

## METHODS FOR MODIFYING TRUSTS UNDER DELAWARE LAW

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Delaware has become a favored jurisdiction for trusts for many reasons, perhaps most notably due to the flexibility and administrative advantages afforded by Delaware law. Individuals from across the country, and even internationally, have increasingly begun to use Delaware situs trusts to accomplish their planning objectives. In many cases, individuals with existing irrevocable trusts with a non-Delaware situs will seek to move the situs of the trust from another jurisdiction to Delaware in order to take advantage of certain aspects of Delaware law.<sup>1</sup> The purpose of this article is to discuss the various techniques available for migrating a non-Delaware situs trust to Delaware and modifying or reforming certain provisions of the governing instrument.

### I. THE *PEIERLS* CASES IN DELAWARE COURT OF CHANCERY

Before the Delaware Supreme Court's rulings in the *Peierls* cases,<sup>2</sup> it was common practice in Delaware for parties interested in moving (or "migrating") a trust to Delaware from another jurisdiction to file a petition with the Delaware Court of Chancery ("Chancery Court") asking the Court to (i) confirm the appointment of a Delaware corporate trustee, (ii) accept jurisdiction over the trusts, and (iii) approve modification and reformation of the trusts at issue. In the context of such petitions, each of the beneficiaries would consent (thus leading to such petitions to be commonly referred to as "consent petitions") to the relief requested in the petition, and the Delaware trustee's acceptance of its appointment as successor trustee would typically be contingent upon an order from the Chancery Court confirming such requested relief.

The Peierls family sought to move several trusts to Delaware and to consolidate management of the trusts.<sup>3</sup> The Peierls trusts had similar dispositive and administrative provisions, but not all were situated in the same jurisdiction and had different trustees.<sup>4</sup> Petitions regarding each of the five inter vivos trusts, seven testamentary trusts, and one charitable

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1. There are a number of advantages to migrating a trust to Delaware, all of which have been discussed at length by other authors. See, e.g., R. Nenno, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, ALI-ABA Planning Techniques for Large Estates, 509-651 (Apr. 2007); T. Pulsifer, Esq., *Taking Advantage of the "Delaware Advantage": Why and How to Settle Trusts in Delaware and Move Trusts to Delaware*, <http://www.mnat.com/assets/attachments/208.pdf>. The purpose of this article, however, is not to discuss the relative advantages of Delaware law relating to trusts, but to summarize the various ways to transfer the situs of and modify an existing trust under Delaware law.

2. *In re Peierls Family Testamentary Trusts*, 77 A.3d 223 (Del. 2013) [hereinafter *Peierls Testamentary Trusts*]; *In the Matter of Ethel F. Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013) [hereinafter *Peierls Charitable Lead Unitrust*]; *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del. 2013) [hereinafter *Peierls Inter Vivos Trusts*].

3. *Id.*

4. Most of the trusts had a corporate trustee and two individual trustees.

lead unitrust were filed in the Chancery Court asking for the following relief with respect to each trust: (i) approval of the resignation of the individual trustees; (ii) confirmation of the appointment of a Delaware corporate trustee for each trust; (iii) acceptance by the Chancery Court of jurisdiction over each trust so that Delaware would be the situs of each trust and Delaware law would govern the administration of each trust; and (iv) modification or reformation of certain administrative provisions of each trust (including the creation of the positions of Investment Direction Adviser and Trust Protector, and modification of the provisions relating to the removal, resignation and appointment of corporate trustees).

