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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

RESPONDENT BELOW, APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In this appeal from the Court of Chancery's grant of judgment on the pleadings deciding Trustee's[1] petition for instructions, Appellant challenges the Court of Chancery's interpretation of four words in a 1986 instrument.

Agreeing that the 1986 Exercise is unambiguous and its interpretation ripe for judgment on the pleadings, Appellant contends nevertheless that the Court of Chancery erred by giving the phrase "to the extent permissible" the broad and unconstrained meaning those words ordinarily convey. Appellant asks this Court to reverse the Court of Chancery and adopt an unreasonably restrictive interpretation found nowhere in their plain meaning. Appellant's proposed interpretation depends upon speculative and irrational inferences of intent drawn from the language of instruments executed years before the final, controlling language of the 1986 Exercise. Indeed, Appellant's interpretation would require this Court to believe that in her 1986 Exercise, Alice knowingly engaged in a futile act —executing a fatally flawed document containing a provision in clear violation of long-standing Delaware law, without any savings language or valid alternative disposition.[2]

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[1] James adopts capitalized terms as utilized in the Court of Chancery's June 25, 2021 Memorandum Opinion granting James's motion for judgment on the pleadings and denying the Foundation and the Estate's cross-motions for judgment on the pleadings ("Opinion" or "Op."). The Opinion is attached as Exhibit A to the Estate's Opening Brief ("Op. Br.").

[2] The Trustee and the Foundation have not appealed the Court of Chancery's

Below, the Court of Chancery methodically applied well-settled rules of interpretation to discern the intent expressed in the plain meaning of the words Alice used in her 1986 Exercise, the final instrument by which she exercised a power of appointment and provided for the continued maintenance in trust for her children of the assets of a trust her father Felix had created for her in 1934.

In exercising her limited power of appointment to split the trust into equal shares for the benefit of each of her three children and create new limited powers of appointment for those children, Alice created a limited power of appointment for her daughter Phyllis that included the option for Phyllis, upon her death, to appoint the Phyllis Trust to a charitable organization "***to the extent permissible***," with an alternative disposition if Phyllis did not fully and effectively appoint the Phyllis Trust.

Phyllis passed away on January 14, 2019. A15, ¶ 6. Before her death, she had exercised her power of appointment with an aim to appoint the Phyllis Trust to the Foundation. A67. On August 29, 2019, Trustee filed its petition seeking instructions and an order from the Court of Chancery to confirm the appropriate distribution of the Phyllis Trust. A12. On November 8, 2019, James, the Estate, and the Foundation each filed answers to the petition. A2. On August 19, 2020, the

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interpretation of the 1986 Exercise. The other named Respondent—Phyllis and James's sister, Mary—has not entered an appearance in this proceeding.

Foundation filed an amended answer. A124.

With the pleadings closed, on October 15, 2020, James moved for judgment on the pleadings and filed his opening brief. A139. The Estate and the Foundation filed cross-motions for judgment on the pleadings on December 22, 2020. A171, 277. The Court of Chancery heard oral arguments on April 26, 2021, and issued its Opinion on June 25, 2021, ruling fully in favor of James's interpretation of the relevant instruments. On August 17, 2021, the Court of Chancery entered its Final Order and Judgment. Op. Br. Ex. B. The Estate noticed its appeal to this Court on September 16, 2021. A11.

In its Opinion, the Court of Chancery interpreted the plain meaning of the term "to the extent permissible" as an unconstrained proviso relating to Phyllis's power to appoint to a charitable organization, one that encompassed any reason that would or could render such an appointment impermissible. That is, the Court of Chancery held that in Alice's 1986 Exercise she created a ***conditional authority*** whereby Phyllis could not appoint the Phyllis Trust to a charitable organization if doing so would be impermissible for any reason.

Appellant concedes that at least one such reason existed. Under long-standing common law, ultimately codified in the Delaware Code,[3] the terms Phyllis's

[3] 12 *Del. C.* § 505; Restatement (Third) of Property: Wills and Other Donative Transfers § 19.14 (Am. Law Inst. 2011); Restatement (Second) of Property:

grandfather Felix used when establishing the original trust created a limited power of appointment for Alice—namely, a limited universe of individuals for whose benefit the original power, or any derivative powers emanating therefrom, could be exercised. In this case those persons were Alice's husband and her issue.[4] Felix did not include charities as objects of the power. On appeal, Appellant concedes that from the time of Alice's 1986 Exercise up to and at the time of Phyllis's 2019 death, Delaware law had not changed to permit Phyllis to appoint the Phyllis Trust to a charitable organization and that her effort to do so was therefore ineffective.

Given its determination that the 1986 Exercise validly created only a conditional authority for Phyllis to appoint the Phyllis Trust to a charitable organization, the Court of Chancery concluded that the ineffectiveness of Phyllis's appointment was a result of Phyllis's 2006 Exercise, not of Alice's 1986 Exercise. Because Alice had conditioned the expansion of the scope of Phyllis's power under the 1986 Exercise upon such expansion being permissible, the 1986 Exercise was held to be valid and not violative of Delaware law. Consequently, Phyllis's failure to effectively appoint the Phyllis Trust triggered the 1986 Exercise's default distribution scheme. Pursuant to the default framework Alice established, the trusts

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Donative Transfers § 19.4 (Am. Law Inst. 1986); Restatement (First) of Property § 359 (Am. Law. Inst. 1940).

[4] This universe is known as "objects of the original power."

she previously set aside for James and Mary each would receive half of the unappointed Phyllis Trust.

