in the common law and as reflected in the *cy pres* statute, warranted the use of the trust's funds to support the needed maintenance of a broader area of the cemetery which would in turn benefit the lots.[32]

The Court of Chancery held that the trust was not a charitable trust because "[i]t provides for the preservation and maintenance of two specific burial lots and their immediate surroundings."[33] Because the trust is a private trust, the Court of Chancery held that the common law doctrine of *cy pres* was not available.[34]

The Court of Chancery then decided whether 12 *Del. C.* §3541 (the codification of the *cy pres* doctrine) allowed it to modify a trust.[35]

In its current form, Section 3541 states:

> (a) Subject to subsection (b) of this section, if a particular charitable purpose or noncharitable purpose becomes 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:

25. *See* In re Latimer Trust, 78 A.3d 875, 877 (Del. Ch. 2013).

26. *See id.*

27. *See id.*at 877-78.

28. *Id.* at 878.

29. *See id.*

30. *See id.*.

31. *See id.*at 878-79.

32. *See id.*. at 879.

33. *Id.* at 882.

34. *Id.*

35. *See id.* at 882-83.

> (1) The trust does not fail in whole or in part;
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> (2) The trust property does not revert to the trustor or the trustor's successors in interest; and
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> (3) The Court of Chancery shall modify or terminate the trust and direct that the trust property be applied or distributed, in whole or in part, in a manner consistent with the trustor's charitable or noncharitable purposes, whether or not such purposes be specific or general.
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> (b) The power of the Court of Chancery to modify or terminate a charitable or noncharitable purpose trust, as provided in subsection (a) of this section, is in all cases subject to a contrary provision in the terms of the trust instrument, whether such contrary provision directs that the trust property be distributed to a charitable or noncharitable beneficiary.
>
> (c) For purposes of this section, a "noncharitable purpose" is a purpose within the meaning of §3555 or §3556 of this title.[36]

The Court of Chancery determined that Section 3541 set up a two-step inquiry before it could modify the trust.[37] The first inquiry is whether "the trust's purpose has become unlawful" or "whether the trust does not otherwise serve 'any … noncharitable purpose'."[38] The second inquiry is "whether the settlor contemplated the particular contingency and provided for it."[39], The Court of Chancery held that "[b]y its terms, Section 3541 does not authorize judicial modification of burial lot trusts", and that if Section 3541 did apply the petitioners would not have gotten past the first step (i.e., they did not "allege that the trust's purpose became unlawful or that the trust no longer served "'ny … noncharitable purpose'").[40] In essence, the Court of Chancery said, " the petitioner's real beef is that the Trust does not serve the purpose they prefer."[41]

The Court also rebutted the petitioner's argument that by failing to modify the trust to accommodate the needs of the cemetery, the cemetery will fall into despair, thereby damaging the burial plots by pointing out that the trust provided for the excess net income to "remove the bodies" from the burial lots "to another location."[42]

Important in the Court's ruling was the acknowledgment that under Delaware's codification of the *cy pres* doctrine, even though expanded to include noncharitable trusts, a court's power to modify a trust requires a first inquiry into whether the trust is unlawful or no longer serves any charitable or noncharitable purpose, and not whether it is excessively funded or wasteful.[43] The Court of Chancery also held that the statutory *cy pres* doctrine is not available to trusts for the

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36. *Id.* at 883 (quoting Del. Code Ann. tit. 12, § 3541 (West 2008)).

37. *Latimer Trust*, 78 A.3d at 883.

38. *Id.* (quoting Del. Code Ann. tit. 12, § 3541(a) (West 2008)).

39. *Latimer Trust*, 78 A.3d at 883.

40. *Id.* at 883-84 (quoting Del. Code Ann. tit. 12, § 3541(a) (West 2008)).

41. *Latimer Trust*, 78 A.3d at 884.

42. *Id.*

43. See *Id.*

maintenance of cemetery plots, by its terms.[44] One way to look at this ruling is to view it as a window into the Court of Chancery's opinion on when it is appropriate to modify trusts and that this court is reluctant to modify a trust even when there are no human beneficiaries and all other interested parties have consented to the modification. The other way to look at this ruling is to view it as a sign that the Court of Chancery is committed to ensuring that the settlor's intent is upheld unless the modification expressly meets the criteria under either common law or statutes that allow for modification.

B. Formation

1. *Otto v. Gore*, 45 A.3d 120 (Del. 2012)

Wilbert ("Bill") and Genevieve ("Vieve") Gore, founders of W. L. Gore and Associates, Inc., decided to form a trust for their grandchildren.[45] The Gores placed most of their company stock into a holding company and the holding company issued preferred stock, reducing the value of the common stock to almost nothing.[46] From there, the holding company transferred the common stock to a family trust for the Gore's grandchildren.[47] The Gores did this to "avoid incurring significant gift taxes at the time of transfer" by shifting any future appreciation on the value of the stock out of their estates and into the trusts which would then realize any gain.[48]

The Gores formed the holding company in January, 1972.[49] In May of 1972, the Gores signed a trust (the "May Trust") before two witnesses and a notary.[50] The May Trust provided a formula for distributing the shares per stirpes.[51] Attached to the May Trust was a Schedule A that listed 1,000 shares of the holding company as the property of the May Trust,[52] but it was not signed or initialed. [53] Bill wrote a contemporaneous letter describing the May Trust and a plan of distribution for the stock that was different than that contained in the May Trust.[54] After Bill sent the letter, the letter and the May Trust disappeared into a file and were not discovered until they were produced during the discovery process of the litigation. [55]

Meanwhile, the Gores subsequently signed another Trust in October, 1972 (the "October Trust").[56] Like the May Trust, the Gores attached a Schedule A to the October Trust listing 1,000 shares of the holding company as the

44. *See id.*at 884.

