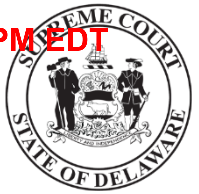
EFiled: Nov 02 2021 04:01PM EDT
Filing ID 67063687
Case Number 293,2021



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES B. WYETH, solely in his capacity as the Executor of the Estate of Phyllis Mills Wyeth, Respondent Below, Appellant, v. JAMES PAUL MILLS JR. and MARY CHICHESTER MILLS ABEL-SMITH, Respondents Below, Appellees, and WILMINGTON TRUST COMPANY, as Trustee of the A. FELIX DU PONT Trust dated December 28, 1934, Trust No. 2108 f/b/o Phyllis Mills Wyeth, Petitioner Below, Appellee.	No. 293, 2021 Case Below: Court of Chancery of the State of Delaware C.A. No. 2019-0690-JTL

APPELLANT'S OPENING BRIEF

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November 2, 2021

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NATURE OF PROCEEDINGS

On December 28, 1934, A. Felix du Pont ("Felix") created a trust (the "Trust") for the benefit of his daughter, Alice F. du Pont ("Alice"), under an irrevocable trust agreement (the "Trust Agreement") between Felix, as trustor, and Wilmington Trust Company ("Trustee"), as trustee.

Pursuant to the Trust Agreement, Felix granted Alice the power to appoint the remaining assets of the Trust upon her death in favor of her spouse and her issue, and if Alice failed to exercise the power, the remaining assets of the Trust at Alice's death would, by default, be distributed to Alice's then-living issue in equal shares, outright and free of trust.

Alice had three children, Mary Chichester Mills Abel-Smith ("Mimi"), Phyllis Mills Wyeth ("Phyllis"), and James Paul Mills, Jr. ("James").

Alice exercised her limited power of appointment multiple times from 1973 to 1986, each time addressing issues such as changes in the law, life events, and the personal life decisions of her children. Alice exercised her power for the final time on July 25, 1986 (the "1986 Exercise"). Alice died 14 years later in 2002, predeceased by her husband, and survived by Mimi, Phyllis, and James.

Pursuant to the 1986 Exercise, Alice appointed the Trust upon her death in further trusts for each of Mimi ("Mimi's Trust"), Phyllis ("Phyllis's Trust"), and James ("James's Trust"); granted each of Mimi, Phyllis, and James the power to

appoint the assets of their respective trust at death; and granted Phyllis, and only Phyllis, the ability to appoint the assets of Phyllis's Trust in favor of a charity, as well as her issue.

On June 15, 2006, in full compliance with the terms of the 1986 Exercise, Phyllis exercised the power of appointment conferred upon her by Alice (the "2006 Instrument") in favor of The Wyeth Foundation (the "Foundation"), a charitable organization under section 501(c)(3) of the Internal Revenue Code ("I.R.C.") incorporated in Delaware.

Phyllis died on January 14, 2019, survived by her husband, Respondent-Appellant James B. Wyeth, who serves as the executor of Phyllis's estate (the "Estate"), and her two siblings, neither of whom formally challenged Phyllis's power to appoint in favor of a charity prior to her death.

On August 29, 2019, the Trustee filed a Verified Petition for Instructions (the "Petition"), seeking instructions regarding the validity of Alice's 1986 Exercise and Phyllis's 2006 Instrument and the proper distribution of the remaining assets of Phyllis's Trust. A1. On November 8, 2019, Respondents below, the Estate, the Foundation, and James, filed their respective answers to the Petition. A2. Mimi never responded to the Petition or otherwise appeared. A180.

On January 6, 2020, discovery was initiated, and the parties began producing documents. *See* A3-5. On August 19, 2020, based on the limited discovery produced

thus far, the Foundation filed an Amended Response to Verified Petition for Instructions. A5. On October 15, 2020, before discovery was complete, James moved for judgment on the pleadings ("James's Motion") and filed an opening brief. A5; A139.

On December 22, 2020, the Foundation and the Estate each cross moved for judgment on the pleadings (the "Estate's Cross-Motion"). A6-7. The parties fully briefed the cross-motions by April 1, 2021. A139; A179; A277; A321; A376; A435. The Court of Chancery held oral argument on April 26, 2021. A464.

On June 25, 2021, the Court of Chancery granted James's Motion, denied both the Foundation's cross-motion and the Estate's Cross-Motion, and ordered the remaining assets of Phyllis's Trust to be distributed to Mimi's Trust and James's Trust and not to the Foundation as intended. *See* Memorandum Opinion, Exhibit A hereto ("Opinion" or "Op."); *see also* Final Order and Judgment ("Order"), Exhibit B hereto. This is the Estate's appeal.

SUMMARY OF ARGUMENT

1. The 1986 Exercise is partially invalid because it expanded the scope of the Original Limited Power of appointment. Consequently, the Opinion must be reversed and the assets of Phyllis's Trust must be distributed to the Estate pursuant to Delaware law.

2. The Court of Chancery's interpretation of the "plain meaning" of the phrase "to the extent permissible" in the 1986 Exercise—that it creates a conditional power of appointment—is incorrect because it fails to consider the entirety of the 1986 Exercise, lacks context, and is inconsistent with Felix's intent. It cannot, therefore, save the validity of the 1986 Exercise.

3. In the alternative, because the Estate has, at a minimum, set forth a reasonable interpretation of "to the extent permissible," the phrase is ambiguous, and this case should be remanded so that the parties can proceed with discovery.

STATEMENT OF FACTS

A. Felix Settles A Trust For The Benefit Of Alice

On December 28, 1934, Felix created the Trust for the benefit of his daughter, Alice, for her lifetime benefit under the Trust Agreement. A13, ¶ 1. Further, Felix gave Alice the power to appoint the remaining assets of the Trust at her death to her surviving spouse and to her then-living "lawful issue" outright and free of trust. *Id*. This power also allowed Alice to direct that the Trust assets be held in further trust for those individuals upon such terms and conditions as Alice determined appropriate. *Id*.

Alice had to exercise her power of appointment by a written instrument executed and delivered to the Trustee during Alice's lifetime, or by her last will and testament. *Id*. If Alice failed to effectively exercise her power of appointment, the Trust would, by default, be distributed to Alice's then-living issue, outright and free of trust. *Id*.

Specifically, Paragraph 1 of Article I of the Trust Agreement (the "Original Limited Power") provides that:

> Upon the death of Trustor's said daughter, Alice F. du Pont, Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto the widower of said Alice F. du Pont, and/or unto the lawful issue of said Alice F. du Pont, in such manner and amounts and upon such trusts, terms and conditions as said Alice F. du Pont shall have appointed by the last instrument in writing which she

> shall have executed and delivered during her lifetime to Trustee, or failing such instrument by her Last Will and Testament, or in default of any such appointment then unto her then living issue, if any, per stirpes and not per capita, subject however, to the provisions of paragraph "2" hereof.