The Chancery Court denied the petitions. With respect to the petitions relating to the five inter vivos trusts, the Chancery Court concluded 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.<sup>5</sup> The Chancery Court held that because Delaware law did not currently govern the administration of the trusts, it could not consider the proposed modifications because the proposed modifications contemplated the use of Delaware law in order to effectuate the proposed modifications.<sup>6</sup> With respect to the seven testamentary trusts, the Chancery Court concluded that other states retained jurisdiction over those trusts and therefore refused to consider such petitions as to do so would violate interstate comity principles.<sup>7</sup> The Chancery Court denied the petition relating to the charitable lead unitrust because it concluded that the petitioners could already change the situs and administration of that trust under the terms of its governing instrument without the need for court involvement and that “reformation” of the trust, as opposed to “modification,” was not a proper remedy.<sup>8</sup> Lastly, the Chancery Court held that it could not rule upon the resignation and appointment of trustees because the governing instruments already contained provisions relating to the resignation and appointment of trustees, and therefore ruling upon such matters would constitute an advisory opinion.<sup>9</sup> The petitioners appealed the Chancery Court decision to the Delaware Supreme Court, which issued its opinions in October of 2013.

## II. THE *PEIERLS* CASES IN THE DELAWARE SUPREME COURT: ADMINISTRATIVE SITUS, CHOICE-OF-LAW AND JURISDICTIONAL PREREQUISITES

The Delaware Supreme Court analyzed three issues in its opinions: (i) when does Delaware law govern the administration of a trust,<sup>10</sup> (ii) when can or should a court exercise jurisdiction over a trust,<sup>11</sup> and (iii) whether the relief requested constituted an impermissible advisory opinion.<sup>12</sup>

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

6. *Id.* at 255.

7. *Peierls Testamentary Trusts*, 77 A.3d at 229-230.

8. *Peierls Charitable Lead Unitrust*, 77A. 3d at 237-238.

9. *Id.* at 237.

10. *Peierls Inter Vivos Trusts*, 77 A.3d at 256.

11. *Peierls Testamentary Trusts*, 77 A.3d at 228.

12. *Peierls Charitable Lead Unitrust*, 77 A.3d at 237.

The Delaware Supreme Court concluded that if a governing instrument contains a choice of law provision, the law governing the administration of the trust can be changed by changing the location of administration of the trust via appointment of a successor trustee in another jurisdiction, unless the governing instrument specifically provides that the laws of a particular jurisdiction shall always govern the administration of the trust.<sup>13</sup>

The Delaware Supreme Court held that the relief requested in the *Peierls* petitions (i.e., change of existing trustees, acceptance of jurisdiction over the trusts, change of trust situs and administrative law, and modifications of the trusts, including the creation of the positions of Investment Direction Adviser and Trust Protector) were “administrative matters.”<sup>14</sup>

### **A. Situs And Choice-Of-Law Issues Associated With Statutory Methods To Modify Or Reform Trusts**

In order to access the methods available under Delaware practice and law to modify or reform an irrevocable trust, whether judicial or non-judicial in nature, the first key issue is to determine whether Delaware law applies to the administration of the trust. This question is critical because, as will be later discussed, once Delaware law governs the administration of a trust, the non-judicial methods for modifying an irrevocable trust potentially become available to the interested parties to the trust (assuming all other statutory requirements of such nonjudicial methods can be met). In addition, if the interested parties utilize the consent petition process in order to add administrative provisions that are specific to Delaware law, the ability to affirmatively show that Delaware law governs the administration of the trust can greatly simplify the consent petition process, since the petitioners will be able to avoid the need to address in the pleadings the laws of a jurisdiction (other than Delaware) relating to the ability to make the requested modifications to the trust.

Whether Delaware law governs the administration of a trust is very closely linked to the trust’s place of administration (commonly referred to as the “administrative situs,” or sometimes simply the “situs,” of the trust). If a trust contains a provision selecting Delaware law to govern the administration of the trust, and if the trust is being administered in Delaware, then typically no further inquiry is needed, as Delaware law generally provides that the administration of a trust shall be governed by Delaware law while the trust is administered in Delaware.<sup>15</sup> A potentially more difficult scenario is where an irrevocable trust originally settled outside the State of Delaware is either (i) is silent as to law that governs of the administration of the trust, or (ii) affirmatively designates the law of a jurisdiction other than Delaware to govern the administration of the trust.