45. *See* Otto v. Gore, 45 A.3d 120, 124-125 (Del. 2012).

46. *See id.*at 125.

47. *See id.*

48. *Id.*

49. *See id.*

50. *See id.*

51. *See id.* at 126.

52. *See id.* at 125-26.

53. *See id.* at 126.

54. *See id..*

55. *See id.*

56. *See id.*

trust's property.[57] Unlike the May Trust, the Gores initialed this Schedule A and incorporated a new formula—the Pokeberry formula—into the October Trust.[58] Furthermore, instead of merely signing the October Trust as they did with the May Trust, the Gores placed "blue backers" on the trust to signify it as an original, delivered a copy to their lawyer, and requested a taxpayer identification number from the IRS.[59] It was this trust, the October Trust, that the parties initially believed governed the distribution of the shares, and it was the application of the October Trust's Pokeberry formula that ultimately spurred the underlying litigation.[60]

Susan Gore, Bill and Vieve's daughter, married Jan C. Otto ("Jan C."), and had three children (the "Otto Grandchildren").[61] Susan later divorced Jan C. during the 1990s.[62]

In the early 2000s, Nathan Otto, one of Susan's children, discovered that upon Vieve's death, each of the grandchildren would receive 420 Gore shares, except for the Otto Grandchildren, who would receive only 95 shares pursuant to the Pokeberry formula.[63] The Otto Grandchildren received a lesser number of shares than the other grandchildren under the formula because four out of five of Bill and Vieve's childrenhad four children of their own, whereas Susan had only three.[64] If Susan had had another child before Vieve passed, there would have been 20 grandchildren and each grandchild would have received 350 shares.[65] This would equalize the total number of shares to be owned by the grandchildren after inheriting shares owned directly by their parents.[66]

Nathan wrote a letter to his extended family to discuss the Pokeberry formula.[67] Then, in March, 2013, while celebrating Vieve's birthday, Nathan asked Vieve to change the Pokeberry formula so that every grandchild received the same amount of shares.[68] Vieve declined to do so.[69]

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57. *See id.* at 126.

58. *See id.*

59. *See id.* at 127.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 128.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 127.

68. *See id.* at 128.

69. *See id.*

Thereafter, Susan considered adopting a child to equalize the Pokeberry formula allocation.[70] Jan C., her ex-husband, suggested that Susan adopt him[71] which she later did.[72] Jan C. agreed to give his shares back to the corpus of the October Trust and take only a nominal fee for serving as an adoptee.[73] Soon after the adoption, Jan C. began to reconsider this agreement.[74] After discovering Jan C.'s change of heart, Susan and the Otto Grandchildren discussed whether or not to un-adopt him; however, before a decision could be made, Vieve died, triggering the distribution of shares.[75]

Susan eventually filed a petition for construction of the Pokeberry formula in the Delaware Court of Chancery, spawning the ensuing litigation and discovery that uncovered the May Trust.[76] Upon discovering the May Trust, and its alternate formula for distributing the shares, the Otto Grandchildren argued that the May Trust should control the distribution of shares instead of the October Trust because it was a validly executed irrevocable trust.[77] The Otto Grandchildren further argued that, with the May Trust in place and funded, the Gores could not have funded the October Trust with the shares.[78]

The Court of Chancery held that, despite the Gores having signed the May Trust in the presence of two witnesses and a notary, and that the May Trust explicitly stated that it was an "Irrevocable Trust," the Gores actually intended to create a revocable place holder until the Gores completed their estate planning with the October Trust.[79]

On appeal, the Delaware Supreme Court had to accept this lower court finding because it was one of fact.[80] As such, the Supreme Court reframed the legal issue before it to be whether the Gores intended to create a final legal document at all when they signed the May Trust.[81]

The Supreme Court relied on Delaware case law and treatises such as *Bogert on Trusts* and the *Restatement (Third) of Trusts* to decide this question.[82] According to *Bogert's*, a settlor must form the intent to create a trust in order for that trust to be enforceable, and under the *Restatement*, the intent must be evidence by writing or by conduct.[83] The Supreme

70. *See id.* at 128.

71. *See id.*

72. *See id.* at 129.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 129.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 129.

81. *See id.* at 132.

82. *See id.* at 130.

83. *See id.*

Court noted that in this atypical case, it was presented with "extrinsic evidence" that "contradict[ed] the written manifestation of intent."[84] The Court ultimately held that the Gores had not formed the requisite intent to create an enforceable trust when they signed the May Trust.[85]

The Supreme Court defined intrinsic evidence as "evidence existing within the writing", and extrinsic evidence as evidence relating to the writing but not appearing on the face of it.[86] Here the extrinsic evidence consisted of "the circumstances surrounding the creation of the trust[s] and the conduct" of the Gores.[87] The Supreme Court clarified that under the parol evidence doctrine they could not consider extrinsic evidence relating to the meaning of specific terms of the May Trust, but could use it to determine the Gores' intent in creating the May Trust.[88]

The Supreme Court concluded that there was clear intrinsic evidence that the Gores intended to create the May Trust, as evidenced by their signatures and the terms of the trust itself.[89] However, the Court found that the extrinsic evidence outweighed that of the intrinsic evidence, thereby demonstrating the Gores intent not to create a binding legal document when they signed the May Trust.[90]