The Appellant attempts an end-run around the legal prohibition of Phyllis's appointment to a charitable organization and the resulting application of the plain terms of the 1986 Exercise, by asking this Court to reverse the Court of Chancery and adopt an unreasonable interpretation of the 1986 Exercise that would render it facially invalid. Relying on inferences drawn by comparing language from earlier exercises to the final, controlling language of the 1986 Exercise, the Appellant argues that the simple phrase "to the extent permissible" relates only to Phyllis's appointment not violating the rule against perpetuities, but not to any other potential reason her appointment might be impermissible. Yet as the Court of Chancery explained, the phrase is broad and unconstrained. Nothing in the language of the 1986 Exercise supports a finding that the phrase "to the extent permissible" was intended to save an appointment from Phyllis to a charitable organization from only a perpetuities violation and not from other reasons that would render it impermissible. Indeed, the Appellant's argument is reduced to the patently unreasonable assertion that the inclusion of the phrase "to the extent permissible" for the first time in the 1986 Exercise was intended only to save the appointment from a perpetuities violation and not from the obvious charitable appointment violation applicable under then-existing law.

The Court of Chancery carefully considered and methodically rejected the Estate's arguments, relying on well-settled Delaware precedent to conclude that the Estate's interpretation was neither a supportable interpretation nor an alternative basis for finding the 1986 Exercise ambiguous. For the reasons set forth herein and in the Court of Chancery's carefully reasoned decision, this Court should affirm the judgment below.

SUMMARY OF ARGUMENT

1. **Denied.** The 1986 Exercise is fully valid, not partially invalid. Its plain terms did not expand unconditionally the scope of the Original Limited Power of appointment. Rather, its plain terms placed conditionality upon Phyllis's Second Limited Power that would provide for an expansion of its scope only to the extent permissible under Delaware law. If such an expansion was not permissible, under Delaware law or otherwise, Phyllis could exercise her power under the 1986 Exercise in another manner. Barring that, the 1986 Exercise provided a default framework of distribution should Phyllis not effectively exercise her power. The Court of Chancery correctly rejected the Estate's argument that the 1986 Exercise was rendered partially invalid because of the failure of the condition placed on the expansion of Phyllis's power. This Court should affirm the Opinion.

2. **Denied.** The Court of Chancery's interpretation of the plain meaning of the 1986 Exercise and its phrase "to the extent permissible" accords with the treatment of unambiguous language under Delaware law. The Court of Chancery concluded that the plain terms of the Second Charitable Proviso operated to include all reasons Phyllis's appointment to a charitable organization would be impermissible and that no extrinsic evidence or attempts to craft context around the 1986 Exercise could overcome the primary source of Alice's intent—the plain and ordinary meaning of the unambiguous language used within the four corners of the

instrument. The Appellant asks this Court to overrule that interpretation, ignore the plain language and overall framework of the 1986 Exercise, and twist its plain terms so that the phrase "to the extent permissible" would apply only to a perpetuities violation that rendered Phyllis's appointment to a charitable organization impermissible. Stunningly, in doing so, the Appellant argues the Court of Chancery erred by concluding that the phrase also applied to an impermissible expansion of the scope of Phyllis's power of appointment to include a charitable organization, even though the Estate itself concedes Delaware law did not permit such expansion at the time Alice executed the 1986 Exercise. This Court should reject the Estate's ill-conceived and unreasonable interpretation and affirm the Court of Chancery's Opinion.

3. **Denied.** The Estate has not set forth an alternative reasonable interpretation of "to the extent permissible." Instead, the Estate proposes a speculative and unreasonable reading of that phrase, and one that arises wholly from sources beyond the four corners of the 1986 Exercise and its plain language. An unreasonable interpretation cannot serve as the basis of ambiguity under Delaware law, nor does it warrant a remand to the Court of Chancery for discovery. Instead, this Court should affirm the Court of Chancery's Opinion ruling that the language of the 1986 Exercise was unambiguous and applies in accordance with its plain meaning.

STATEMENT OF FACTS

In its Opinion the Court of Chancery set forth a factual background relevant to the cross-motions for judgment on the pleadings. Op. at 1-13. Here, James presents a distillation of the facts relevant to the more limited issue on appeal to this Court, all of which are undisputed. James then highlights facts that provide context for the dispute between the parties but that the Court of Chancery did not deem relevant to a plain-language interpretation of "to the extent permissible" in the 1986 Exercise.

A. Alice Exercises her Power of Appointment with Unambiguous Language

Under the Trust Agreement, dated December 28, 1934, Felix established a trust that named his daughter Alice as the life beneficiary. A23. Wilmington Trust Company served as Trustee and designated the trust as "Trust No. 2108." A12.

The Trust Agreement granted Alice her Original Limited Power of appointment.[5] Between 1973 and 1986, on four occasions Alice exercised the Original Limited Power in favor of Phyllis, James, and Mary, but on each occasion set forth different terms. A39, A210, A231, A252. Alice's 1986 Exercise contains the final, controlling terms of her exercise of the Original Limited Power. The 1986

[5] The language of Alice's Original Limited Power is located in Section 1 of the Trust Agreement. A23.

Exercise, like prior exercises, provided that upon Alice's death, the Trustee would divide Trust No. 2108 into equal shares—one for each of Alice's surviving children—and hold each share as a separate trust. A40-41. Also, like some of Alice's prior exercises, the 1986 Exercise created a framework for a Second Limited Power, which each of Alice's children could exercise relative to their respective trust share. A42-43.