When seeking to migrate an irrevocable trust from another jurisdiction to Delaware, the question that naturally arises is whether the transfer of the administrative situs of a trust to Delaware is sufficient to then govern the administration of the trust, particularly if the trust selects another jurisdiction’s laws as the governing law of the trust. As previously noted, pursuant to Section 3332(b), the administration of a trust will be governed by Delaware law while the trust is administered in Delaware; however, the statute sets forth an exception stating that the general rule shall not apply if the application of the laws of another jurisdiction is “otherwise expressly provided by the terms of a governing instrument or by court order.” As such, under Section 3332 the question of whether changing the administrative situs of a trust from another jurisdiction to Delaware will cause Delaware law to apply to the administration of the trust is arguably left open

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13. *Peierls Inter Vivos Trusts*, 77 A.3d at 258-259.

14. *Id.* at 256.

15. DEL. CODE ANN. TIT. 12, § 3332(B) (2006) [hereinafter “Section 3332(b)”].

to varying interpretations. However, the *Peierls* decisions directly addressed the impact of transferring the administrative situs of irrevocable trusts to Delaware through the appointment of a Delaware corporate trustee in a variety of factual circumstances, which has shed some much-needed light on the matter.

In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court concluded that even if a trust contains a governing law provision, the law governing the administration of a trust will change when the place of administration of the trust (i.e., the administrative situs of the trust) is transferred as a result of the proper appointment of a successor trustee, unless the settlor has specifically stated his or her intent that a state's law shall always govern the administration of that trust.<sup>16</sup> The Court related this principle back to the settlor's intent in creating the trust by stating that “[W]hen a settlor does not intend his choice of governing law to be permanent and the trust instrument includes a power to appoint a successor trustee, the law governing the administration of the trust may be changed.”<sup>17</sup>

In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court analyzed the provisions of each of the inter vivos trusts at issue and determined that the settlor did not intend that the initial law governing the administration of the trusts, as reflected in the choice-of-law provisions contained in the trusts, must always remain the law of the original jurisdiction, and concluded that for each trust the “law of administration would change with a change in the place of administration.”<sup>18</sup> It is important to note that, in connection with the discussion that follows concerning potential jurisdictional obstacles to be overcome before utilizing the available methods to modify or reform trusts under Delaware law, the trusts at issue in *Peierls Inter Vivos Trusts* had not previously been subject to court action in any jurisdiction. The Delaware Supreme Court was careful to note that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction “only when a beneficiary or trustee brings a suit over the trust,” which is distinguishable from the situation in which the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.<sup>19</sup> *Peierls Testamentary Trusts* contains a thorough discussion of the choice-of-law principles that apply when a trust is subject to the continuing jurisdiction of a particular court.<sup>20</sup>

Determining the scope of matters that are administrative in nature is critical to understanding what issues relating to a trust will be governed by Delaware law. Thankfully, the Delaware Supreme Court does not disappoint, noting that administrative matters are matters relating to the management of the trust, including, among other matters, a trustee's powers and liabilities, the proper investments for the trust, and the removal and appointment of trustees.<sup>21</sup> In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court held that the items of relief requested in the consent petitions (which included the proposed modification of the trusts to create the positions of Investment Direction Adviser with authority over trust investment decisions and Trust Protector with the authority to amend the administrative and technical provisions of the trusts) were all “administrative matters.”<sup>22</sup> The practical result of the holdings in the *Peierls* decisions is that for most *inter*

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16. *Peierls Inter Vivos Trusts*, 77 A.3d at 263-64 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 271 cmt. g (1971)).

17. *Id.* at 259.

18. *Id.* at 263-66.

19. *Id.* at 257-58 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 272 cmt. e (1971)).

20. See discussion *infra* Part II.B.

21. *Peierls Inter Vivos Trusts*, 77 A.3d at 256 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 272 cmt. a (1971)).

22. *Id.*

*vivos* trusts settled outside of Delaware, once the administrative situs of the trust is transferred to Delaware through the appointment of a Delaware corporate trustee, Delaware law will then govern the administration of the trust, which in turn will allow the interested parties to the trust to access the methods available under Delaware to reform or modify the trust.