The Supreme Court applied the factual findings made by the Court of Chancery,[91] to the legal issue of whether or not the Gores intended for the May Trust to be a "final and legally binding trust at all." In doing so, the Court rejected the lower court's holding that the May Trust was a legally binding, but revocable trust.[92] First, the Supreme Court concluded that under "well-settled law," the decision not to communicate the existence of a trust to anyone, while not conclusive, is persuasive evidence that the Gores had not intended for the May Trust to be enforceable.[93] The Court found other evidence, such as the Gores' failure to use the same "formal procedure they used when signing other irrevocable trusts both before and after" the May Trust to be more convincing.[94] For example, for the other twenty-seven trusts the Gores executed, "they (i) signed two originals not just one, (ii) placed a color backer on the signed originals to indicate that it was a final trust instrument, (iii) initialed Schedule A of the originals, (iv) sent a conformed copy to their lawyer, and (v) requested a taxpayer identification number from the IRS."[95] The Supreme Court noted that the Gores did none of these procedures for the May Trust.[96]

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84. *Id.*

85. *See id.* at 134.

86. *See id.* 130-31.

87. *See id.* at 131.

88. *See id.*

89. *See id.*

90. *See id.* at 132-34.

91. *See id.* at 130.

92. *Id.* at 132.

93. *See id.* at 132.

94. *Id.* at 133.

95. *See id.*

96. *Id.*

Although the Supreme Court adopted the Vice-Chancellor's finding that the Gores intended to create a "placeholder" with the May Trust, it determined that the May Trust was not even a revocable trust because, by definition, a placeholder "cannot establish a settlor's intent to create a finalized, enforceable trust."[97]

The other extrinsic evidence that the Supreme Court found "particularly persuasive" was that in May, 1972, Bill sent a letter to his lawyer requesting that the trust "equalize as nearly as possible to the expectations of Gore stock," a request that, according to the Supreme Court, was contrary to the distribution method in the May Trust.[98] After balancing all the evidence, the Supreme Court concluded that, despite the intrinsic evidence of the Gores intent for the May Trust to be irrevocable, the extrinsic evidence to the contrary (i.e., the Gores' conduct before and after the execution of the documents) was too strong and proved otherwise.[99]

This ruling makes clear that the Delaware courts may look to evidence outside of the document when determining the settlor's intent when the intent is not clear. This ruling also raises some new questions: What if the Gores had executed the May Trust with the same procedural steps they had taken with the other twenty-seven trusts, but told no one of its existence, or vice-versa? In other words, how much extrinsic evidence is needed to overcome the clear intrinsic evidence?

C. Adult Adoptions

1. *Otto v. Gore*, 45 A.3d 120 (Del. 2012)

As mentioned in the previous section, Susan Gore adopted her ex-husband, in the words of the Court of Chancery, "for the sole, and improper, purpose of thwarting or circumventing the Gores' intentions regarding the [October] Trust."[100] Shortly after Nathan failed to convince his grandmother Vieve Gore to change the Pokeberry formula, Jan C. Otto, Nathan's father and Susan's ex-husband, suggested that Susan adopt him to "equalize" the application of the formula.[101] Within four months Susan formally adopted him.[102]

The Court of Chancery held that although the adoption was legal under Wyoming law, it would not recognize Jan C. as a grandchild and, therefore, as a beneficiary, for purposes of the October Trust.[103] The Delaware Supreme Court adopted the Court of Chancery's factual findings and affirmed the ruling.[104]

The Delaware Supreme court again looked to both extrinsic and intrinsic evidence to determine whether or not the Gores intended to include adopted adults as beneficiaries of the October Trust.[105] On its face, the October Trust defines

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97. *Id.*

98. *See id.* at 134.

99. *See id.*

100. *Id.* at 136.

101. *See id.* at 128.

102. *See id.* at 129.

103. *See id.* at 137.

104. *See id.* at 137.

105. *See id.* at 136.

child as "child, children, or issue of that person by adoption as well as by blood."[106] The October Trust did not define "grandchild."[107] The Supreme Court then upheld the Vice-Chancellor's ruling that there was an ambiguity as to "whether a person adopted as an adult for purely strategic reasons, and not for the purpose of creating a parent-child relationship with its attendant emotional ties is a 'grandchild'" under the October Trust.[108]

The Supreme Court then adopted the Vice-Chancellor's factual finding that the Gores "'did not intend to provide for adult adoptees with whom their children had no parent-child relationship.'"[109] The Court of Chancery found evidence for this in a letter that the Gores sent to their lawyer stating that the class of beneficiaries would close "at the time of the death of the last of G.W.G. or W.L.G. or at the time our daughter Betty reaches 45 years of age (or May 2, 1992) whichever occurs last—note: *so that all our Grandkids are born*."[110], It was this language that the Court emphasized demonstrated that "the Gores considered grandchildren as minors and who were part of and integral to the parent-child relationship."[111] Since Jan C. was 65 years old at the time of the adoption, the Supreme Court found that the Gores did not intend for him to be a beneficiary.[112]

The Supreme Court also held that under existing Delaware law it may consider the purpose of the adoption to determine the "collateral economic consequences of an adult adoption for a trust"[113] and noted that there are "common sense limitations on any adult adoption."[114] Because this adoption was purely for the strategic purpose of circumventing the Pokeberry formula, the Supreme Court upheld the Court of Chancery's decision not to include Jan C. as a beneficiary of the October Trust.[115]

2. *H.M.A. v. C.A.H.W.*, C.A. No. 95-05-03-A, 2013 WL 1748618 (Del. Fam. Ct. Mar. 28, 2013)

In 1995, "for the purposes of financial and estate planning and to formalize the close emotional relationship existing between them," the petitioner legally adopted the respondent.[116] At the time of that adoption and for fifteen years thereafter, Delaware did not recognize civil unions.[117] In 2011, however, Delaware passed a bill allowing same-sex couples to

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.*

110. *See id.* at 136.

