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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

APPELLANT'S REPLY BRIEF

Matthew P. D'Emilio (#4845)
Joseph L. Christensen (#5146)
Kerry M. Porter (#6067)
McCollom D'Emilio Smith Uebler LLC
2751 Centerville Road, Suite 401
Wilmington, Delaware 19808
(302) 468-5960

Attorneys for Respondent Below-Appellant James B. Wyeth in his capacity as the Executor of the Estate of Phyllis Mills Wyeth

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I. James's Interpretation of the 1986 Exercise is Contrary to Delaware Law and the Basic Principles of Contract Interpretation

This case is about the validity of the 1986 Exercise, not the 2006 Instrument.[1] The validity of the 1986 Exercise, in turn, centers on the meaning of the phrase "to the extent permissible."

The Court of Chancery's interpretation of "to the extent permissible," and James's attempt to defend it, must be rejected. James's interpretation does not take into consideration the entirety of the 1986 Exercise, renders portions of the 1986 Exercise meaningless, is inconsistent with Felix's and Alice's intent, and relies on an incorrect interpretation of the 2019 amendment to 25 *Del. C.* § 505 (the "2019 Amendment").

The 1986 Exercise is partially invalid because it expanded the scope of the Original Limited Power. The phrase "to the extent permissible" did not create a "broad and unconstrained" conditional power of appointment intended to cover a future change in the law. Instead, the phrase relates to one of two critical perpetuities-related phrases. Consequently, the 1986 Exercise is partially invalid. Because of the partial invalidity, this case is entirely consistent with the *Foulke* case. As a result, Phyllis's Trust should now be distributable to the Estate.

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[1] The Estate will continue to use the defined terms in Appellant's Opening Brief filed on November 2, 2021 ("Op. Br.").

A. James and the Court of Chancery rely on a faulty reading of 12 *Del. C.* § 505.

James, and the Court of Chancery, attempted to breathe life into a strained interpretation of the phrase "to the extent permissible" by relying on the 2019 Amendment. According to James, the 2019 Amendment substantially diverges from the well-settled common law by permitting the donee of a limited power of appointment to create a further power that can be exercised in favor of non-objects of the original power. Ans. Br. at 12, n.8; A328-329. Both James and the Court of Chancery misunderstand Section 505, and this misunderstanding plagued their interpretation of the phrase "to the extent permissible."

While the Court of Chancery correctly concluded that Section 505 did not change the outcome of the present case, Op. at 20,[2] it erred when it concluded that Section 505, as amended in 2019, now permits Alice to grant Phyllis the power to appoint to non-objects of the original power. Op. at 20, n.6 ("By reversing the default rule, [Section 505] thus likely changed the donative schemes of many settlors, albeit to the benefit of current power holders.").

The 2019 Amendment did not reverse the "default" common law rule. The 2019 Amendment revised Section 505 as follows:

> Unless the instrument creating a nongeneral power of appointment expressly manifests a contrary intent of the

[2] The Estate argued below that Section 505 was inapplicable to this case, and has not changed its position. A384.

> donor, the donee of such a power, in addition to exercising the power in any other manner permitted by law and the instrument creating the power, may effectively appoint all or a portion of the assets subject to such power to a trustee or trustees for the benefit of 1 or more objects of the power and may, in addition, create in an object of the power a general or nongeneral power of appointment, exercisable during life or at death, over assets subject to the original power or may create in a person who is not an object of the power a nongeneral power of appointment, exercisable during life or at death, to appoint such assets among objects all of whom are objects of the original power.

25 *Del. C.* § 505(a) (2019) (emphasis added).[3]

Pursuant to the 2019 Amendment, in addition to exercising the power in any other manner permitted by law and the instrument creating the power, a donee:

(1) may effectively appoint all or a portion of the assets subject to such power to a trustee or trustees for the benefit of 1 or more objects of the power; and

(2) may, in addition, create: (a) in an object of the power, a general or nongeneral power of appointment, exercisable during life or at death, over assets subject to the original power, or (b) in a person who is not an object of the power a nongeneral power of appointment, exercisable during life or at death, to appoint such assets subject to the original power. But in either event, the power holder may

[3] Section 505 addresses the permissible ways a donee can exercise a power of appointment. Section 505 does not address how to distribute assets that are ineffectively appointed. A384.

only appoint such assets among objects all of whom are objects of the original power.