Even with the guidance provided by Section 3332(b) and the *Peierls* decisions in the areas of administrative situs and the determination of when the law governing the administration of a trust originally settled outside of Delaware, some questions remain that may be ripe for further clarification through future action by the General Assembly or the courts. For example, if a trust has multiple fiduciaries serving, how much “administration” needs to take place in the State of Delaware in order for Delaware to be considered the primary place of administration and administrative situs of the trust for purposes of Section 3332(b) or the *Peierls* decisions? While *Peierls Inter Vivos Trusts* does not directly answer this question, some insight can be gained from the ruling as the Delaware Supreme Court concluded that the appointment of a Delaware corporate trustee to replace the current non-Delaware corporate trustee would result in the application of Delaware law to the administration of the trust.<sup>23</sup> This suggests that the location or place of business of the corporate trustee is directly relevant in determining the administrative situs of a trust when the trust has multiple trustees serving at any given time.

### III. METHODS FOR MODIFICATION

In light of the clarification of Delaware law regarding jurisdictional issues and the mechanics of the migration and modification of trusts set forth in the *Peierls* decisions, there are now several options available to individuals to move an existing trust to Delaware and modify it to take advantage of Delaware’s laws relating to the administration of trusts.

#### A. Consent Petitions

The consent petition process is governed by Delaware Court of Chancery Rules 100 through 104, which provide a streamlined judicial mechanism for the modification of trusts. Trust fiduciaries and trust beneficiaries may find the consent petition process to be an attractive option for modifying an irrevocable trust as compared to the available non-judicial methods. Among other reasons, the Delaware Court of Chancery’s imprimatur can carry significant weight among the interested parties. Further, the governing Rules contain numerous safeguards to ensure that jurisdictional, administrative situs and governing law requirements are met and that minor or unborn beneficiaries are properly represented. For these reasons, the consent petition process is a popular way to modify the administrative provisions of Delaware trusts, in particular the addition of “Advisers” under Delaware’s directed trust statute<sup>24</sup> with the authority to direct the trustee with respect to distribution decisions or decisions relating to the investment and management of trust assets.

The Delaware Court of Chancery Rules require that the party seeking a modification to a trust address in the petition (i) the basis for the Court’s jurisdiction over the trust,<sup>25</sup> (ii) whether the trust was settled or creates in a state

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23. See *Peierls Inter Vivos Trusts*, 77 A.3d at 263-66

24. DEL. CODE ANN. TIT. 12, § 3313 (2014).

25. DEL. CHANC. CT. R. 100(a)(3) (stating that petition must address “[T]he basis for this Court’s jurisdiction over the trust and, to the extent jurisdiction is based on Delaware being the principal place of administration, a description of the administrative tasks and duties carried out by the Delaware trustee or other Delaware fiduciaries and a comparison of those tasks and duties to those entrusted to fiduciaries or proposed fiduciaries domiciled outside of Delaware.”).

other than Delaware or contains a choice of law provision that selects the law of a jurisdiction other than Delaware,<sup>26</sup> (iii) whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately prior to the change in situs to Delaware,<sup>27</sup> and (iv) whether Delaware law governs the administration of the trust, and, if so, why.<sup>28</sup> For all such requirements, the *Peierls* decisions are instructive and have provided much needed clarity. Pursuant to the principles set forth in *Peierls Inter Vivos Trusts* and *Peierls Testamentary Trusts*, for most inter vivos trusts that are not subject to the primary supervision of another state, the key to establishing jurisdiction and administrative situs in Delaware and the application of Delaware law to the administration of the trust is to appoint, through the mechanism contained in the trust's governing instrument, a Delaware trustee prior to filing the Petition.