The 1986 Exercise included two provisos that addressed only Phyllis's Second Limited Power. First, the Adopted Child Proviso permitted Phyllis alone to exercise her Second Limited Power in favor of adopted children. A48-49.[6] Next, the Second Charitable Proviso by its plain terms enabled Phyllis alone to designate a charitable organization as the recipient of the remaining assets of the Phyllis Trust using the following language:

> [P]rovided, 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 limitations contained in Paragraph (d) of this Article SECOND.

A43 (emphasis added).

[6] The Adopted Child Proviso first appeared in Alice's 1976 Exercise. A239-40. She included it in her 1983 Exercise, A262, and retained it in her final 1986 Exercise. A48-49. Its terms and meaning are not at issue in this litigation.

The 1986 Exercise contained a Final Default Provision that addressed a scenario in which Phyllis, James, or Mary died without having fully and effectively exercised his or her Second Limited Power, including the scenario of a power holder failing to do so and not being survived by issue:

> To the extent a child of Grantor 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 Grantor, per stirpes, subject to the provisions of Article FOURTH and subparagraph 3 of this Paragraph (a).

A44.

B. Phyllis Fails To Appoint her Trust Effectively

Alice died on March 13, 2002, survived by Phyllis, James, and Mary. A14, ¶ 4 n.3. Per the terms of the 1986 Exercise, the Trustee divided Trust No. 2108 into three equal shares and continued to hold those shares in trust, one for the benefit of each of Alice's children. A14, ¶ 4. By execution of her 2006 Exercise, Phyllis sought to exercise the Second Limited Power granted to her in the 1986 Exercise by relying on the expanded scope granted by the Second Charitable Proviso, but without reference to its conditionality or incorporating conditionality into her own exercise. A66-69. In the 2006 Exercise, Phyllis provided that the corpus of the Phyllis Trust would pass on her death, free from trust, to the Foundation, or to comparable

charities if the Foundation was not in existence or qualified at the time of her death. A67.

Phyllis died on January 14, 2019, without children. A15, ¶ 6. Her will appointed her husband, James B. Wyeth, as the Executor of her Estate. *Id.* It is undisputed that at the time of Phyllis's death—in light of the specific language Felix chose to use in the 1934 Trust Agreement—Delaware law did not permit someone in Phyllis's position to appoint the Phyllis Trust to a charitable organization because it was not an object of the original power.[7] Op. Br. at 23 n.11. At this point in the proceedings, it is undisputed that Phyllis did not effectively appoint the Phyllis Trust to the Foundation.[8]

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[7] The legal prohibition against Phyllis appointing the Phyllis Trust in this manner was an issue before the Court of Chancery. There, the Estate had joined the Foundation in a primary argument that Phyllis was permitted to appoint the Phyllis Trust to the Foundation and that she had validly and effectively done so via the 2006 Exercise. A192. The Court of Chancery ruled in James's favor, however, concluding that Delaware law prohibited Phyllis's appointment to the Foundation. Op. at 17, 22. On appeal, the Estate has not contested the ruling that Delaware law prohibited Phyllis from appointing the Phyllis Trust to a charitable organization. Instead, the Estate on appeal takes a position that is fundamentally at odds with its previous primary argument. The Estate now argues that, from inception, the 1986 Exercise's Second Charitable Proviso was unlawful, and therefore all along the 1986 Exercise suffered from invalidity. Op. Br. at 23.

[8] After Phyllis's death, the General Assembly amended 12 *Del. C.* § 505 to permit an expansion of the scope of a limited power. 82 Del. Laws Ch. 52 § 3 (2019). The Trustee sought instructions in part because of a question regarding the application of the 2019 legislation. A18-19, ¶¶ 12-13. On appeal, no party disputes that the 2019 legislation, having been enacted after Phyllis's death, does not affect the

C. Certain Other Undisputed Facts Relied on by the Estate Held no Weight in the Court of Chancery's Analysis of Plain Language

On appeal, the Estate again relies on content in Alice's exercises prior to 1986 in an effort to create a constraint not present in the plain language Alice used to express her intent in the dispositive 1986 Exercise. The Court of Chancery explicitly rejected these facts as irrelevant to the question of the determination of Alice's intent as shown by the plain meaning of the 1986 Exercise's terms, including the term "to the extent permissible." Op. at 24-25.

- James does not dispute that the Original Charitable Proviso in Alice's 1983 Exercise did not include the term "to the extent permissible." Op Br. at 11, 17.
    - The Court of Chancery recognized that this change between the 1983 Exercise and 1986 Exercise meant that the latter "address[ed] explicitly the possibility of an incomplete or ineffective exercise." Op. at 26. It found no importance in this change when interpreting the plain language of the 1986 Exercise as the expression of Alice's intent, stating that "[t]he fact that the 1983 Exercise was not as thorough in anticipating future possibilities does not undermine the plain meaning of the 1986 Exercise." *Id.*

Phyllis Trust.