A23, Art. I ¶ 1.

Pursuant to Paragraph 2 of Article I of the Trust Agreement, to comply with the common law rule against perpetuities that was applicable in Delaware at that time,[1] all trusts created under the Trust Agreement "shall end immediately prior to the expiration of twenty-one years from and after the death of the last survivor of Trustor and his now living issue" (the "Original Perpetuities Period"). A25, Art. I ¶ 2.

Mimi, Phyllis, and James were all born *after* December 28, 1934, the effective date of the Trust. A181. Accordingly, they were not among Felix's "now living issue" when the Trust was established.

B. Alice Exercises Her Limited Power Of Appointment

Alice exercised the Original Limited Power four times during her lifetime: on February 12, 1973 ("1973 Exercise"), January 19, 1976 ("1976 Exercise"), January 12, 1983 ("1983 Exercise"), and July 25, 1986 (1986 Exercise, and collectively the

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[1] *Wilmington Tr. Co. v. Sloane*, 54 A.2d 544, 548 (1947) (Delaware applied "the common-law rule against perpetuities which permits the distribution of trust funds to be suspended during a life or lives in being at the death of the donor, or testator, and twenty-one years and the usual period of gestation thereafter.").

"Exercises"). A182; *id.* at n.3. The Opinion ultimately hinges on the interpretation of the phrase "to the extent permissible." It is important to trace the history of Alice's Exercises to understand the phrase's true meaning, which relates to a perpetuities-related limitation.

1. 1973 Exercise

In 1973, Alice exercised the Original Limited Power by dividing the assets of the Trust into shares for each of Mimi, Phyllis, and James, and holding each share in further trust to be governed by the terms of the 1973 Exercise. A212, 1973 Art. SECOND ¶ (b).

Alice granted each of Mimi, Phyllis, and James a further power to appoint the remaining assets of their trusts upon their deaths in favor of their natural born issue. A214, 1973 Art. SECOND ¶ (b)1.D.[2] At the time, Phyllis was 32 with no children.[3]

Specifically, Paragraph (b)1.D. of Article SECOND of the 1973 Exercise (the "1973 Limited Power") provided that:

> Upon the death of such child or grandchild, this separate trust shall terminate, and the principal and accumulated or undistributed income, if any, shall be distributed among the issue of such child or grandchild, as the case may be, in such proportions and manner (in trust or otherwise) without regard to equality and to the exclusion of any, as

[2] The 1973 Exercise defined "issue" to mean "lawful blood descendants" and explicitly excluded adopted children. A218, 1973 Art. FIFTH ¶ (a).

[3] "Phyllis was paralyzed from the waist down as the result of injuries sustained in a car accident when she was 22. Her injuries made it unlikely, if not impossible, that Phyllis would ever have biological children." A299, n.5.

> he shall appoint by the last instrument in writing which he shall have executed and delivered to the Trustee during his lifetime, or failing such instrument by his Last Will and Testament, expressly referring to this power … To the extent a child of [Alice] does not appoint, the trust property shall be distributed to the issue, per stirpes, of such deceased child … To the extent a child of [Alice] does not appoint and is not survived by issue, such property shall be distributed to the then surviving issue of [Alice], per stirpes, subject to the provisions of Article FOURTH and subparagraph 3 of this Article SECOND.

A214, 1973 Art. SECOND ¶ (b)1.D.

The 1973 Exercise extended the duration of each of the trusts created for Mimi, Phyllis, and James beyond the Original Perpetuities Period by creating a new perpetuities period. This was done ostensibly to create a perpetual trust.[4]

Specifically, Article THIRD of the 1973 Exercise, provided that:

> Notwithstanding any other provisions of this Trust Agreement, each of the trusts created under Article SECOND shall terminate at the end of twenty (20) years and eleven (11) months after the death of the last survivor of [Alice], [Alice's] husband, all children and grandchildren who are in being as of the date this document is deemed executed. If this limitation shall cause

[4] Under Delaware law at the time, "every interest in property created by the exercise of a power of appointment (limited or general) [was] deemed to have been created at the time of exercise of the power rather than at the creation of the original trust," which "offered the possibility of having a perpetual trust without the imposition of federal transfer tax through the exercise of limited powers of appointment in successive generations." Richard W. Nenno, *Delaware Law Offers Asset Protection and Estate Planning Benefits*, 26 Est. Plan. 3, at 1 (1999); *see also* Kasey A. Place, *Section 2041(A)(3): A Trap Not Easily Sprung*, 55 Real Prop. Tr. & Est. L.J. 259, at 262 & n.15 (2020) (*citing* 38 DEL. LAWS 198, § 1 (1933) (predecessor to 25 *Del. C.* § 501)).

> the termination of any such trust prior to the time otherwise fixed for the termination thereof, then upon such earlier termination under this Article THIRD the entire principal and any accumulated and/or undistributed income remaining in such trusts shall be distributed free of the trust, subject to the provisions of Article FOURTH, to the persons then entitled to receive the income of such trust in the proportions in which they share in such income.

A216, 1973 Art. THIRD.

Pursuant to Paragraph (d) of Article SECOND of the 1973 Exercise, if Alice failed to effectively exercise the Original Limited Power, the assets of the Trust would pass pursuant to the default provision in the Original Limited Power (*i.e.*, to Alice's then-living issue, per stirpes, outright and free from trust). A216, 1973 Art. SECOND ¶ (d).

2. 1976 Exercise

In 1976, Alice again exercised the Original Limited Power by dividing the assets of the Trust into shares for Mimi, Phyllis, and James, but this time, the shares for Mimi and James would be held in further trust, and the share for Phyllis would be distributed to Phyllis outright and free from trust. A233, 1976 Art. SECOND ¶ (b).

As she did in the 1973 Exercise, Alice granted Mimi and James the further power to appoint the remaining assets of their trusts upon their deaths in favor of their natural born issue. A235, 1976 Art. SECOND ¶ (b)1.D. This limited power of appointment (the "1976 Limited Power") was substantively identical to the 1973

Limited Power. *Id*. Of course, the 1976 Limited Power did not apply to Phyllis because Phyllis was to receive her share outright. However, Alice changed the definition of "issue" so that, with respect to Phyllis, adopted children would be considered issue. A239, 1976 Art. FIFTH ¶ (a).

Like the 1973 Exercise, the 1976 Exercise extended the duration of each of the trusts created for Mimi and James beyond the Original Perpetuities Period by creating a new perpetuities period. A237, 1976 Art. THIRD; *see supra* n.4.

Paragraph (d) of Article SECOND also remained the same. A237, 1976 Art. SECOND ¶ (d).