There are factual scenarios that will require an initial proceeding in the courts of a jurisdiction other than Delaware in order to release jurisdiction or transfer the situs of the trust to Delaware contingent upon an order from the Delaware Court of Chancery accepting jurisdiction over the trust or confirming the transfer of the trust's situs. This is typically referred to as a "pitch and catch" procedure,<sup>29</sup> and the consent petition will typically seek to modify the trust in addition to confirming the transfer of the trust's situs to Delaware. A "pitch and catch" may be required when (i) a court outside of Delaware is exercising primary supervision over the trust, (ii) the trust does not contain a valid mechanism for the appointment of a Delaware corporate trustee, in which case the court of such other jurisdiction will need to appoint the Delaware corporate trustee in addition to transferring the situs of the trust to Delaware, or (iii) the trust contains a provision stating that a particular jurisdiction's laws shall govern the administration of the trust even if the situs of the trust is moved, in which case the court of such other jurisdiction will need to change the law governing the administration of the trust to Delaware in addition to transferring the situs of the trust to Delaware.

A consent petition must include as exhibits a consent or statement of non-objection to the relief requested in the petition signed by all interested parties.<sup>30</sup> The interested parties to a trust may include, but are not limited to: (i) trustees and other fiduciaries (unless they have otherwise signified their consent to the Petition by acting as the Petitioner); (ii) the trust beneficiaries who have a current interest in the trust or whose interest would vest if the current interest in the trust terminated as of the date the petition is filed (without regard to the exercise or non-exercise of power appointment); and (iii) all other persons having an interest in the trust pursuant to the express terms of the trust instrument, such as power holders and persons having other rights and powers, held in a non-fiduciary capacity, with respect to trust property.<sup>31</sup> A trust beneficiary's consent must be executed by: (i) the beneficiary personally; (ii) the beneficiary's attorney ad litem; (iii) a person authorized to virtually represent the beneficiary pursuant to 12 Del. C. § 3547 or any successor statute; or (iv)

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26. DEL. CHANC. CT. R. 100(A)(2).

27. DEL. CHANC. CT. R. 100(d)(3) (stating that if the petition seeks to apply Delaware law to a trust despite a choice of law provision selecting the law of another jurisdiction to govern the trust, then the petition must address "[W]hether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change in situs to Delaware for approval of the transfer of situs of the trust to Delaware, and the status of the application, or if no application was made, why such approval need not be sought.").

28. DEL. CHANC. CT. R. 100(D)(4).

29. See *Peierls Testamentary Trusts*, 77 A.3d at 230.

30. DEL. CHANC. CT. R. 101(A)(7).

31. *Id.*

a person authorized by applicable law to represent the beneficiary with respect to the Petition (such as the beneficiary's attorney-in-fact or the Delaware Attorney General in the case of certain charitable beneficiaries).<sup>32</sup>

A minor or unborn beneficiary may be virtually represented by another party for purposes of any judicial proceeding or non-judicial matter involving a trust.<sup>33</sup> The virtual representation statute provides that the interest of "a minor, incapacitated, or unborn person, or a person...whose identity or location is unknown and not reasonably ascertainable" may be represented and bound by another with a substantially identical interest, to the extent that there is no material conflict of interest between the representative and the person being represented with regard to the particular question or dispute.<sup>34</sup> In the case of a minor or incapacitated beneficiary, the surviving and competent parent or parents (or the custodial parent in cases where one parent has sole custody) may represent and bind the beneficiary, provided "there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary's parents with respect to the particular question in dispute."<sup>35</sup> A "presumptive remainder beneficiary" (one who would take if the trust terminated at that time without regard to the exercise or non-exercise of a power of appointment) may represent and bind contingent remainder beneficiaries, including adults and charities.<sup>36</sup> Use of the virtual representation statute can avoid the need for the Delaware Court of Chancery to appoint a guardian *ad litem* to represent the interests of minor or unborn beneficiaries in connection with a consent petition. However, the Court may appoint a guardian *ad litem* in the event the virtual representation statute cannot be properly invoked due to a material conflict of interest between the proposed representative and the minor or unborn beneficiary.