- James does not dispute that the language of the Perpetuities Provision evolved over the four exercises, particularly between the 1976 Exercise and the 1983 Exercise. Op. Br. at 10, 12-13.
    - The Court of Chancery explained that it is the plain language of the 1986 Exercise that controlled, and the evolution of language over previous instruments did not demonstrate an intent by Alice that the phrase "to the extent permissible" be applied in a limited scope not warranted by its plain meaning. A limited interpretation was found to be unwarranted, as "the 'to the extent permissible' language [in the 1986 Exercise] does not contain any cross reference or limitation that would restrict its application to a perpetuities issue." Op. at 25.
- James does not dispute that the Original Default Provision in Felix's Trust Agreement directed the Trustee to distribute the property in Trust No. 2108 unto Alice's living issue at the time of her death if Alice had failed to exercise the Original Limited Power. A23.
    - The Court of Chancery explained that this provision in the Trust Agreement indicating Felix's default intent did not apply in the present dispute because the 1986 Exercise did not involve a failure by Alice to exercise effectively the Original Limited Power. Instead, the 1986 Exercise was fully valid and used conditional

language in the grant of the Second Charitable Proviso to Phyllis. In light of Phyllis's failure to properly exercise the Second Limited Power, the Final Default Provision in Alice's valid 1986 Exercise controlled. Alice exercised her Original Limited Power by explicitly addressing the possibility and consequences of a child attempting to exercise the Second Limited Power but doing so only partially or ineffectively. Op. at 31.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT THE 1986 EXERCISE WAS VALID

A. Question Presented

Did the Court of Chancery correctly interpret the plain meaning of "to the extent permissible" in determining the 1986 Exercise was valid? The question of plain meaning was raised below, A347-54, and it is at the core of the Court of Chancery's decision to grant James's motion for judgment on the pleadings. Op. at 23-29.

B. Scope of Review

James concurs with the scope of review the Estate has cited. "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." Op. Br. at 22 (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)). Because the Court of Chancery committed no legal error in formulating or applying well-settled legal precepts and rules of construction, this Court should affirm the judgment below.

C. Merits of Argument

The Estate's appeal turns entirely on the proper interpretation of the phrase "to the extent permissible" and its impact on the validity of the 1986 Exercise. *See* Op. Br. at 22-23 (arguing that the interpretation of this phrase is the source of the

Court of Chancery's error); Op. at 23 ("The outcome depends on the validity of the 1986 Exercise.").

By its plain terms, this phrase rendered the expanded scope of Phyllis's Second Limited Power conditional, dependent on that scope being permissible at the time of her death. The 1986 Exercise provided alternate and permissible objects if the expanded scope was not permissible and set forth an alternative disposition if the power was not fully and effectively exercised. Thus, the 1986 Exercise was valid. The Estate's argument for partial invalidity rests entirely on a reading that the 1986 Exercise exceeded its scope by granting to Phyllis the Second Charitable Proviso in contravention of Delaware law. But Phyllis's Second Limited Power was only expanded by the Second Charitable Proviso "to the extent permissible." This conditionality on the expansion of the scope makes it clear that Alice allowed for the possible future evolution of Delaware law and did not improperly exceed the scope of the Original Limited Power. The Estate proposes an alternative and unreasonable interpretation of the phrase that violates the tenets of interpretation of written instruments. The Court of Chancery correctly interpreted and gave effect to the plain meaning of all the terms used in the 1986 Exercise. It properly concluded that the Estate's interpretation was not reasonable and that the Estate's interpretation did not render the 1986 Exercise ambiguous.

1. Unambiguous Language in a Trust Instrument Is the Controlling Expression of the Settlor's Intent

The Court of Chancery properly grounded its decision on fundamental principles of Delaware law. Op. at 14-15.

A court construes a contract "in accordance with [its] terms to give effect to the parties' intent." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013). In determining intent, the court considers "the parties' words and the plain meaning of those words." *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (internal quotations and citation omitted). Unambiguous language controls, as "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or create an ambiguity." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.3d 728, 739 (Del. 2006) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

These same principles apply to the interpretation of a trust instrument, including the effectuation of the settlor's intent as established by unambiguous language in the instrument. *In re Peierls Fam. Inter Vivos Tr.*, 77 A.3d 249, 263 (Del. 2013). Giving effect to unambiguous language comes via the court applying

the ordinary meaning of the words. *DiSabatino v. Diferdinando*, 2002 WL 2005743, at *1, 2 (Del. Ch. Aug. 13, 2002), *aff'd*, 808 A.2d 1204 (Del. 2002). "[T]he Court will not consider extrinsic evidence to vary or contradict express provisions of a trust instrument that are clear, unambiguous, and susceptible of only one interpretation." *Wilmington Tr. Co. v. Annan*, 531 A.2d 1209, 1211 (Del. Ch. 1987).

2. By its Plain Terms, the 1986 Exercise Validly Established a Condition on Expansion of the Scope of the Power of Appointment Granted to Phyllis

The Court of Chancery correctly concluded that the 1986 Exercise contained unambiguous language and that those plain terms established its validity. *See* Op. at 24-25.

The 1986 Exercise and its Second Charitable Proviso provided Phyllis with the power to appoint the Phyllis Trust to a charitable organization "to the extent permissible." A43. These plain terms have two important consequences as a matter of law.

First, the phrase created a conditional authority on the Second Charitable Proviso. The expansion of the scope of Phyllis's power depended on whether that expansion was permissible, including whether Delaware law would permit Phyllis to appoint the Phyllis Trust in favor of a charitable organization given the scope restrictions imposed by the Original Limited Power. If an appointment to a charitable organization would run counter to Delaware law at the time of Phyllis's

death, then the 1986 Exercise did not grant Phyllis the authority to make any such appointment. More broadly, and in light of its plain language, the 1986 Exercise did not provide Phyllis an authority that violated Delaware law. *See* Op. at 24.