111. *Id.*

112. *See id.* at 137.

113. *Id.* at 137.

114. *Id.*

115. *See id.*

116. H.M.A. v. C.A.H.W., C.A. No. 95-05-03-A, 2013 WL 1748618, at *1 (Del. Fam. Ct. Mar. 28, 2013).

117. *See id.* at *2.

enter into civil unions with all the rights and responsibilities of marriage under Delaware Law.[118] Delaware's governor signed that bill into law on May 11, 2011, and same-sex couples have been able to enter into civil unions since January 1, 2012.[119],

The petitioner and respondent desired to enter into a civil union.[120] Delaware law prohibits civil unions between a person and his "ancestor" or "descendant," among others.[121] Thus, the parties sought relief pursuant to Family Court Civil Rule 60(b)(5) and 60(b)(6), arguing that it is no longer equitable for the decree of adoption to apply prospectively.[122]

Noting that the court can reopen and vacate adoptions in limited circumstances, the Family Court of Delaware for Sussex County did so on equitable grounds—upon a finding of "extraordinary circumstances"—so that the parties could enter into a civil union.[123] While court orders are rarely vacated, the circumstances here were such that equity dictated it be done.[124]

D. ADMINISTRATION

1. *In re the Trust of Vale ex rel. Asche,* C.A. No. 7662-ML, 2013 WL 3804584 (Del. Ch. July 19, 2013)

Mrs. Vale died testate in 1961, leaving in her will a trust for the benefit of her daughter, Mrs. Asche.[125] "Mrs. Vale's will provided that, upon Mrs. Asche's death, the principal of the trust would be divided into equal shares" among Mrs. Vale's grandchildren.[126] Mrs. Asche died in 2001.[127] One of the shares set up a trust for Frederic B. Asche, Jr., a.k.a Tex ("Tex").[128] Mrs. Vale's will gave Tex a power of appointment.[129] If he failed to exercise his power of appointment, the trust would distribute the remaining principal to Tex's issue, per stirpes.[130]

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118. *See id.*

119. *See id.* at *1.

120 *See id.*

121. *See id.*

122. *See id.* at *1.

123. *See id.* at *2.

124. *See id.*

125. *See* In re the Trust of Vale ex rel. Asche, C.A. No. 7662-ML, 2013 WL 3804584, at *1 (Del. Ch. July 19, 2013).

126. See *Id.*

127. *See id.*

128. *See id.*

129. *See id.* at *2.

130. *See id.*

When Tex died, he left behind five children and his wife, Sallie.[131] During Tex's life, Tex executed several wills and codicils.[132] On September 29, 2011, Tex purportedly exercised his power of appointment, leaving everything in the trust to Sallie.[133] After Tex's death, Sallie filed an application to admit Tex's will to probate on October 18, 2011.[134]

Shortly after applying Tex's will to probate, Sallie died, leaving her estate to a trust, the beneficiary of which was Baylor University Medical Center of Dallas ("Baylor").[135] If Tex's power of appointment was valid, the assets of Tex's trust would go to Baylor.[136] If it was invalid, the assets would go to his children.[137]

Tex's children filed a will contest in the Texas probate court on August 1, 2012, alleging that their father lacked capacity to make a will and was under undue influence.[138] The executrix of Sallie's estate meanwhile demanded that PNC Delaware Trust Company ("PNC"), the trustee of Tex's trust, distribute the trust's assets to Sallie's estate so that Sallie's executrix could then transfer those assets to Baylor.[139]

PNC filed a petition in the Delaware Court of Chancery seeking, among other things, instructions on whether it should distribute Tex's trust's assets to Sallie's estate.[140] Sallie's estate and Tex's children each filed briefs in support of their respective positions.[141] Sallie's estate argued that, because the Texas Probate Court granted an "order" admitting the will to probate, and that that order stated that the testator was of sound mind and body, PNC had to distribute the trust assets to Sallie's estate.[142] Tex's children, on the other hand, argued that PNC should hold the assets pending resolution of the will contest.[143]

In her final report, Master LeGrow pointed out that the granting of the probate order was a quasi-administrative proceeding that was uncontested and convened without notice to Tex's children.[144] She further held that, because Tex's children had challenged the validity of the will itself and not the ability of the executor to gather assets pursuant to the

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131. *See id.* at *2.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.* at *3.

136. *See id.*

137. *See id.* at *4.

138. *See id.* at *3.

139. *See id.* at *4.

140. *See id.*

141. *See id.*

142. *See id.*at *5.

143. *See id.*at *5.