In 2013, the virtual representation statute was amended to provide that a material conflict of interest between a representative and each beneficiary is presumed when, as a result of the judicial proceeding or nonjudicial matter: (i) the representative will be appointed to a fiduciary or nonfiduciary office or role, unless the representative already serves in a fiduciary or nonfiduciary office or role and will not receive greater authority, broader discretion, or increased protection as a result of the new appointment; (ii) the representative currently holds a fiduciary or nonfiduciary office or role and will receive greater authority, broader discretion, or increased protection; or (iii) the representative has any other "actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth."<sup>37</sup> The 2013 amendment to the virtual representation statute aligns the virtual representation statute with Delaware Court of Chancery Rule 103 regarding what constitutes a material conflict of interest between a proposed representative and the individual proposed to be represented. As a practical matter, if the interested parties to a consent petition are seeking to create new fiduciary position and appoint trust beneficiaries in such roles, the parties should carefully consider the material conflict of interest presumptions set forth in the virtual representation statute if such beneficiary is purporting to virtually represent any other party.

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32. DEL. CHANC. CT. R. 102(A)(2).

33. DEL. CODE ANN. TIT. 12, § 3547 (2013) [hereinafter the "virtual representation statute"].

34. DEL. CODE ANN. TIT. 12, § 3547(A) (2013).

35. DEL. CODE ANN. TIT. 12, § 3547(C) (2013).

36. DEL. CODE ANN. TIT. 12, § 3547(B) (2013).

37. DEL. CODE ANN. TIT. 12, § 3547(E) (2013).

In addition to modifying an irrevocable trust, it is also possible to utilize the consent petition process to seek a judicial *reformation* of an irrevocable trust. Under Delaware law, a trust reformation differs from a trust modification in that a reformation seeks to make a change to the trust that is effective as of the time of the creation of the trust, as opposed to a modification of a trust that only changes the terms of a trust from the date of the modification.<sup>38</sup> The Delaware Court of Chancery has authority to reform a trust, since “reformation is an equitable remedy and an ordinary remedy for mistake in the terms of a trust instrument.”<sup>39</sup>

## B. Decanting

Delaware law permits a trustee to distribute (or “decant”) the principal of a trust to the trustee of another trust that has the same dispositive provisions as the first trust.<sup>40</sup> Decanting has become an increasingly popular method for migrating trusts to Delaware and modifying such trusts to take advantage of certain aspects of Delaware trust law. Delaware’s decanting statute is available when Delaware law governs the administration of the trust or when the trust is administered in Delaware.<sup>41</sup>

The requirements of the decanting statute are as follows:

- (1) The beneficiaries of the second trust must also be beneficiaries of the first trust.<sup>42</sup>
- (2) The second trust must comply with any standard that limits the trustee’s authority to make distributions from the first trust.<sup>43</sup>
- (3) A written “decanting instrument” must be signed and acknowledged by the trustee and filed with the records of the trust.<sup>44</sup>

While the second trust may not have beneficiaries who were not beneficiaries of the first trust, the decanting statute specifically permits the second trust to grant a beneficiary of the first trust a limited or general power of appointment, thereby allowing the beneficiary to appoint trust property to a person who is not a beneficiary of the first trust.<sup>45</sup>

Unlike consent petitions, a trustee does not need the consent of the beneficiaries or any other interested party to exercise its decanting power. However, because decanting is an exercise of the trustee’s discretion it is common practice to have the beneficiaries consent to the decanting and release and indemnify the trustee from any liability in connection with the decanting.

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38. See *Peierls Charitable Lead Unitrust*, 77 A.3d at 237-38.

39. 90 C.J.S. TRUSTS § 92.

40. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

41. DEL. CODE ANN. TIT. 12, § 3528(F) (2013).

42. DEL. CODE ANN. TIT. 12, § 3528(A)(1) (2013).

43. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

44. DEL. CODE ANN. TIT. 12, § 3528(B) (2013).

45. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

### C. Merger

Delaware law permits the merger of trusts without judicial involvement. Under Delaware law, a trustee is authorized to “[m]erge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.”<sup>46</sup> A simple merger instrument signed by the trustee is sufficient to accomplish a merger. Any changes to administrative provisions available through the consent petition process or decanting could also be accomplished by merger, including the addition of Investment Direction Adviser, Distribution Advisers and Trust Protectors.