Second, and contrary to the Estate's assertions, the phrase included no qualifier or limitation conditioning Phyllis's charitable appointment authority on compliance with only one particular legal rule or a specific provision of the 1986 Exercise. By its very terms, the phrase applied broadly to any reason that would prevent Phyllis from having the authority to appoint the assets of the Phyllis Trust to benefit a charitable organization. Indeed, it is baffling to consider why Alice would have included this type of conditional language, which reads as a savings provision, but would *not* have intended it to apply to certain areas of the law or certain other invalidating provisions of the instrument. That is, it is not reasonable to conclude Alice would intend to take some chance that the 1986 Instrument could be found invalid in whole or in part. The Court of Chancery correctly interpreted the language of the 1986 Exercise. *See* Op. at 25 ("The phrase 'to the extent permissible' is broad and unconstrained. It encompasses *any reason* why it might be impermissible or permissible for Phyllis to rely on the [conditional authority to appoint to a charitable organization]." (emphasis added)).

Having utilized unambiguous language to grant a conditional authority for Phyllis that did not and could not permit or authorize an exercise in contravention of

Delaware law, Alice's 1986 Exercise constituted a fully valid exercise of the Original Limited Power.

3. The Estate's Litany of Alternative Arguments Fails To Create a Reasonable Interpretation of "To The Extent Permissible"

The Estate has taken the primary position that the phrase "to the extent permissible" unambiguously gives Phyllis the power to appoint to a charitable organization but only to the extent such appointment is permitted by the perpetuities provisions in the 1986 Exercise. Because Alice's 1986 Exercise nowhere contains this exclusive limitation, the Estate relies on a speculative analysis drawn from comparing Alice's previous exercises to Alice's utilization of the phrase in the 1986 Exercise. *See* Op. Br. at 26 ("The Court Misinterpreted The Unambiguous Language Of The 1986 Exercise"); Op. at 13-14 (discussing the litigation positions of the Foundation and, by adoption, the Estate). Of course, a necessary implication of the Estate's position is that the Estate believes the Court of Chancery could have ruled, and now this Court can rule, on the language of the 1986 Exercise without additional discovery. The Court of Chancery agreed the 1986 Exercise was unambiguous, but in doing so it correctly rejected the Estate's cramped interpretation of the disputed phrase as the correct interpretation or a reasonable alternative capable of creating an ambiguity.

a. The Estate Seeks a Narrow Interpretation that Lacks Textual Support and Creates Surplusage and Invalidity

Notwithstanding the complete absence of any supporting language in the 1986 Exercise, the Estate seeks to tie this phrase exclusively to the issue of the rule against perpetuities. Op. Br. at 29. The Court of Chancery correctly rejected the Estate's interpretation based on a reading of the plain terms of the 1986 Exercise, noting that the "language does not contain any cross reference or limitation that would restrict its application to a perpetuities issue." Op. at 25. Further, narrowing the phrase such that it applies only in a perpetuities context would render as surplusage the surrounding language in Article SECOND, ¶ (a)(1)(D) in the 1986 Exercise that *does*—and, in the 1983 Exercise, already did—explicitly prohibit exercises of any Second Limited Power, including Phyllis's, from violating the rule against perpetuities. *Id.* (citing *Wilmington Tr. Co. v. Wilmington Trust Co.*, 24 A.2d 309, 313 (Del. 1942)).

Equally without merit is the Estate's insistence that its interpretation is the only unambiguous reading—one that renders the 1986 Exercise *partially invalid* and, by the application of *Equitable Tr. Co. v. Foulke*, 40 A.2d 713 (Del. Ch. 1945) ("*Foulke*"), renders the Exercise *completely irrelevant* to the final disposition of the trust assets over which Alice held the Original Limited Power. While claiming this reading would be true to Alice's intent, the Estate asks the Court to ignore the clear

documentation of Alice's intent. It does so by arguing that a provision that on its face imposes conditionality and serves as a savings provision should not—indeed, cannot possibly—be read in a manner to honor the terms of the instrument that Alice herself executed and delivered to the Trustee. The Estate's unreasonable position is highlighted by this argument, one that claims Alice's intention was to heighten the chances that her words would be ultimately ignored when it came to the ultimate distribution of the assets that had been held in Trust No. 2108.

b. The Estate Misreads the Terms of the 1986 Exercise and Posits an Untenable Hypothetical in an Effort To Deviate from its Plain Language

Lacking any explicit language in the 1986 Exercise that ties the phrase "to the extent permissible" solely to the perpetuities context, the Estate embarks on a series of unpersuasive or inapt arguments.

The Estate argues the only way to save the plain language of the 1986 Exercise from a purported fatal perpetuities flaw is to interpret its overall provisions such that "to the extent permissible" *must* relate *solely* to the issue of perpetuities. The Estate posits that if this Court gives *any* other meaning to this broad phrase, then the 1986 Exercise—and the 1983 Exercise before it—could be void entirely because Phyllis might have exercised her power after the expiration of the perpetuities period or

possibly retained her power to appoint even after the interests had already fully vested in her issue. Op. Br. at 29-32.[9]

The Estate asserts that its 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." Op. Br. at 33. The Estate makes this assertion without a hint of irony, even though this resulting interpretation yields an instrument that it asserts to be partially invalid, and which therefore needs to rely on the *Foulke* case and other maxims outside of its four corners to obtain the result it advocates. In actuality, the Estate's interpretation ignores the presence or operation of clear language in both the 1983 Exercise and elsewhere in the 1986 Exercise that obviates a scenario involving Phyllis exercising her power after the perpetuities period.