3. 1983 Exercise

After the 1976 Exercise, there were substantial changes in federal tax law,[5] prompting Alice to exercise the Original Limited Power by dividing the Trust into shares for Mimi, Phyllis, and James, but holding all shares, including the share for Phyllis, in further trust to be governed by the terms of the 1983 Exercise. A254, 1983 Art. SECOND, ¶ (b).

Again, Alice granted each of Mimi, Phyllis, and James the further power to appoint the remaining assets of their trusts upon their deaths in favor of their

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[5] *See* Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 Pepp. L. Rev. 1291, 1292 & n.1 (2013) (*citing* Tax Reform Act of 1976, Pub. L. 94-455, § 2006, 90 Stat. 1520, 1879 (Oct. 4, 1976)); *id.* at 1297 ("The tax benefits of generation-skipping trusts were prospectively curtailed by the enactment of the Generation Skipping Transfer tax in 1976.").

respective permissible issue. A256, 1983 Art. SECOND ¶ (b)1.D. Specifically, Paragraph (b)1.D. of Article SECOND of the 1983 Exercise (the "1983 Limited Power") provided that:

> Upon the death of such child or grandchild, if such death occurs during the period provided in Paragraph (a) of Article THIRD, this separate trust shall terminate, and the principal and accumulated or undistributed income, if any, shall be distributed among the issue of such child or grandchild, as the case may be, in such proportions and manner (in trust or otherwise) without regard to equality and to the exclusion of any, but subject to the limitation contained in Paragraph (c) of this Article SECOND, as he shall appoint by the last instrument in writing which he shall have executed and delivered to Trustee during his lifetime, or failing such instrument by his Last Will and Testament, expressly referring to this power …; provided, however, that [Phyllis] may exercise any power conferred upon her under this subparagraph in favor of any organization or organizations to which deductible contributions may be made for purposes of federal income or estate tax laws, as well as in favor of her issue, but subject to the limitation contained in Paragraph (c) of this Article SECOND. To the extent a child of [Alice] does not appoint, the trust property shall be distributed to the issue, per stirpes, of such deceased child . . To the extent a child of [Alice] does not appoint and is not survived by issue, such property shall be distributed to the then surviving issue of [Alice], per stirpes, subject to the provisions of Article FOURTH and subparagraph 3 of this Paragraph (b).

Id.[6]

[6] The two cross-references to Paragraph (c) should have been to Paragraph (e). A387, n.15.

Unlike the 1973 and 1976 Exercises, the 1983 Exercise did *not* extend the duration of each of the trusts created for Mimi, Phyllis, and James beyond the Original Perpetuities Period. Now, for the first time, instead of creating a new perpetuities period, the 1983 Exercise was in sync with the Original Perpetuities Period in the Trust Agreement. Specifically, Article THIRD of the 1983 Exercise now provided that:

> (a) Notwithstanding any other provisions of this document, each of the trusts created under Article SECOND shall, unless sooner terminated under the terms of this document, terminate at the end of twenty (20) years and eleven (11) months after the death of [Alice's] husband and the issue of [Felix] who were in being on December 27, 1934.[7]
>
> (b) If the limitation contained in Paragraph (a) of this Article THIRD shall cause the termination of any such trust prior to the time otherwise fixed for the termination thereof, then upon such termination under this Article THIRD, the entire principal and any accumulated income remaining in each such trust shall vest in interest in the then living issue, per stirpes, of the person who is then entitled to receive the income of such trust subject to the provisions of Article FOURTH; provided however, that Trustee shall continue to hold and administer the trust assets during the life of the person then entitled to receive the income of such trust and such person shall continue to receive the income for the balance of his or her life. If there are no then living issue of the person who is then entitled to receive the income of any such trust, then the entire principal and any accumulated and/or undistributed income remaining in such trust shall be distributed free of

[7] The measuring lives were now limited to those lives in being when the Trust was created in 1934.

> trust, subject to the provisions of Article FOURTH, to the person who is then entitled to receive the income of such trust.

A260, 1983 Art. THIRD.

Also, the 1983 Exercise introduced a new provision prohibiting any beneficiary from exercising any power of appointment in any manner that would "postpone or suspend the absolute ownership or power of alienation of the appointed property" beyond the Original Perpetuities Period. Specifically, the new Paragraph (e) in Article SECOND provided that:

> Notwithstanding anything hereinbefore contained to the contrary, no power of appointment created or granted under this Article may be exercised in any manner which will postpone or suspend the absolute ownership or power of alienation of the appointed property beyond the end of twenty (20) years and eleven months after the death of the last to survive of the issue of [Felix] who were in being on December 27, 1934, said date being ascertained with regard to and preceding the date of creation of the power exercised by [Alice] hereunder.[8] If this limitation should be considered invalid or unenforceable, then the powers of appointment conferred under subdivisions C and D of subparagraph 1 of Paragraph (b) of this Article SECOND shall not exist; no beneficiary shall have the power of appointment and the trust property shall be distributed in the manner provided as if a beneficiary fails to appoint.

A259, 1983 Art. SECOND ¶ (e).

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[8] This language tracks the language in I.R.C. § 2041(a)(3), which is known as the "Delaware Tax Trap," a trigger for estate tax inclusion. *See* McCouch, *supra* n.5, at 1294 n.10, 1297.

The 1983 Exercise differed from the 1973 and 1976 Exercises in several important ways.

First, in addition to granting Mimi, Phyllis, and James the power to appoint to their issue, the 1983 Exercise granted Phyllis, and only Phyllis, the additional power to appoint Phyllis's Trust upon her death in favor of charity, as well as in favor of her issue. A256, 1983 Art. SECOND ¶ (b)1.D. At the time, Phyllis was 42 with no natural or adopted children.

Second, the power of appointment granted to each of Mimi, Phyllis, and James became, for the first time, subject to *two* perpetuities-related limitations: (1) each of Mimi, Phyllis, and James could only exercise their respective power of appointment in favor of their respective permissible issue if they died "during the period provided in Paragraph (a) of Article THIRD" (*i.e.*, before the end of the Original Perpetuities Period); and (2) each of Mimi, Phyllis, and James were prohibited from exercising any power of appointment in a manner that would "postpone or suspend the absolute ownership or power of alienation of the appointed property beyond" the Original Perpetuities Period pursuant to Paragraph (e) of Article SECOND. Notably, the power granted to Phyllis to appoint to charity, as well as her issue, was only expressly subject to the second perpetuities-related limitation. *See supra* at 11 (*quoting* 1983 Art. SECOND ¶ (b)1.D).