Like decanting, merger is an exercise of the trustee’s discretion. While not required under the statute, best practices would suggest that the trustee obtain a release from the trust beneficiaries and other interested parties before effectuating a merger.

### D. Nonjudicial settlement agreements

Another method for modifying trusts under Delaware law is through the use of a nonjudicial settlement agreement. In 2013, the State of Delaware enacted a nonjudicial settlement agreement statute<sup>47</sup> modeled closely after Section 111 of the Uniform Trust Code. As with the other methods that are available under Delaware to modify trusts without court involvement, the Delaware nonjudicial settlement agreement statute is available to any trust that is governed by Delaware law with respect to matters of administration.

What matters may be resolved and what type of modifications may be accomplished pursuant to a Delaware nonjudicial settlement agreement? The statute is quite new in Delaware, and, therefore, as of yet there is no judicial guidance interpreting its provisions. The language of the statute is quite broad, and provides that *any* matter involving a trust (with certain restrictions relating to charitable trusts and special purpose trusts) can properly be the subject of a Delaware nonjudicial settlement agreement.<sup>48</sup> The statute also provides a nonexclusive list of six matters that may be resolved by a nonjudicial settlement agreement: (i) the interpretation or construction of the terms of the trust; (ii) the approval of a trustee’s report or accounting; (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (iv) the resignation or appointment of a trustee and the determination of a trustee’s compensation; (v) the transfer of a trust’s principal place of administration; and (vi) the liability of a trustee for an action relating to the trust.<sup>49</sup>

A Delaware nonjudicial settlement agreement is “only valid to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law.”<sup>50</sup> What constitutes a “material purpose” is not defined under Delaware’s trust code, and there is no direct guidance in the model UTC provisions or the UTC’s commentary. However, the intent of the settlor in creating

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46. DEL. CODE ANN. TIT. 12, § 3325(29) (2013).

47. DEL. CODE ANN. TIT. 12, § 3338 (2013).

48. DEL. CODE ANN. TIT. 12, § 3338(B) (2013).

49. DEL. CODE ANN. TIT. 12, § 3338(D) (2013).

50. DEL. CODE ANN. TIT. 12, § 3338(C) (2013).

the trust, express or implied, would likely be relevant in determining the “material purpose” of the trust. Interestingly, any interested person to a trust may seek judicial determination to interpret, apply, enforce or determine the validity of a nonjudicial settlement agreement,<sup>51</sup> which opens the door for future judicial determinations of what constitutes a “material purpose” of the trust. As a practical matter, if the settlor of the trust is living at the time that entering into a nonjudicial settlement agreement is contemplated, then the issue of whether a material purpose of the trust is being violated may be largely moot. The settlor could be asked to provide an affidavit stating that the subject of the nonjudicial settlement agreement and any attendant changes to the trust do not violate a material purpose of the trust and are consistent with the settlor’s intentions in creating the trust. The settlor may also sign the nonjudicial settlement solely for the purpose of indicating the settlor’s non-objection or stating that the settlor takes no position with respect to the matters set forth in the nonjudicial settlement agreement.

All “interested persons” must be parties to the nonjudicial settlement agreement. Under the statute interested persons” means “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery.”<sup>52</sup> As such, in determining who must sign the nonjudicial settlement agreement, the parties must look to the Delaware Court of Chancery Rules governing consent petitions, specifically Rule 101(a)(7) which sets forth a list of who must provide a consent or statement of non-objection in connection with a consent petition. This means that the same parties who must take part in a consent petition relating to a trust would also have to sign a nonjudicial settlement agreement relating to that trust. This requirement, along with the other protections and safeguards inherent in the nonjudicial settlement agreement statute, including the ability for any interested person to seek judicial approval of the matter at any time, may make a nonjudicial settlement agreement more attractive to the parties seeking to modify a trust as compared to decanting or merger, which involve a pure exercise of discretion on the part of the trustee and do not require the consent of or notice to any trust beneficiaries.