The Estate argues that no term in the 1983 Exercise cabined Phyllis's conditional power to appoint to a charitable organization only within the perpetuities period, thus explaining the need for the adoption of "to the extent permissible" in the 1986 Exercise to secure that meaning. Op. Br. at 31. The Estate misreads the 1983 and 1986 Exercises, however, failing to account for the global, introductory language of Article SECOND, ¶ (a)(1)(D) and the testamentary nature of each

[9] The Estate does not explain why it would take issue with the 1986 Exercise suffering from invalidity due to an issue with perpetuities but not due to an issue with objects of the power.

Second Limited Power, Phyllis's power included, which were evident in both instruments. That introductory language applies to all powers created for Phyllis, James, and Mary under that subsection, and does so by placing conditions on all the powers such that they can only be effectuated if the power holder dies within the perpetuities period. *See* A42-43 ("Upon the death of such child or grandchild, if such death occurs during the [perpetuities period]…."). The Estate fails to explain how this clear language authorizes Phyllis to exercise a power to appoint to a charitable organization after the end of the perpetuities period, or how any other language of Article SECOND, ¶ (a)(1)(D) suggests Phyllis's conditional power provided in the Second Charitable Proviso would be exempt from the global language at the outset of that section without the use of "to the extent permissible."

The Estate suggests that absent its narrow reading of "to the extent permissible" Phyllis might have been able to exercise a power of appointment in favor of a charitable organization had she lived beyond the expiration of the perpetuities period. Op. Br. at 29-30, 32. Again, the Estate fails to read the 1983 and 1986 Exercises correctly. All powers of appointment were valid only to the extent that they were effectuated during the perpetuities period. *See* A42 (Article SECOND, ¶ (a)(1)(C) establishing powers of appointment (not at issue in this litigation) that could be effectuated during the power holder's lifetime if executed and delivered within the perpetuities period)); A42-43 (Article SECOND, ¶

(a)(1)(D) establishing powers of appointment (at issue in this litigation) that could only be effectuated at the time of the power holder's death if such death occurred within the perpetuities period)).

Further, by their very terms, the 1983 and 1986 Exercises would have terminated the Phyllis Trust at the conclusion of the perpetuities period. *See* A46 (Article THIRD, ¶ (a) of the 1986 Exercise); A260 (Article THIRD, ¶ (a) of the 1983 Exercise). At that point, a specific distribution scheme applies—either leading to an outright distribution or the creation of a further trust that has all of its beneficial interests fully vested from the outset. *See* A46-47 (Article THIRD, ¶ (b) of the 1986 Exercise); A260-61 (Article THIRD, ¶ (b) of the 1983 Exercise). In either case, there would no longer be a trust governed by Article SECOND, ¶ (a)(1) with assets remaining to be appointed in connection with a power of appointment dependent on the terms of Article SECOND, ¶¶ (a)(1)(C)-(D). Nor would there be any remaining power under these governing terms that could be exercised. The Estate provides no explanation for why the 1986 Exercise would operate any differently than the 1983 Exercise without the use of "to the extent permissible."

In short, reading the 1986 Exercise as a whole belies the Estate's argument that "to the extent permissible" phrase was necessary to save the Second Charitable Proviso from a perpetuities violation, much less the exclusive reason for its addition

to the 1986 Exercise. The Court of Chancery wholly and correctly rejected the Estate's arguments on these points. Op. at 24-25.

c. The Estate's Reliance on Earlier Exercises and Dicta in the Chancery Opinion Fails to Justify Deviation from the Plain Language of the 1986 Exercise

The Court of Chancery also correctly rejected the Estate's other arguments grounded in a comparison of the 1983 Exercise and the 1986 Exercise. *Id.* at 26. The Estate revisits its argument on appeal, offering irrelevant mention of the Court of Chancery's failure to address typographical errors in subsection numberings within Alice's multiple exercises. Op. Br. at 33-34. The Estate fails to explain how acknowledgment of those typographical errors would have modified the Court of Chancery's interpretation of the plain meaning of the 1986 Exercise or otherwise changed the Court of Chancery's stated reasoning for its decision. To the contrary, acknowledgment of the typographical error in the 1983 Exercise only reinforces the fact that the 1983 Exercise had sufficiently accounted for the rule against perpetuities throughout its Article SECOND. This undercuts the Estate's argument that not only was this purported deficiency the motivating factor behind the implementation of "to the extent permissible" in the 1986 Exercise but also that it is the polestar for interpreting that language in as restrictive and strained a manner as possible. In any event, the Court of Chancery grounded its decision on the plain language of the 1986

Exercise, and any typographical errors contained in Alice's earlier exercises are of no moment.

So too should this Court disregard the Estate's argument regarding the Court of Chancery having noted certain changes to the 1986 Exercise and the reference to the 1986 Exercise in Phyllis's 2006 Exercise. *See* Op. Br. at 34-37. As to the former—the meaning of the addition of language in the 1986 Exercise addressing the failure of a power holder to "fully and effectively" appoint—the Estate overstates the Court of Chancery's reliance on this addition. The Opinion merely notes the consistency of certain changes in the 1986 Exercise as preparing for an eventuality of an unexercised or ineffective exercise of a Second Limited Power. The Estate's claim of the Court of Chancery "ascrib[ing] substantial significance" to this item, s*ee* Op. Br. at 34, is belied by the Court of Chancery's light treatment of it in the Factual Background section of the Opinion. It is also perhaps not surprising that the Estate questions the Court of Chancery for supposedly reading this language as applying to Phyllis's Second Limited Power alone, and not Mary and James's. Although the Estate provides no support for this conclusion, it is consistent with the Estate's fundamental argument for the interpretation of "to the extent permissible," which is founded on its misreading of the 1983 Exercise and 1986 Exercise as handling Phyllis's Second Limited Power separately from her siblings', even though

all three were appropriately limited and compliant with the rule against perpetuities in both instruments.