In other words, the 2019 Amendment merely allows a donee like Alice to grant to someone who is not an object of the power, the power to appoint to an object of the power. For example, it would allow Alice to grant to a trust protector the power to appoint Phyllis's Trust to objects of the original power. It did not change the common law rule that the power must be exercised in favor of only objects of the original power. *See* Restatement (Second) of Property § 19.4 (Oct 2019 Update); Restatement (Third) of Property § 19.14 (2011), cmts. f & g.[4] Accordingly, the "default" common law rule, that the Court of Chancery held to have prevented Alice from granting Phyllis the power to appoint Phyllis's Trust to charity, still stands.

The Court of Chancery's incorrect interpretation of Section 505 must be corrected by this Court.

[4] James cited these Restatement sections below. A336, n.10 & n.11.

B. James's interpretation is unreasonable.

1. James's interpretation ignores perpetuities-related provisions.

Like the Court of Chancery, James fails to recognize that there are *two* different perpetuities-related limitations contained in paragraph (a)1.D. of Article SECOND of the 1986 Exercise.

James argues that the introductory language in the 1986 Limited Power "applies to all powers created for Phyllis, James, and Mary under that subsection," Ans. Br. at 25, and therefore, the Estate's interpretation of the phrase "to the extent permissible"—that it refers to a specific perpetuities-related limitation—is a stretch. Ans. Br. at 22; *Id.* at 24-25 ("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 Second Limited Power, Phyllis's power included, which were evident in both instruments.").

James ignores the fact that the 1986 Limited Power is subject to *two* perpetuities-related provisions. The first perpetuities-related limitation provides that a child of Alice could exercise his or her limited power of appointment only if they died within the Original Perpetuities Period ("if such death occurs during the period provided in Paragraph (a) of Article THIRD"). The second perpetuities-related limitation provides that any exercise could not extend the vesting of any interests in a trust created under Alice's 1986 Exercise beyond the Original

Perpetuities Period ("but subject to the limitation contained in Paragraph (d) of this Article SECOND"). As the Estate has explained, without inclusion of the phrase "to the extent permissible" in the 1986 Exercise, the first perpetuities-related limitation was not applicable to the Expanded Power granted to Phyllis. Op. Br. at 29.

The illustration below makes clear that "to the extent permissible" relates to the perpetuities-related limitation provided in Paragraph (a) of Article THIRD, providing parity between the First Power applicable to Mimi, Phyllis, and James, and the Expanded Power applicable to only Phyllis:

The 1986 Limited Power (Article SECOND ¶ (a)1.D.):

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 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.

Existing language in 1976 Exercise with 1983 additions. *See* A396.

Expanded Power added in 1983 without disturbing existing language above. *See* A396.

Limitation 1 **added in 1983**

Limitation 2 **added in 1983**

Limitation 1 ***added in 1986*** *See* A418

Limitation 2 **added in 1983**

2. James's interpretation renders certain provisions meaningless.

James suggests that the Estate's reading leads to surplusage, however it is James's interpretation, not the Estate's, that results in surplusage in the 1986 Limited Power. James's interpretation ignores the fact that the second perpetuities-related limitation ("but subject to the limitation contained in Paragraph (d) of Article SECOND") is repeated in the Expanded Power granted to Phyllis. If the first mention of these two perpetuities-related limitations applied to the Expanded Power, the second reference to the second perpetuities-period limitation would be rendered meaningless, violating the rules of construction that James so heavily relies.

3. James's interpretation ignores the entirety of the Expanded Power.

Finally, James's interpretation entirely ignores the fact that the Expanded Power granted to Phyllis was not limited to charity. Instead, the Expanded Power included Phyllis's power to appoint to charity "*as well as her issue*." (emphasis added). Under James's interpretation of "to the extent permissible," Alice must also have questioned her ability to grant Phyllis the power to appoint to issue, making it conditional on a future change in the law.[5] This interpretation is squarely

[5] James argued below that "to the extent permissible" was not intended to address the possibility that it was impermissible for Alice to grant Phyllis the ability

at odds with the power granted to Mimi, Phyllis, and James earlier in the same sentence, granting each of them the unconditional right to appoint their respective trusts in favor of their issue, subject to the two perpetuities-related limitations.

Unlike James's interpretation of "to the extent permissible," the Estate's interpretation gives effect to all language within the 1986 Exercise, ascribes a specific, intentional meaning to the phrase "to the extent permissible," and results in no surplusage.

C. The New York case cited by James supports the Estate's interpretation.

1. James misunderstands *Moore.*

James argues that a single New York trial court case, applying the law of the state of New York in July 1985, explains why the phrase "to the extent permissible" was added to the July 1986 Exercise. Ans. Br. at 30 (*citing Matter of Moore*, 493 N.Y.S.2d 924 (N.Y. Sup. Ct. 1985).[6] The *Moore* case does not support James's argument. If anything, it supports the Estate's interpretation.