Since the enactment of the statute, some practitioners have questioned whether a Delaware nonjudicial settlement agreement can be used to modify or amend the administrative provisions of a trust that is governed by Delaware law as to its administration. The broad scope of the statute’s wording of the statute strongly suggests that modifying the administrative provisions of a trust is permissible as long as all other requirements are met. The interested persons may enter into a binding agreement with respect to *any* matter involving a trust, except with respect to charitable trusts and purpose trusts described in the Delaware Code.<sup>53</sup> The phrase “any matter” is inclusive rather than restrictive, suggesting that the presumption should be that a particular matter will fall within the proper scope of a nonjudicial settlement agreement rather than not. Indeed, jurisdictions that have adopted similar versions of a nonjudicial settlement agreement statute based upon Section 111 of the Uniform Trust Code, but did not wish for nonjudicial settlements agreements to be used to modify trusts, have seen the need to explicitly state such a restriction on the use of nonjudicial settlement agreement to counteract the otherwise permissive language contained in Section 111 of the Uniform Trust Code.<sup>54</sup>

Further, the non-exclusive list of matters that can be resolved by a nonjudicial settlement agreement includes the “grant to a trustee of any necessary or desirable power.”<sup>55</sup> The use of a nonjudicial settlement agreement to expand a

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51. DEL. CODE ANN. TIT. 12, § 3338(E) (2013).

52. DEL. CODE ANN. TIT. 12, § 3338(A) (2013).

53. DEL. CODE ANN. TIT. 12, § 3338(B) (2013).

54. See IOWA CODE, § 633A.6308.1; MICH. COMP. LAWS, § 700.7111(2).

55. DEL. CODE ANN. TIT. 12, § 3338(D)(3) (2013).

trustee's power would logically include the granting of a necessary or desirable power not already granted by the trust's governing instrument (otherwise the use of the nonjudicial settlement agreement to grant such powers would be unnecessary), and, as such, would effectuate a *de facto* modification of the trust's governing instrument. A nonjudicial settlement agreement may also be used to determine a trustee's liability for an action relating to a trust.<sup>56</sup> It has been suggested that use of a nonjudicial settlement agreement to limit or define a trustee's liability for particular actions (or inactions) through the use of a nonjudicial settlement agreement, in conjunction with the appointment of a trustee (which is also specifically permitted under the statute<sup>57</sup>), could permit the appointment of a special trustee with certain exclusive powers that would otherwise be exercised by the existing trustee of the trust, and set forth the standard of liability that will apply to such special trustee.<sup>58</sup> This is another example of adding operative provisions to a trust's governing instrument that the governing instrument does not currently contain, which can only be properly described as a modification to the trust.

In light of the foregoing, Delaware nonjudicial settlement agreements can certainly be considered another valuable tool that interested parties can use to modify the administrative provisions of a trust, including common modifications that are desired such as the addition of Advisers under Delaware's directed trust statute<sup>59</sup> with the authority to direct the trustee as to distribution decisions or decisions relating to the investment and management of trust assets.

#### IV. CONCLUSION

Through the *Peierls* decisions, the Delaware Supreme Court has provided much needed clarity regarding the administrative, choice-of-law, and jurisdictional issues relating to the migration and modification of trusts under Delaware law. Practitioners now have four clear tools with which to assist their clients in their planning objectives.

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56. DEL. CODE ANN. TIT. 12, § 3338(D)(6) (2013).

57. DEL. CODE ANN. TIT. 12, § 3338(D)(4) (2013).

58. Todd A. Flubacher and Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper*, TRUSTS AND ESTATES, DECEMBER 2013, AT 42-44.

59. DEL. CODE ANN. TIT. 12, § 3313 (2014).