As to the latter item cited by the Estate—the reference to a recital in Phyllis's 2006 Exercise—this is another fact recital by the Court of Chancery that does more to provide context and highlight the legal precepts at play than provide a foundation to the decision. Op. at 10-11. The Court of Chancery simply noted the omnipresence of the restrictions on the Original Limited Power over all subsequent instruments.

In each case, the Estate's claim of the Court of Chancery "ascrib[ing] substantial significance" to these items fails to reflect the analysis set forth in the Opinion. Each claim also provides no basis for why a discussion of consistent terminology throughout various instruments creates error that would lead to any change in the holding. The Court of Chancery's Opinion explained why the plain language of the 1986 Exercise should control. Op. at 26. The Estate's arguments to the contrary do not explain why its restrictive interpretation of "to the extent permissible" is reasonable.

d. The Estate Makes Unreasonable Assumptions About Alice's Awareness or Attentiveness to Long-Standing Common Law

The Estate takes issue with the concept that Alice might have been unsure whether she could grant Phyllis a power to appoint to a charitable organization, and how that concept factored into the Court of Chancery's analysis. Op. Br. at 37. The

Estate incorrectly states that "there is nothing in the record to support this conclusion" that Alice felt any uncertainty. *Id.* Yet there most certainly is such support in the record. James has pointed to a New York court opinion published shortly before Alice executed the 1986 Exercise that raised the issue of whether a grantor such as Alice could create an expanded power of appointment for someone such as Phyllis to appoint her trust share to a charitable organization. A360-61. It is reasonable to consider that Alice or her legal advisors would have known about an unfolding debate among trust law practitioners and authorities on this point. If, as the Estate contends, the 1986 Exercise was intended to fix omissions in the 1983 Exercise to save it from invalidity, it is unreasonable to suggest that Alice or her legal advisors would specifically and purposefully eschew language that would avoid a violation of the long-standing common law that prohibited Phyllis from appointing her share to a charitable organization. *See supra* at 3 n.3.

The Estate also seeks to attach significance to the 1983 Exercise having included the power for Phyllis to appoint to a charitable organization but not having included the phrase "to the extent permissible." The Estate takes the position that including the phrase in the 1986 Exercise could not have been connected to any concern by Alice about the legality of an appointment to a charitable organization, for otherwise Alice would have included the phrase in the 1983 Exercise, too. Op. Br. at 37. Again, the Estate fails to account for the increasing spotlight on this issue

as represented by the New York court opinion that was published between the times Alice executed the 1983 Exercise and the 1986 Exercise. A360-61. The Estate also fails to account for the possibility that including the phrase in the 1986 Exercise was a corrective action, overlooked in the 1983 Exercise as the Estate contends the perpetuities issue was.

Most fundamentally, the Estate's argument tries to cast the Court of Chancery's holding as the resolution of a false dichotomy: whether Alice adopted "to the extent permissible" in the 1986 Exercise because of a concern with the rule against perpetuities or because of a concern with the expanded scope of objects. In truth, the Court of Chancery's ruling held only that the language "to the extent permissible" unambiguously encompassed an impermissible expansion of the scope of the objects allowed under the law. Op. at 25. The Estate continues its failure to acknowledge the importance of the plain language of the 1986 Exercise: that Alice conditioned Phyllis' appointment to a charitable organization on it being valid—whether under the existing common law prohibitions, perpetuities requirements, or otherwise. Op. at 28-29.

e. The Estate Makes an Unsupported Conclusory Argument Regarding Legislative Authority

The Estate's last effort to upset the Court of Chancery's sound ruling that the 1986 Exercise is valid is likewise insufficient. In a conclusory fashion, with no

citation to legal authorities in support of its curious position, the Estate suggests a future change in Delaware trust law on powers of appointment could not possibly occur due to conflicts that would arise between that change and Felix's intent, the terms of the Trust Agreement, or Delaware Code. *See* Op. Br. at 39.

In addition to failing for lack of any authority to support this argument, the Estate's argument runs counter to its briefing below and should be disregarded. A305 (the Foundation noting, in its opening brief in support of its cross-motion for judgment on the pleadings, James's concession that in 2019 the Delaware General Assembly did in fact modify Delaware law to permit an expanded scope of objects); A178 (in its opening brief in support of its cross-motion for summary judgment, the Estate confirming that it "fully incorporates all of the Foundation's arguments" from the Foundation's opening brief).

4. The Estate's Unreasonable Interpretation Does Not Justify a Finding of Ambiguity

Though the Estate primarily argues that the 1986 Exercise is unambiguous, it also argues alternatively that the 1986 Exercise at least is ambiguous. Op. Br. at 4, 40. The Estate requests a remand for purposes of discovery. This Court should reject the Estate's alternative argument for remand. As explained above, *supra* at 18-19, under Delaware law neither a disagreement on interpretation nor extrinsic evidence as to context are enough to create an ambiguity when an instrument's plain

meaning is clear and, as here, susceptible to only one reasonable interpretation. The Estate's cramped interpretation of the 1986 Exercise and its phrase "to the extent permissible" is not reasonable. Under Delaware law, only reasonable interpretations can serve as a basis for a finding of ambiguity. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)) ("[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.").