Third, several other provisions of the 1983 Exercise were now expressly subject to "the period provided in Paragraph (a) of Article THIRD" (which remained in sync with the Original Perpetuities Period). Upon the expiration of the Original Perpetuities Period, if a beneficiary had issue, the assets of their trust would automatically vest in such issue but would continue to be held in further trust for the beneficiary's lifetime and distributed to such issue upon the beneficiary's death (or distributed outright to the beneficiary if they had no issue). A260, 1983 Art. THIRD ¶ (b). Beneficiaries could appoint up to 50 percent of their lifetime income interest, but only during the Original Perpetuities Period. A255, 1983 Art. SECOND ¶ (a)1.C. Creditor protections now only applied during the Original Perpetuities Period. A263, 1983 Art. SIXTH. The Trustee could now be removed upon the expiration of the perpetuities period in Article THIRD. A273, 1983 Art. FIFTEENTH.

Paragraph (d) of Article SECOND still remained the same. A259, 1983 Art. SECOND ¶ (d).

4. 1986 Exercise

Alice exercised the Original Limited Power for the fourth and final time on July 25, 1986. A39. At this time, Phyllis was 46 years old with no children, natural or adopted. A183, n.4.

Like she did in the 1983 Exercise, Alice exercised the Original Limited Power by dividing the Trust assets into shares for Mimi, Phyllis, and James, and holding

each share in further trust to be governed by the terms of the 1986 Exercise. A40, 1986 Art. SECOND ¶ (a).

Many changes made to the 1986 Exercise were non-substantive and stylistic, intended to render the document internally consistent. A184; *see* A415-431. Other changes removed provisions that benefited Alice's husband following Alice's death and increased the age when beneficiaries would begin to receive distributions. A415-431. However, the 1986 Exercise differed from the 1983 Exercise in one critical way. Specifically, Paragraph (a)1.D. of Article SECOND ("1986 Limited Power") contained four new words:

> Upon the death of such child or grandchild, if such death occurs during the period provided in Paragraph (a) of Article THIRD, this separate trust shall terminate, and the principal and accumulated or undistributed income, if any, shall be distributed among the issue of such child or grandchild, as the case may be, in such proportions and manner (in trust or otherwise) without regard to equality and to the exclusion of any, but subject to the limitation contained in Paragraph (d) of this Article SECOND, as he shall appoint by the last instrument in writing which he shall have executed and delivered to Trustee during his lifetime, or failing such instrument by his Last Will and Testament, expressly referring to this power …; provided, however, that to the extent permissible [Phyllis] may exercise any power conferred upon her under this subparagraph in favor of any organization or organizations to which deductible contributions may be made for purposes of federal income or estate tax laws, as well as in favor of her issue, but subject to the limitation contained in Paragraph (d) of Article SECOND. To the extent a child of [Alice] does not fully and effectively appoint, the trust property, to the extent not fully and effectively appointed,

> shall be distributed to the issue, per stirpes, of such deceased child . . To the extent a child of [Alice] does not fully and effectively appoint and is not survived by issue, such property to the extent not effectively appointed shall be distributed to the then surviving issue of [Alice], per stirpes, subject to the provisions of Article FOURTH and subparagraph 3 of this Paragraph (a).

A42, 1986 Art. SECOND ¶ (a)1.D; A418.

Like the 1983 Limited Power, the portion of the 1986 Limited Power granting each of Mimi, Phyllis, and James the ability to appoint to issue was expressly subject to the two perpetuities-related limitations in Paragraph (a) of Article THIRD and Paragraph (d) of Article SECOND. Unlike the 1983 Limited Power, the power granted to Phyllis, and only Phyllis, to appoint to charity, as well as her issue, was now also expressly subject to those same two perpetuities-related limitations as a result of the addition of "to the extent permissible."

Like the 1973, 1976, and 1983 Limited Powers, each of Alice's children had to exercise the 1986 Limited Power by written instrument executed and delivered to the Trustee during their lifetimes expressly referring to the power granted to them in the 1986 Exercise, and failing any such instrument, by their last will and testament. A42, 1986 Art. SECOND ¶ (a)1.D.

Also like the 1973, 1976, and 1983 Limited Powers, if any of them failed to effectively exercise the 1986 Limited Power, the remaining assets of their respective

trusts would be distributed to their then-living issue, per stirpes, and if they were not survived by issue, to Alice's then-living issue, per stirpes. *Id*.

Paragraph (c) of Article SECOND continued to provide that if Alice failed to effectively exercise the Original Limited Power, the assets of the Trust would pass pursuant to the default provision in the Original Limited Power (*i.e.*, to Alice's then-living issue, per stirpes, outright and free from trust). A45, 1986 Art. SECOND ¶ (c). This would result in Mimi, Phyllis, and James receiving their shares of the Trust outright and free of trust upon Alice's death.

C. Alice Dies And The 1986 Exercise Becomes Irrevocable

Alice died on March 13, 2002, survived by Mimi, Phyllis, and James. A14, ¶ 4 n.3. Alice was predeceased by her husband, James Paul Mills, who died on September 14, 1987, approximately one year after the 1986 Exercise was executed. A184, n.5. Upon Alice's death, the 1986 Exercise became irrevocable and was the operative instrument for the purposes of distributing the remaining assets of the Trust. A189. Phyllis was 60 years old with no children at the time of Alice's death. A183, n.4.

As a result of Alice's death, pursuant to Paragraph (a) of Article SECOND of the 1986 Exercise, Mimi's Trust, Phyllis's Trust, and James's Trust were created. A14, ¶ 4.

D. Phyllis Exercises Her Limited Power Of Appointment In Strict Accordance With The Terms Of The 1986 Exercise

On June 15, 2006, pursuant to the 1986 Exercise, Phyllis exercised the 1986 Limited Power by executing the 2006 Instrument. A15, ¶ 5; A66. Pursuant to the 2006 Instrument, upon Phyllis's death, Phyllis directed the Trustee to distribute Phyllis's Trust outright to the Foundation. *Id*. The Trustee acknowledged delivery of the 2006 Instrument in accordance with the terms of the 1986 Exercise. A68.

Phyllis died on January 14, 2019, without issue and within the Original Perpetuities Period. A15. Had Phyllis survived the Original Perpetuities Period, Phyllis's Trust would have been distributed to Phyllis, outright and free from trust (because she died without natural or adopted issue). A46, 1986 Art. THIRD ¶ (b).

E. The Current Dispute

On May 23, 2019, shortly after Phyllis's death, claiming to be unaware that Phyllis exercised the 1986 Limited Power,[9] counsel for James sent a letter to the Trustee (the "2019 Letter") challenging any attempt by Phyllis to appoint her trust in favor of a charity. A73-75.

Counsel for James asserted that, based on "preliminary research," Phyllis's exercise of the 1986 Limited Power, if exercised in favor of a charity, would be

[9] James had been aware of the 1986 Exercise and Phyllis's intent to appoint to the Foundation since *at least* 2008. A129, ¶ 7.

invalid because it would exceed the scope of the Original Limited Power, which was limited to Alice's widower and lawful issue. *Id*.