144. *See id.*at *3.

probate order, objecting to an immediate distribution in this matter was not a direct challenge to the Texas probate order, and therefore not a collateral attack on the Texas order.[145] In Master LeGrow's words, to view it otherwise would "mean that if an independent executor attempts to gather an asset, the ownership of which is disputed, no court in the land can enter an order respecting that asset, other than the court that appointed the executor."[146]

Likewise, Master LeGrow determined that, although the Texas probate order was final for the purpose of taking an appeal, entry of an order instructing PNC to hold and manage the trust assets through the pendency of the Texas will contest would not be in violation of the Full Faith and Credit Act because the issue of the decedent's testamentary capacity had not been made final by the Texas Probate Court.[147]

The take-away from this case is that a trustee should not proceed with the distribution of a trust's assets when there is an action in another jurisdiction challenging the ultimate beneficiaries of the trust. Here, the will—whose power of appointment would have the assets go to Sallie—was being challenged by the default trust beneficiaries. The life beneficiary's death necessitated PNC to distribute the trust's assets, but the will contest cast doubt on who should receive those assets. The Court of Chancery did not need to consider the merits of the will contest, to order PNC to hold the assets pending final resolution of the Texas case. This case shows that the court will use its equitable powers to weigh the hardships parties to a will contest might ultimately suffer, similar to how a court balances the equities in a preliminary injunction case.

E. Litigation and Attorneys' Fees

1. *Mennen v. Wilmington Trust*, C.A. No. 8432-ML, 2013 WL 5288900 (Del. Ch. September 18, 2013); *Mennen v. Wilmington Trust*, C.A. No. 8432-ML, 2013 WL 4083852 (Del. Ch. July 25, 2013)

The Plaintiffs in this still-ongoing case, Kathryn Mennen, Sarah Mennen, John Mennen, Shawn Mennen, and Alexandra Mennen (collectively, the "Beneficiaries") are beneficiaries of a trust created in 1970 by George S. Mennen for the benefit of John H. Mennen (the "Trust").[148] The defendants are Wilmington Trust Company ("Wilmington Trust"), the corporate trustee of the Trust, and George Jeff Mennen ("Jeff" together with Wilmington Trust, the "Co-Trustees"), who is the individual trustee.[149] Plaintiffs seek damages in excess of $100 million as a result of alleged breaches of the Co–Trustees' fiduciary duties.[150]

This action was preceded by a petition for instructions filed by Wilmington Trust to remove Jeff as the individual co-trustee of the Trust (the "Petition Action").[151] In the Petition Action, Wilmington Trust alleged that Jeff had caused

145. *See id.* at *7.

146. *Id.* at *8.

147. *See id.*at *9.

148. *See* Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 4083852, at *1 (Del. Ch. July 25, 2013).

149. *See id.*

150. *See id.*

151. *See id.*

the Trust to lose a substantial portion of its value.[152] Wilmington Trust argued that the Trust was a directed trust, requiring Wilmington Trust to follow Jeff's instructions.[153] "Wilmington Trust sought (1) removal of Jeff as individual trustee, (2) an order authorizing the adult beneficiaries of the Trust to appoint a successor individual co-trustee, and (3) access to certain investment information Jeff allegedly was withholding."[154] The Beneficiaries did not participate in that case, but in March 2013, the Beneficiaries filed this case and the Court of Chancery stayed the Petition Action.[155]

On June 12, 2013, the Beneficiaries filed a motion to compel (the "First Motion to Compel") production of the Co-Trustees' internal and external communications with counsel related to the Petition Action which they had continued to refuse to do.[156] Wilmington Trust also refused to create a privilege log for the documents it withheld relating to the Petition Action.[157] In addition, while Wilmington Trust raised the "advice of counsel defense," it refused to produce documents related to that defense.[158]

The Motion to Compel sought from Wilmington Trust "all privileged documents related to the Trust through March 22, 2013," the date they filed their Verified Complaint, as well as "all privileged documents related to the Trust" and created thereafter if "not created in connection with [the] defense" of this action.[159] The Plaintiffs asserted that, under *Riggs National Bank of Washington D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), "Wilmington Trust must turn over all documents related to the Petition Action because that action … was brought on behalf of the Beneficiaries, who were, in effect, the ultimate clients of the attorneys … representing Wilmington Trust."[160] Wilmington Trust argued that because litigation with the Beneficiaries was reasonably anticipated when it retained counsel, and because it paid for that legal advice itself rather than using trust assets to pay those fees, the *Riggs* factors did not support the application of a fiduciary exception to attorney-client privilege.[161]

The Motion to Compel raised three issues: (1) whether Wilmington Trust could withhold documents that related to the Petition Action under *Riggs National Bank of Washington, D.C. v. Zimmer*; (2) whether communications regarding Wilmington Trust's powers and duties under the Trust Agreement were privileged under *Riggs*; and (3) whether Wilmington Trust's decision to plead the affirmative defense of advice of counsel in its answer to the complaint waived the privilege.[162] On July 25, 2013, Master LeGrow issued a final report recommending that the Court find that (1) Wilmington Trust was entitled to withhold the Petition Action documents, but was required to produce a privilege log of the

152. *See id.*

153. *See id.*

154. *See id.*at *1.

155. *See id.*

156. *See id.*at *2.

157. *See id.*

158. *See id.*

159. *Id.* at *8 -10.

160. *See id.*at *2.