II. THE COURT OF CHANCERY DID NOT ERR IN APPLYING THE DEFAULT DISTRIBUTION FRAMEWORK UNDER THE PLAIN TERMS OF THE 1986 EXERCISE

A. Question Presented

Having found the 1986 Exercise to be valid, did the Court of Chancery correctly apply the default distribution framework and order the Trustee to distribute the Phyllis Trust in equal halves to the trusts established for James and Mary, respectively? The question of the default distribution framework was raised below, A161-62, A364-68, and the Court of Chancery addressed it in the Opinion. Op. at 29-32.

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." Op. Br. at 22 (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

C. Merits of Argument

1. The Unambiguous Language of the 1986 Exercise Expresses Alice's Intent for Disposition of the Phyllis Trust

It is a basic premise of Delaware law that the unambiguous language of a settlor expresses her intent. *In re Peierls Fam. Inter Vivos Tr.*, 77 A.3d 249, 263 (Del. 2013). The plain language of the 1986 Exercise expresses Alice's intent for

what would occur if Phyllis failed to effectively appoint, and this Court should affirm the Court of Chancery's ruling applying Alice's Final Default Provision.

The 1986 Exercise includes unambiguous language governing the disposition of the Phyllis Trust if not effectively appointed: "[t]o the extent a child of Grantor 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 Grantor, per stirpes…." A44. Pursuant to Article SECOND, ¶ (a)(3), such distribution is to occur by adding each of James and Mary's halves of the Phyllis Trust to their respective share trusts, rather than distributing their halves of the Phyllis Trust to them outright. A45.

As the Court of Chancery concluded, the validity of the 1986 Exercise, combined with the ineffective exercise of the power by Phyllis, triggers implementation of this unambiguous Final Default Provision that Alice provided for in circumstances where, as here, Phyllis failed to effectively appoint. *See* Op. at 23-24, 29, 31. It would be inappropriate as a matter of law to adopt the Estate's suggestion that the better way to honor Alice's intent is to disregard the unambiguous words she used, particularly if the result is to effect a transfer not set forth in Alice's 1986 Exercise and that does not originate from within its four corners. *See* Op. Br. at 25 ("Here, the entire 1986 Limited Power must be rendered invalid to stay true to Alice's scheme of disposition."). Such a position again

contravenes the Delaware law that applies a settlor's unambiguous language to effectuate the expression of her intent.

2. The Estate Cites Case Law that Is Inapplicable and Distinguishable Given Alice's Unambiguous Language

The Estate asks this Court to ignore Alice's plain language in the Final Default Provision and adopt in its place the reasoning of *Foulke*. Op. Br. at 39-40.

The Estate's position depends first on a finding that the 1986 Exercise was partially invalid. Op. Br. at 23, 25-26, 39-40. As discussed previously, however, and as determined by the Court of Chancery, the 1986 Exercise was valid.

When presented with the Estate's argument below, the Court of Chancery correctly rejected the application of *Foulke* and distinguished that case's facts from the circumstances of the 1986 Exercise. In *Foulke* the settlor had not addressed what would occur in the event of an ineffective or invalid exercise. Thus, in *Foulke*, the Court of Chancery had to rely on equitable principles in the absence of explicit direction from the settlor. Op. at 31-32. The present case is the exact opposite. Alice explicitly addressed the possibility that a child might attempt to exercise the Second Limited Power but do so only partially or ineffectively. *Id.* at 31. "With Alice having exercised her authority, there is no room for the court to rely on equitable discretion. The court's task instead is to implement Alice's intent as expressed in the plain language of the 1986 Exercise." *Id.* at 32.

Further distinguishing the present case, the *Foulke* case also resulted in a resolution—an outright distribution to the power holder's surviving issue—that mirrored both the power holder's intended disposition (which failed because of invalidity) and the original settlor's default provision had no exercise been attempted. In this case, Felix's default provision does not adequately account for both the transfer tax planning undertaken by Alice through the 1986 Exercise and the fact that Alice had previously considered, but ultimately rejected, an outright gift to Phyllis that would have given her unfettered discretion to dispose of the assets of the Phyllis Trust, whether among issue or non-issue, in whatever manner she wished. A233 (Article SECOND(b)(1) of the 1976 Exercise, providing an outright distribution to Phyllis, free and clear of trust). In addition, the assets of the Phyllis Trust being paid outright and free from trust to the beneficiaries of Phyllis's estate planning—persons who were not Felix's or Alice's issue—and subject to transfer tax consequences as if they were an asset held by Phyllis during her lifetime[10] is in no way a result that either Felix or Alice intended.

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[10] Appellant does not challenge directly the validity of the powers Alice gave her other two children, James and Mary. But by asking the Court to rely on equitable principles to find the 1986 Exercise invalid and urging a default distribution under *Foulke* based on their grandfather Felix's original trust (outright distribution per stirpes as of Alice's death in 2002), the Estate is advocating for a result that would dramatically and retroactively affect the trust restrictions and potential transfer tax liability applying to all three siblings—an outcome that would hardly be equitable and would be quite inconsistent with Alice's wishes as expressed through the

The Court of Chancery properly applied Delaware law. The Final Default Provision is unambiguous and not susceptible to other reasonable interpretations. A finding that the 1986 Exercise was valid and that Phyllis failed to effectively appoint the Phyllis Trust triggers the operation of the Final Default Provision and a *per stirpes* distribution of the Phyllis Trust to James and Mary's trusts.

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evolution of her exercises.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's Opinion granting judgment on the pleadings in favor of James.

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