Despite the fact that the Trustee never questioned Alice's ability to grant Phyllis a power to appoint Phyllis's Trust in favor of a charity,[10] after receiving James's 2019 Letter, instead of distributing the remaining assets of Phyllis's Trust to the Foundation in accordance with the 2006 Instrument, the Trustee filed the Petition seeking instructions from the Court of Chancery as to the validity of the 1986 Exercise and the 2006 Instrument and how the assets of Phyllis's Trust should be distributed. A190.

In its Opinion granting James's Motion, the Court of Chancery correctly recognized that an appointment by either Alice or Phyllis in favor of charity, a non-object of the Original Limited Power, would violate the Original Limited Power and be invalid. Op. at 17. However, the Court of Chancery incorrectly concluded that: (1) Alice *did not* exercise the Original Limited Power in favor of a non-object of the Original Limited Power because the 1986 Limited Power included the phrase "to the extent permissible"; (2) Phyllis *did* exercise the 1986 Limited Power in favor of a non-object of the Original Limited power rendering the 2006 Instrument invalid; and

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[10] The Trustee acknowledged the 1986 Exercise and agreed "to act in accordance with its terms," acknowledged the 2006 Instrument and may have assisted in drafting the Exercises, and has served as trustee of the Trust and of Phyllis's Trust since each trust's creation. A190.

(3) the assets of Phyllis's Trust are now distributable to James and Mimi pursuant to the default language in Paragraph (a)1.D. of Article Second of the 1986 Exercise as if Phyllis never exercised her power at all. Op. at 18-32.

The Opinion must be reversed because the phrase "to the extent permissible" did not save the validity of the 1986 Exercise. Consequently, the 1986 Exercise is invalid and the assets of Phyllis's Trust must be distributed to the Estate pursuant to the equitable principles of distribution set forth in *Equitable Tr. Co. v. Foulke*, 40 A.2d 713 (Del. Ch. 1945).

ARGUMENT

The Court Of Chancery Erred In Denying The Estate's Cross-Motion For Judgment On The Pleadings And Granting James's Motion For Judgment On The Pleadings

A. Question Presented

Did the Court of Chancery commit legal error by upholding the validity of 1986 Exercise even though it granted a further power of appointment that exceeded the scope of the Original Limited Power of Appointment? This question was raised below (A192-206; A380-90) and considered by the Court of Chancery (Op. at 14-37).

B. Scope of Review

The Supreme Court reviews *de novo* a trial court's grant of a motion for judgment on the pleadings to determine if the trial court committed legal error in formulating or applying legal precepts. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

The Court of Chancery erred in denying the Estate's Cross-Motion and granting James's Motion based on a misinterpretation of the phrase "to the extent permissible" in the 1986 Limited Power. The Estate's interpretation of the phrase, that it related to a perpetuities-related limitation, is the only reasonable interpretation. Consequently, the Opinion and Order must be reversed and the assets should be distributed to Phyllis's Estate pursuant to *Foulke* and Paragraph 1 of

Article I of the Trust Agreement. At a minimum, the Estate's interpretation is reasonable, warranting reversal so the parties can proceed with discovery.

1. The 1986 Exercise Is Partially Invalid And, Consequently, Phyllis's Trust Should Be Distributed To Phyllis's Estate

The Petition sought a determination of the validity of the 1986 Exercise and the 2006 Instrument. The validity of the 2006 Instrument rests entirely on the validity of the 1986 Exercise. The 1986 Exercise exceeded the scope of the Original Limited Power by granting Phyllis the power to appoint to non-objects of the Original Limited Power. Therefore, the 1986 Exercise is partially invalid. When a donee's exercise of a power of appointment is partially invalid, Delaware courts apply the rule adopted in *Foulke* and will distribute the trust in a manner that best achieves the donee's intended (but nevertheless invalid) scheme of disposition. Applying the principles set forth in *Foulke* to the present case, Phyllis's Trust must be distributed to the Estate, not to James and Mimi.

The common law applicable to powers of appointment set forth by the Court of Chancery is not disputed.[11] Op. at 17. The intent of the donor is the controlling factor in determining the scope of a power of appointment. *Foulke*, 40 A.2d at 716.

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[11] However, the Court of Chancery's interpretation of 25 *Del. C.* § 505, that in 2019 the statute was amended "to permit the holder of a limited power to enlarge the class of permissible appointees," is disputed. Op. at 19-22. Section 505 does not allow a donee to expand the scope of permissible objects of the original power. Section 505 is not applicable to the present case. A384.

While the holder of a power of appointment (the "first power") may use that power to create a trust that grants a further power of appointment (the "second power"), the second power may not name additional objects who were not already objects of the first power. Op. at 16-17 (*citing Foulke*, 40 A.2d at 716).

In the Original Limited Power, Felix gave Alice the first power to appoint the Trust "unto the widower of [Alice], and/or unto the lawful issue of [Alice], in such manner and amounts and upon such trusts, terms and conditions as [Alice] shall have appointed by" her last will or separate instrument. Therefore, pursuant to the terms of the Original Limited Power and the common law, Alice was permitted to (1) appoint the Trust to her issue outright or in further trust, and (2) if in further trust, grant her issue a second power of appointment over their share of the trust. However, any second power of appointment could not exceed the scope of the Original Limited Power by naming new objects (or potential appointees).

Alice exercised the Original Limited Power by creating further trusts for her children and granted each of them a second power of appointment. However, she exceeded the scope of the Original Limited Power when she granted Phyllis the power to appoint to charity, a non-object of the Original Limited Power.

Because the portion of the 1986 Limited Power granting Phyllis the power to appoint to charity exceeded the scope of the Original Limited Power,[12] the 1986 Exercise is partially invalid.

Where one part of an exercise is invalid and another part, standing alone, is valid, the entire exercise will be rendered invalid if "the donee's scheme of disposition is more closely approximated by allowing both parts to pass in default of appointment" rather than allowing only the invalid portion to pass in default. A195-206; *Foulke*, 40 A.2d at 718 (*citing* Restatement (First) of Property (Future Interests) § 362 (1940)).

Alice's intent was clear—she wanted the Trust to be distributed among her three children *equally*, in further trust, and for each them to have the power to dispose of their share at their deaths.[13] Alice recognized Phyllis's lack of natural children and her philanthropic desires, and therefore gave Phyllis (and only Phyllis) the power to appoint to adopted issue and charity.

Here, the entire 1986 Limited Power must be rendered invalid to stay true to Alice's scheme of disposition. If the entire 1986 Limited Power is invalid, then in 2002 (and consistent with Alice's intent) the Trust would have passed pursuant to

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[12] It is undisputed that Alice did not exceed the scope of the Original Limited Power by allowing Phyllis to appoint her trust in favor of adopted issue. A471:15-A472:21.