161. *See id.*

162. *See id.*

withheld documents; (2) the powers and responsibilities documents that were not related to the Petition Action or the Beneficiary Action were not privileged under *Riggs*;[163] and (3) Wilmington Trust should determine, if it had not already done so, whether to pursue its advice of counsel defense.[164]

While the Master acknowledged that *Riggs* continues to be the law in Delaware, she found that the plaintiffs-beneficiaries bear the burden of showing that *Riggs* applies to each of the categories of documents that they sought to compel.[165] As the Master explained, in *Riggs*, "the application of the fiduciary exception to the attorney-client privilege primarily turned on a determination of who the 'real' or 'ultimate' client was, meaning the person for whose benefit the legal advice was procured."[166] To make this determination, Delaware courts apply *Riggs* and examine: "(i) the purpose of the legal advice; (ii) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained; and (iii) the source from which the legal fees associated with the advice were paid."[167] Here, the Court found that Wilmington Trust decided to obtain the legal advice because it was reasonably worried about its liability exposure.[168] Moreover, the Court also found that there was a real threat of litigation between Wilmington Trust and the beneficiaries[169] because the trust's largest holding had gone bankrupt which resulted in a significant decline in the trust's value. Regarding the last prong of the *Riggs* test, the Court explained that "Delaware law confirms that a trustee's retention of counsel, and its payment of counsel's fees out of trust funds, does not operate as a waiver of the attorney-client privilege."[170] As a result of those findings, the Master upheld the privilege as to the documents at issue, but required Wilmington Trust to create a privilege log.[171]

Two days before the Master issued her final report on the First Motion to Compel, Wilmington Trust "alerted the parties that it intended to pursue its advice of counsel defense and therefore would withdraw its claim of privilege with regard to 'advice and documents related to the Co–Trustees[']duties and powers'."[172] However, "Wilmington Trust stated that its withdrawal of its privilege claim '[did] not affect Wilmington Trust's assertion of privilege with regard to any advice or documents created in early 2012, following the bankruptcy filing of Wave2Wave Communications, Inc., and thereafter.'"[173]

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163 *See id.*at *10.

164. *See id.*at *8.

165. *See id.*at *4.

166. *Id.* (citing Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)).

167. *Mennen*, 2013 WL 4083852, at *4.

168. *See id.*at *5.

169. *See id.*

170. *Id.*

171. *See id.*at *6.

172. Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 5288900, at *3 (Del. Ch. Sept. 18, 2013) (quoting Shindel Aff. Ex. 6, at 1).

173. Mennen v. Wilm. Trust, 2013 WL 5288900, at *3 (quoting Shindel Aff. Ex. 6, at 2).

The Beneficiaries then sought clarification (the "Second Motion to Compel") of what the First Motion to Compel order required Wilmington Trust to produce in light of its decision to pursue the advice of counsel defense.[174] "[T]he Beneficiaries argued that Wilmington Trust's advice of counsel defense had placed all the Powers and Responsibilities Documents at issue, even those after the Wave2Wave bankruptcy", and as such, Wilmington Trust needed to produce those documents.[175]

At the conclusion of the hearing on the Second Motion to Compel, Master LeGrow issued a draft report from the bench that recommended the Court enter an order finding that, "by invoking an advice of counsel defense regarding the directed nature of the Trust, Wilmington Trust had waived attorney-client privilege as to all Powers and Responsibilities Documents, regardless of when those documents were created."[176] She also held that the "'at issue' waiver of privilege did not equate to a waiver of work-product protection, and that [she] would not address whether Wilmington Trust was required to produce work-product until a privilege log had been produced and the Beneficiaries explained why production of specific work-product documents was appropriate under Rule 26(b)(3)."[177]

In her final Report, Master LeGrow held that Wilmington Trust "waived attorney-client privilege for all communications with counsel regarding its powers and duties under the trust agreement", other than communications in which counsel directly evaluated the trustee's potential exposure or its litigation strategy.[178] Wilmington Trust maintained that the trust is directed.[179] Given that stance, the Master found that the trustee placed at issue the advice of counsel regarding to what extent the trust agreement required the corporate trustee to follow investment directions from Jeff.[180] Wilmington Trust agreed that it was waiving privilege as to all powers and responsibilities documents, but it sought to limit that waiver to communications relating to challenged decisions.[181] The Master concluded, however, that allowing the requested limitation "would unfairly limit or eliminate the Beneficiaries' ability to assess the reliability of the advice and the factual information on which it was based."[182] Wilmington Trust cited patent infringement cases and argued that the waiver should only extend to the information base of the legal advice from which the reliance allegedly arose.[183] Nevertheless, the Master found that the patent infringement case law was not convincingly analogous.[184]

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174. *See* Mennen v. Wilm. Trust, 2013 WL 5288900, at *3.

175. *Id.*

176. *Id.* at *4.

177. *Id.*

178. *Id.* at *1.

179. *See id.*at *2.

180. *See id.*at *6.

181. *See id.*

182. *Id.*

183. See *Id.* at *7.

184. *See id.*at *8.

F. Non-Prevailing Parties Fees to be Paid Out of Trust

1. *IMO Trust for Grandchildren of Gore*, C.A. No. 1165-VCN, 2013 WL 771900, at *5 (Del. Ch. Feb. 27, 2013)

At the conclusion of the litigation regarding the Gore Trusts (previously discussed herein), the court ordered that all parties' fees be paid by the trust.[185] The discovery taken by the non-prevailing parties in the course of the litigation uncovered a possible alternative trust instrument that may have controlled the distribution of shares of stock.[186] This trust instrument appeared to be "irrevocable" and predated the other previously known trust instrument.[187] Had the Court held that this alternate instrument held the shares of stock and controlled its distribution, the respondents would have been entitled to the greater number of stock shares they were seeking.[188] The Court of Chancery concluded that without the judicial resolution resulting from the discovery of the second instrument, proper administration of the trust would have been impossible.[189] Therefore, the Court reasoned, the litigation –regardless of its original intent– benefitted the trust.[190]