[13] It is of no consequence that the 1986 Exercise is invalid when determining Alice's intent. *See Sec. Tr. Co. v. Cooling*, 76 A.2d 1, 5 (Del. Ch. 1950).

Paragraph 1 of Article I of the Trust Agreement, and each of Mimi, Phyllis, and James would have received their shares outright. The assets of Phyllis's Trust would have been part of the Estate, and Phyllis could have disposed of them as she wished. The same would be true for James and Mimi.[14]

If, on the other hand, only the Expanded Power is invalidated, then upon Phyllis's death, Phyllis's Trust would pass pursuant to Paragraph (c) of Article SECOND of the 1986 Exercise, and Mimi, James, and the Estate would now each receive one-third of Phyllis's Trust. In other words, Mimi would receive 4/9th of the total Trust, the Estate would receive 1/9th of the total Trust, and James would receive 4/9th of the total Trust, a result clearly inconsistent with Alice's intent to leave the Trust to her children equally and to provide Phyllis with a broader power of appointment.

Pursuant to *Foulke*, Phyllis's Trust must be distributed to the Estate as if Alice had failed *entirely* to exercise her power.

2. The Court Misinterpreted The Unambiguous Language Of The 1986 Exercise

Although the Court of Chancery correctly recognized that "Alice could not expand the class of appointees who could be objects of the [1986 Limited Power],"

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[14] The disposition of Mimi's Trust and James's Trust is not presently before the Court.

Op. at 17, it nevertheless found the 1986 Exercise to be wholly valid. Op. at 24-28. It did so by assigning an incorrect meaning to the phrase "to the extent permissible."

The issue before this Court is the meaning of "to the extent permissible" in the 1986 Limited Power. The Court of Chancery interpreted the phrase as creating a condition to Phyllis's ability to appoint to charity. That is, Phyllis could only appoint the assets of Phyllis's Trust to a charity, a non-object of the Original Limited Power, if she was permitted to do so under the law when the 2006 Instrument became irrevocable (*i.e.*, at Phyllis's death).

The Court of Chancery's interpretation of "to the extent permissible" is incorrect. As explained below, the Court of Chancery's interpretation (1) failed to consider the entirety of the 1986 Exercise and the Trust Agreement, (2) attached significance to provisions unrelated to the meaning of the phrase, and (3) conflicts with the overall scheme of the 1986 Exercise. Moreover, the Court of Chancery rejected the only plausible interpretation of the phrase: "to the extent permissible" was tied to a perpetuities-related limitation.

(a) In determining the plain meaning of "to the extent permissible," the Court of Chancery failed to give effect to all provisions in the 1986 Exercise.

Interpreting a trust agreement is similar to interpreting a contract. Op. at 15 (*citing In re Peierls Fam. Inter Vivos Tr.*, 77 A.3d 249, 263 (Del. 2013)). When interpreting a contract, this Court "will give priority to the parties' intentions as

reflected in the four corners of the agreement," and "construe the agreement as a whole, giving effect to all provisions therein." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). "It is a general rule of construction that no word or phrase shall be rejected, or treated as superfluous, redundant or meaningless, if to it a meaning can be given which is reasonable and consistent with the object and purpose of the writing considered as a whole." *Wilmington Tr. Co. v. Wilmington Tr. Co.*, 24 A.2d 309, 313 (Del. Ch. 1942).

The interpretation of a contract provision must be "reasonably supported by its language or its role within the overall context" of the contract. *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 933 (Del. 2017). "[T]he meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan." *Id*. at 927 n.62 (*quoting GMG Capital*, 36 A.3d at 779). "Usually, '[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.'" *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 62 (Del. 2019).

(i) The Court of Chancery rejected the only reasonable interpretation of the phrase "to the extent permissible."

The phrase "to the extent permissible" must be interpreted in the context of the entirety of the 1986 Limited Power, as well as the 1986 Exercise, earlier

Exercises, and the Trust Agreement. In this context, it is clear that "to the extent permissible" was intended to ensure that the 1986 Limited Power did not exceed the Original Perpetuities Period (set forth in the Trust Agreement).

The 1986 Limited Power effectively grants two separate powers of appointment. First, it grants Mimi, Phyllis, and James the power to appoint to their issue (the "First Power"). Second, it grants Phyllis, *and only Phyllis*, the power to appoint to charity "as well as her issue" (the "Expanded Power"). Both of these powers must, in order to stay within the Original Perpetuities Period, be limited by two separate perpetuities-related limitations: (1) Paragraph (a) of Article THIRD, which provides that any trust created under Article SECOND must terminate within the Original Perpetuities Period (*i.e.*, 21 years after the death of Felix's issue living on December 28, 1934); and (2) Paragraph (d) of Article SECOND, which requires that any power of appointment be exercised in a manner that does not extend the vesting of any interests beyond the Original Perpetuities Period. These two limitations worked in tandem to prevent the 1986 Limited Power from violating the Original Perpetuities Period.

In order to ensure that the Expanded Power would be subject to the same perpetuities-related limitations as the First Power, the phrase "to the extent permissible" must refer to the limitations contained in Article THIRD. If the phrase is given any other meaning, the 1986 Limited Power may have exceeded the Original

Perpetuities Period by allowing Phyllis to exercise her power to appoint Phyllis's Trust after the expiration of the Original Perpetuities Period, possibly resulting in adverse tax consequences or voiding Alice's exercise entirely.[15]

A review of the text of the 1986 Limited Power, as compared to the 1976 and 1983 Limited Powers, confirms this meaning.[16] A396; A418. In the following excerpt of the 1986 Limited Power, the underlined/red text represents the changes between the 1976 Limited Power and the 1983 Limited Power, and the italicized/blue text represents the changes between the 1983 Limited Power and the 1986 Limited Power:

> Upon the death of such child or grandchild, if such death occurs during the period provided in Paragraph (a) of Article THIRD, this separate trust shall terminate, and the principal and accumulated or undistributed income, if any, shall be distributed among the issue of such child or grandchild, as the case may be, in such proportions and manner (in trust or otherwise) without regard to equality and to the exclusion of any, but subject to the limitation contained in Paragraph (d) of this Article SECOND, as he shall appoint by the last instrument in writing which he shall have executed and delivered to Trustee during his lifetime, or failing such instrument by his Last Will and Testament, expressly referring to this power (provided that such child or grandchild may at any time irrevocably

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[15] *See* A15 at 4, n.4; *see Sec. Tr. Co. v. Cooling*, 76 A.2d 1, 5 (Del. Ch. 1950) (an interest that violates the rule against perpetuities is void).

[16] A review of the 1973, 1976, and 1983 Exercises does not require the Court to look outside of the "four corners" of the document because the 1986 Exercise is a "supplement" to those earlier instruments. A182, n.3; A40 (Alice "does hereby modify and supplement said exercise of said power … hereby modifying any and all instruments of appointment previously executed by her…").

> renounce his limited power to appoint by an instrument in writing delivered to Trustee and such renunciation may be with respect to all or part of the property or with respect to all or some of the limited class of appointees); provided, however, that *to the extent permissible* Grantor's daughter PHYLLIS may exercise any power conferred upon her under this subparagraph in favor of any organization or organizations to which deductible contributions may be made for purposes of federal income or estate tax laws, as well as in favor of her issue, but subject to the limitation contained in Paragraph (d) of Article SECOND.

Id. (emphasis added).

As illustrated, the 1983 Limited Power provided that Phyllis could exercise the First Power if she (1) died within the Original Perpetuities Period; *and* (2) did not extend the vesting of any interests in Phyllis's Trust beyond the Original Perpetuities Period. The Expanded Power was *only* limited by the requirement that she not extend vesting beyond the Original Perpetuities Period. That is, the 1983 change referring to the limitation imposed by Paragraph (a) of Article THIRD—that Phyllis must exercise the power within the Original Perpetuities Period—was not paralleled for the Expanded Power. In other words, pursuant to the inconsistent 1983 Limited Power, Phyllis could exercise the Expanded Power (to charity and to her issue) even if she died after the expiration of the Original Perpetuities Period, a freedom not applicable to the First Power. To fix this inconsistency, the phrase "to the extent permissible" was inserted into the 1986 Limited Power.

It was important to limit Phyllis's power of appointment to the time period provided in Paragraph (a) of Article THIRD by making all limitations consistent. Had the inconsistency remained and Phyllis survived the Original Perpetuities Period, then pursuant to Paragraph (b) of Article THIRD, the assets in Phyllis's Trust would have vested in Phyllis's issue, but nevertheless remained in trust for Phyllis's benefit for the remainder of Phyllis's lifetime and, upon Phyllis's death, the assets would be distributed to her issue, outright and free from trust, automatically. If the Court of Chancery's interpretation is correct, had there been a change in the law, Phyllis would have possessed a power to appoint the trust after the interests had already fully vested in her issue. Further, if Phyllis did not have issue, her trust would have distributed to her outright, vitiating Phyllis's ability to further appoint the trust and avoid transfer taxes.

Further support for the Estate's interpretation can be found in changes within the legal and tax environment in the 1970s and 1980s, making it critically important to ensure that the 1986 Limited Power did not violate the Original Perpetuities Period. For example, the federal generation-skipping transfer tax—a tax imposed on transfers made to grandchildren and more remote descendants to prevent families like Alice's from escaping wealth transfer taxes—was introduced in 1976 and overhauled in 1986. *See* McCouch, *supra* n.5, at 1297-99. Further, several weeks prior to the execution of the 1986 Exercise, the Delaware General Assembly passed

legislation abolishing the common law rule against perpetuities.[17] A203. This state and federal legislative activity surely heightened the drafter's awareness of the importance of perpetuities limitations, and the potential transfer tax consequences related thereto, in estate planning documents.

The Estate's interpretation considers the totality of Alice's 1986 Exercise, gives meaning to all of its terms, and comports with the non-surplusage aim of trust interpretation. It also renders Alice's 1986 Exercise partially invalid.

(ii) The Court of Chancery misinterpreted the 1983 Exercise.

The Court of Chancery dismissed the Estate's interpretation of "to the extent permissible" in part due to its misinterpretation of the 1983 Limited Power. In its analysis of the perpetuities limitations in the 1983 Exercise, the Court of Chancery stated that "[t]he [1983] Limited Power … referred to '[t]he limitations contained in Paragraph (c) of this Article Second.' … The reference thus did not affect the scope of the [1983 Limited Power]." Op. at 7 n.4.

Unfortunately, the Court of Chancery failed to recognize that the reference to Paragraph (c) in Article SECOND of the 1983 Exercise was a typographical error. The *correct* cross reference was to Paragraph (e) of Article SECOND, not Paragraph

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[17] McCouch, *supra* n.5, at 1293 ("after enactment of the GST tax in 1986, numerous states enacted statutes abolishing the rule against perpetuities in order to attract trust business").

(c). This cross-reference error was later corrected in the 1986 Exercise to refer to Paragraph (d).[18] A387, n.13; A418-19.

The *correct* cross reference to Paragraph (e) in the 1983 Exercise, and later to Paragraph (d) in the 1986 Exercise, **did** affect the scope of the 1983 Limited Power and the 1986 Limited Power. It required that no beneficiary exercise the 1986 Limited Power by extending the vesting of any interests beyond the Original Perpetuities Period.

(iii) The Court incorrectly attached significance to language that is not relevant to an interpretation of "to the extent permissible."

In determining the plain meaning of the phrase "to the extent permissible," the Court, on its own accord, incorrectly ascribed substantial significance to two provisions: (1) a change made to the 1986 Limited Power relating to the disposition of Phyllis's Trust if she failed to exercise the power, Op. at 26, and (2) certain recitals in the 2006 Instrument. Op. at 10-11. These provisions do not carry the weight that the Court of Chancery attached to them, and were not relevant to determining the plain meaning of "to the extent permissible."

First, all of the Exercises provided that, upon Phyllis's death, if Phyllis did not exercise her power of appointment, Phyllis's Trust would be distributed to her then

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[18] Which would have been Paragraph (e) if not for the deletion of Paragraph (a) of Article SECOND in the 1983 Exercise (relating to Alice's husband, who died in 1987). A416.

living issue, per stirpes. However, this default language was slightly tweaked in 1986. A419. The following excerpt highlights the changes between the language in the 1983 Limited Power and the 1986 Limited Power:

> To the extent a child of [Alice] does not fully and effectively appoint, the trust property, to the extent not effectively appointed, shall be distributed to the issue, per stirpes, of such deceased child, subject to the provisions of Article FOURTH …."

Id.

Based upon this added language to the 1986 Limited Power, the Court of Chancery inferred that the 1973, 1976, and 1983 Limited Powers "did not address expressly what would happen if a child attempted to exercise the [1986] Limited Power but did so ineffectively." Op. at 8. Distinguishing the language in the 1986 Limited Power, and drawing from its flawed interpretation of "to the extent permissible," the Court of Chancery concluded that "[u]nlike the earlier instruments, and consistent with the addition of the phrase 'to the extent permissible' to the [1986 Limited Power], the 1986 Exercise added language to address a failure to exercise the [1986] Limited Power fully and effectively." Op. at 9.