This case also involved a strategic adoption which was not disclosed until after the death of the surviving co-settlor.[191] The prevailing parties in the underlying litigation had argued that the failure to disclose the adoption was in bad faith because it deprived the surviving co-settlor of the opportunity to clarify the intention of the trust and as such should serve to shift the payment of fees related to the litigation to the non-prevailing parties instead of the trust[192] In declining to shift fees, the Court of Chancery concluded that there were other plausible reasons for the failure to disclose the adoption in the final days of the elderly co-settlor's life and that it was unlikely the disclosure would have prevented litigation.[193]

One additional point of interest was the Court's decision to reimburse out of the trust the co-trustees for tax counsel fees and expenses related to this litigation.[194] The Court of Chancery, while admittedly unfamiliar with the intricacies and scope of the tax work involved (because the specific nature of the work was not disclosed), found that the tax analysis provided relevant, beneficial information regarding a potential settlement.[195] And while the tax counsel fees were "large," the court found that they "were reasonable in amount and will be approved."[196]

185. *See* IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, 2013 WL 771900, at *5 (Del. Ch. Feb. 27, 2013).

186. *See id.*at *4.

187. *See id.*at *3.

188. *See id.*.

189. *See id.*

190. *See id.*

191. *See id.* at *2.

192. *See id.*

193. *See id.*at *3.

194. *See id.*at *1.

195. *See id.*

196. *Id.*

In a subsequent opinion, the Court of Chancery decided that the amount of attorneys' fees it previously awarded in a lengthy trust dispute should be in the public domain,[197] unless the parties could demonstrate a "principled basis" for keeping it under seal.[198] The Court explained that "the Public is entitled to know what the Court does" and that the fees awarded provided an example to the Public of just how expensive litigation can be.[199]

Before releasing an un-redacted order, the Court invited the parties to offer any further arguments as to why those fee awards should remain under seal.[200] The parties opted not to do so, and on April 5, 2013, the Court publicly released its Order Awarding Attorneys' Fees without any redactions.[201]

G. Time-barring Statutes

1. *Cummings v. Lewis*, C.A. No. 6948-VCP, 2013 WL 2987903, at *2 (Del. Ch. June 17, 2013)

Plaintiff sought an award against the estate of her daughter's father under Delaware's after-born child statute, 12 *Del. C.* §301.[202] Plaintiff maintained that the decedent, well-known boxing promoter and businessman, Ronald E. "Butch" Lewis, fathered her child shortly before his death.[203] Thirteen months after Mr. Lewis died, Plaintiff filed a statement of claim with the Register of Wills for future child support.[204] The Court of Chancery had previously stayed much of the case pending resolution of the child support claims in Family Court on the grounds that those claims were not ripe or, alternatively, sought advisory opinions.[205]

The only request that the Court of Chancery allowed to go forward was the estate's request for a declaratory judgment that the Plaintiff's child support claims are time-barred by 12 *Del. C.* §2102(a).[206] Section 2102(a) states that "all claims before the death of a decedent must be made against the decedent's estate within eight months after his death."[207]

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197. *See* Letter to Counsel at 2, IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, ID 51412389 (Del. Ch. Feb. 27, 2013).

198. Letter to Counsel, *supra* at 2.

199. *See* Letter to Counsel, *supra* at 2.

200. *See* Letter to Counsel, *supra* at 2.

201. *See* IMO Trust for Grandchildren of Gore, C.A. No. 1165-VCN, 2013 WL 1402219 (Del. Ch.) (Del. Ch. Apr. 5, 2013) (TRIAL ORDER).

202. *See* Cummings v. Lewis, C.A. No. 6948-VCP, 2013 WL 2987903, at *2 (Del. Ch. June 17, 2013).

203. *See id.*

204. *See id.*at *1.

205. *See id.*

206. *See id.*

207. *Id.* (citing Del. Code Ann. tit. 12, § 2102(a) (West 1995)).

Plaintiff contended that her claim was timely because it was asserted within six months of the birth of her daughter.[208] For support, Plaintiff cited to Section 2012(b)'s language that "[a]ll claims against a decedent's estate which arise at or after the death of the decedent" are barred against the estate "within 6 months after [the claim] arises."[209]

The Court, however, relied on the language of Section 2102(a) and found that the Plaintiff's child support claim was time-barred.[210] The Court held that the clock started running from conception and not birth based on Section 2012(a)'s application to all claims whether "due or to become due, absolute or contingent."[211] The Court concluded that because the Plaintiff knew of the conception before Mr. Lewis' death, she had a claim for child support that was contingent on a live birth, and therefore it came within the statute.[212]

Notably, the Court explained that this result was not unduly harsh because Plaintiff could have fairly easily made a claim against the estate while she was pregnant.[213]

2 *In re IMO the Revocable Trust of Conlin*, C.A. No. 8052-ML, 2014 WL 242655, at *5 (Del. Ch. Jan. 21, 2014)

In entering summary judgment in favor of the trustee in this case of alleged breach of fiduciary duties, Master in Chancery LeGrow found that the undisputed facts showed that the beneficiary was on inquiry notice of any alleged wrongdoing by the trustee no later than January 2008.[214] It was at this time the beneficiary began receiving monthly statements for the trust andat which point the Master found that the beneficiary was aware of what assets the trustee held in the trust.[215] Further, the beneficiary had started "asking questions about the trust and the assets that comprised the trust corpus no later than 2007."[216] The Master noted that "although the beneficiary retained counsel and requested documents from [the trustee] during that time period and apparently believed the documents the trustee provided did not fully satisfy her requests, [the beneficiary] took no further steps to assuage her concerns until 2012, when she finally hired a forensic accountant."[217] The beneficiary didn't file this case until November 21, 2012.[218] The Master found that the beneficiary's "receipt of the monthly statements and [the beneficiary's] own conduct in raising questions about assets

208. *See Cummings*, 2013 WL 2987903, at *1.

209. *Id.* at *4 (quoting Del. Code Ann. tit. 12, § 2102(b) (West 1995)).

210. *See Cummings*, 2013 WL 2987903, at *8 (citing Del. Code Ann. tit. 12, § 2102(a) (West 1995)).

211. *Cummings*, 2013 WL 2987903, at *5 (quoting Del. Code Ann. tit. 12, § 2102(a) (West 1995)).

212. *See Cummings*, 2013 WL 2987903, at *5.

213. *See id.*

214. *See* In re IMO the Revocable Trust of Conlin, C.A. No. 8052-ML, 2014 WL 242655, at *5 (Del. Ch. Jan. 21, 2014).

215. *See id.*

216. *Id.*

217. *Id.*

218. *Id.* at *2.

she believed were missing from the trust demonstrates she was aware or should have been aware of the conduct she alleges constituted a breach of [the trustee's] fiduciary duties."[219]

The Master applied the three year statute of limitations under 10 *Del. C.* §8106 (a point conceded by the beneficiary), and noted that the three years "begins to run at the time of the alleged wrongful act, even if a party is ignorant of the cause of action or harm suffered."[220] The Master also found that there was no basis to toll the statute of limitations.[221] As a result, the Master recommended dismissal of the beneficiary's claims.[222]

H. Spendthrift Trusts

1. *Mennen v. Wilmington Trust Company*, C.A. No. 8432-ML, at 1 (Court? January 17, 2014)

The Plaintiffs in this on-going case, the beneficiaries of a trust, are seeking the removal of the co-trustees and damages in excess of $100 million as a result of alleged breaches of the co-trustees' fiduciary duties.[223] The trust is one of four created by the grantor for each of his children and their issue. [224] The defendant trustees include an individual who is the beneficiary of one of the other four trusts.[225] "If the Plaintiffs succeed in their claims against the individual trustee of the trust, they may be entitled to tens of millions of dollars in damages that the individual trustee likely will not be able to pay."[226] Hence, if they are awarded damages, Plaintiffs seek to pierce the individual trustee's separate trust, despite it being subject to a spendthrift clause.[227]

In addition to arguing that summary judgment on this issue was not ripe because there remained disputed issues of fact, Plaintiffs disputed the enforceability of the spendthrift provision against them. In support of this, Plaintiffs argued that they are not creditors contemplated by the trust's terms or 12 Del. C. §3536 (Delaware's spendthrift statute).[228] Plaintiffs also argued that, "even if they are creditors, they may pierce the spendthrift trust because (1) public policy precludes

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219. *Id.* at *5.

220. *See id.* at *3-4.

221. *See id.*at *4-5.

222. *See id.*. at *6.

223. Mennen v. Wilmington Trust, C.A. No. 8432-ML, 2013 WL 4083852, at *1 (Del. Ch. July 25, 2013).

224. *Id*. at 2.

225. *See* Mennen v. Wilmington Trust Company, C.A. No. 8432-ML, at *1 (Del. Ch. January 17, 2014).

226 *Id.*

227. *See id.*

228. *See id.*at 5.

enforcing a spendthrift trust against tort claimants of the [Plaintiffs'] variety, or (2) the [trusts at issue] are essentially sub-trusts, and the [Plaintiffs] are entitled to impound" the individual trustee's interest in his separate trust.[229]

The Master rejected all of Plaintiffs' arguments. In so doing, she explained that, "[a]lthough the policy arguments against enforcement of spendthrift clauses are interesting and compelling, the passage of Section 3536 made clear that this Court must enforce such clauses, subject only to the limits contained or permitted in the statute."[230] She went on to note that, while spendthrift clauses are not "entirely unassailable," Plaintiffs' arguments for an exception under these facts are unavailing.[231] Specifically, the Master concluded that if Plaintiffs were successful at trial, they would merely become creditors of the individual trustee within the meaning of Section 3536.[232] The Plaintiffs argued that as tort claimants and family members they should be entitled to pierce the trust, ,but the Master explained that there is ample precedent that tort claimants are creditors within the meaning of Section 3536.[233] And, the fact that Plaintiffs were family members of the alleged tortfeasor did not entitle them to an exception to spendthrift law in the way "support obligations" may.[234]

The Master further explained that Delaware law also does not recognize an exception to spendthrift clauses for repeated acts of wrongdoing.[235]

As to Plaintiffs' argument that they were entitled to impound the individual trustee's interest in his trust, the Master found that even if impoundment is available as a remedy in Delaware, which did not need to be decided, it would not be applicable because the trusts at issue are separate trusts, not shared interests under a single trust, and its application would violate Section 3536. (In any event, it would be "legally impossible" because the individual trustee had no identifiable share in his separate trust).[236] For all those reasons, the Master recommended granting the individual trustee's motion for summary judgment.[237]

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229. *See id.*

230. *See id.*at 9.

231. *Id*.

232. *See id.*at 13.

233. *See id.*at 11, 13-14.

234. *See id.*at 12.

235. *See id.*at 16.

236. *See id.*at 17-20.

237. *See id.*at 21.