There is nothing in the 1986 Exercise to suggest that this revision related in any way to the phrase "to the extent permissible." Instead, this additional language clarified that an ineffective exercise of the power would be treated no differently than a failure to exercise the power at all. It also could have been added to address

situations where a beneficiary only partially exercised his or her power of appointment, or where a beneficiary exercised his or her power of appointment in a way that violated the perpetuities limitations found in Article THIRD and Paragraph (d) of Article SECOND.

Moreover, the Court of Chancery's reliance on the "fully and effectively" language suggests that it was added solely to address Phyllis's possible power to appoint to charity, but surely this provision would also have applied to an ineffective exercise by Mimi and James, each of whom has a power not preceded by "to the extent permissible." Further, the Court of Chancery did not reconcile the similar language added to Paragraph (c) of Article SECOND, which addresses what would happen if *Alice* failed to exercise her power of appointment ("To the extent not <u>effectively</u> appointed by this document ...."). A420.

Next, and again on its own accord, the Court of Chancery incorrectly attached significance to a recital in the 2006 Instrument stating the source of Phyllis's power. Op. at 10-11. Specifically, the Court of Chancery explained that "[t]he 2006 Exercise thus recognized that the scope of the Original Limited Power extended only to Alice's widower and lawful issue; it did not contain a grant of authority comparable to the Second Charitable Proviso," *id.* at 10, and that "[t]he 2006 Exercise thus captures the conflict between the Original Limited Power and the Second Charitable Proviso." *Id.* at 11.

The recital referenced by the Court of Chancery has nothing to do with the meaning of the phrase "to the extent permissible." Phyllis was legally required to include this recital in the 2006 Instrument, as the 1986 Limited Power required her to "expressly refer[] to this power." A42, Art. SECOND ¶ (a)1.D. The omission of this recital would have rendered the 2006 Instrument entirely ineffective.[19]

(b) The Court of Chancery's interpretation lacks context and is contrary to Felix's intent.

The Court of Chancery's interpretation of "to the extent permissible" undermines the overall context of the 1986 Exercise and is contrary to Felix's intent.

The Court of Chancery's interpretation of "to the extent permissible" implies that Alice and her counsel were unsure if Alice could grant Phyllis the power to appoint to charity. Not only is there nothing in the record to support this conclusion, it is contrary to the 1983 Exercise. If Alice and her counsel feared that Alice was not able to grant Phyllis a power to appoint to charity, then why was the phrase "to the extent permissible" not included in the 1983 Limited Power that, for the first time, specifically permitted the appointment to charity?

The Court of Chancery also implied that Alice added the phrase to incorporate future possible changes in the law. Op. at 28-29. This implication ignores the fact

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[19] *Dutra de Amorim v. Norment*, 460 A.2d 511, 513 (Del. 1983) (referring to the trial court's determination that a donee's attempted exercise of a power of appointment was "defective as to form because he did not specifically refer to the 1972 trust instrument as requested.").

that Alice specifically addressed the consequences of possible changes in the law in Paragraph (d) of Article SECOND, which addresses the consequence of the unenforceability of the perpetuities limitation contained therein.[20] Therefore, it stands to reason that if Alice or her counsel believed in 1986 that Phyllis did not have the ability to appoint in favor of a charity, the drafter would have so stated and addressed the consequences thereof specifically within the 1986 Exercise, just as the drafter did in Paragraph (d) of Article SECOND.

Further, the Court of Chancery rejected the Estate's interpretation of "to the extent permissible" in part because it did not contain an express cross reference to Article THIRD. Op. at 25 (the phrase "does not contain any cross reference or limitation that would restrict its application to a perpetuities issue").

This observation is misplaced. As explained above, with an understanding of the limitations in Paragraph (a) of Article THIRD *and* Paragraph (d) of Article SECOND, the phrase "to the extent permissible" *is* a cross reference to the perpetuities limitations in Article THIRD. Further, the same observation is true of the Court of Chancery's interpretation—the language does not expressly state "to the extent permissible based on a future change in the law that allows appointment to non-objects." Op. at 25.

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[20] "If this limitation should be considered invalid or unenforceable, then the powers of appointment … shall not exist; no beneficiary shall have a power of appointment." A45, 1986 Art. SECOND ¶ (d).

Lastly, but importantly, the Court of Chancery's interpretation is contrary to Felix's intent. It is well settled that the intent of the trustor is the controlling factor in determining the scope of a power of appointment. *Foulke*, 40 A.2d at 716. Additionally, the policy underlying Delaware's trust law is "to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments." *In re Tr. Under the Will of Flint for the Benefit of Shadek*, 118 A.3d 182, 194 (Del. Ch. 2015) (citing 12 *Del. C.* § 3303(a)). Further, Delaware law eschews any presumption that a trustor intends to rely on any law not in effect when the governing instrument is executed. 12 *Del. C.* § 3330(a).

According to the Court of Chancery, the phrase "to the extent permissible" was included because Alice's lawyers "contemplate[d] the possibility that at some unknown point in the future, the law might change." Op. at 28. Such a change is far reaching and inconsistent with Delaware law because such a change could not occur without overriding Felix's intent and without ignoring the express terms of the Trust Agreement. It also goes against Section 3330(a).

(c) The Court failed to apply *Foulke*.

Because the Court of Chancery incorrectly determined that the 1986 Exercise was valid, it incorrectly distinguished and declined to apply *Foulke* to the distribution of Phyllis's Trust. Op. at 29-32. Instead, the Court of Chancery determined that Phyllis's Trust should be distributed pursuant to the default

provision in Paragraph (a)1.D of Article SECOND of the 1986 Exercise. *Id*. For the reasons provided in Section C.1, above, *Foulke* mandates the distribution of Phyllis's Trust to the Estate.

3. If "To The Extent Permissible" Is Ambiguous, Remand Is Required

For the reasons stated above, the phrase "to the extent permissible" was inserted to limit the period under which Phyllis could exercise the 1986 Limited Power. While the Estate believes this to be the only plausible interpretation of the phrase, it is at the very least a *reasonable* interpretation. If the plain meaning of the phrase "is susceptible to more than one *reasonable* interpretation, courts may consider extrinsic evidence to resolve the ambiguity" and after considering such evidence, conclude that only one meaning is objectively reasonable under the circumstances at the time of drafting. *LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc.*, 2017 WL 6629209, at *6 (Del. Ch. Dec. 29, 2017) (emphasis added). To the extent that this Court finds that more than one reasonable interpretation exists, the phrase is ambiguous, and the matter must be remanded to the Court of Chancery to allow the parties to complete discovery. A204.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's grant of judgment on the pleadings in favor of Mills and grant judgment on the pleadings in favor of the Estate. To the extent there is an ambiguity to resolve, this Court should remand for further proceedings in the Court of Chancery.

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Dated: November 2, 2021