The court in *Moore* addressed three issues pursuant to New York law at the time: 1) whether the donee's exercise of her limited power of appointment violated

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to appoint to adopted issue. A471:15-A472:21. The Foundation agreed. A494:11-A495:8.

[6] This case was originally cited below by the Foundation in support of the argument that Alice had the power to grant Phyllis the power to appoint to charity. A304.

the rule against perpetuities, 2) whether the donee effectively exercised her power, and 3) whether the donee could grant her children a further power to appoint their trusts in favor of non-objects of the original limited power. *Moore*, 493 N.Y.S.2d at 926-29.

Like Alice, the donee in *Moore* was the lifetime beneficiary of a trust created by her father who had a limited power of appointment over that trust that could be exercised in favor of the donee's widower and her issue. *Id.* at 925.[7] Also like Alice, the donee in *Moore* had three children who were not living at the time the original trust was created. *Id*. at 927. Further, like Alice did for Phyllis, the donee exercised her limited power in favor of further trusts for her children and their issue and granted her children a further (or second) limited power of appointment that could be exercised in favor of non-objects of the donee's limited power. *Id.* at 926-27.

Unlike Alice, the donee in *Moore* had the "unqualified power to withdraw…any part or all of the principal of her trust, and thus, to terminate same in whole or in part." *Id.* at 927. This unqualified power to withdraw essentially gave

[7] Unlike Alice, the donee in *Moore* was originally granted a *general* power of appointment over the assets of the trust, which could be, and was, changed into a limited power of appointment pursuant to the terms of the original trust agreement at the donee's discretion. *Id.* at 925. The *Moore* court concluded that changing the general power of appointment to a limited power of appointment was "an apparent endeavor to avoid inclusion of such assets in her gross taxable estate for federal estate tax purposes." *Id*.

the donee full control over the assets of the trust and presumably caused the trust's assets to be included in the donee's estate for tax purposes. That is not the case here.

The *Moore* court held that but for the donee's unqualified power to withdraw the assets and terminate the trust, the donee's exercise of her limited power of appointment for her children in further trust "would clearly be in violation of the rule [against perpetuities]" because the measuring lives (her children and their surviving issue) were not in being at the time the original trust was created. *Id*.

The *Moore* court also held that no genuine issue existed as to whether the donee "effectively exercised her testamentary power [because] she made express reference to the power granted her by the subject indenture…and expressly indicated that she was exercising such power by appointing the principal of the subject trust in accordance with the provisions of…said will."[8] *Id*. at 926.

Finally, the *Moore* court, on its own accord, noted that the donee's granting to her children the ability to appoint their trusts in favor of anyone other than themselves, their estates, their creditors, and the creditors of their estates, was beyond the scope of the donee's limited power (donee's widower and her issue). While the *Moore* court acknowledged that one prior New York case held that this

[8] This supports the Estate's interpretation of the language "fully and effectively" and the effectiveness of Phyllis's 2006 Instrument. Phyllis effectively exercised the power that Alice granted to her. If Phyllis's 2006 Instrument is invalid, it is because Alice's 1986 Exercise was partially invalid.

was not permitted, the *Moore* court stated that it was in substantial accord with the criticism that case received. *Moore* at 929. ("Since by established law the donee of the original [limited] power could properly confer upon a permissible appointee either complete ownership or a general power to appoint, there is no rational basis for refusing to permit the creation in such appointee of any kind of non-general power desired by the original donee"), and ultimately held the further power of appointment that the donee granted to her children and issue was valid on the specific facts of that case.

2. *Moore* supports the Estate's interpretation, not James's interpretation.

James suggests that "[i]t 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," and that their awareness of this case led to the inclusion of the phrase "to the extent permissible" in the 1986 Exercise. Ans. Br. at 30-31.

There is no evidence whatsoever in the record to suggest that Alice or her advisers were aware of this New York case or would have reason to seek it out. Of equal importance, however, is the fact that it does not stand for the proposition for which James cites it. *Id*.

If anything, the *Moore* case would have confirmed that Alice *could* grant Phyllis a further power to appoint in favor of objects outside of the scope of the

Original Limited Power. Nothing in *Moore* suggests that Alice's advisers would have needed to add conditional language to the Expanded Power in light of *Moore*.

Further, the *Moore* case highlighted the need to address the rule against perpetuities in Delaware because Mimi, Phyllis, and James were all born after the creation of the Trust, lending further support to the Estate's interpretation that "to the extent permissible" relates to a perpetuities-related limitation.

3. The context actually supports the Estate.

In 1986, major changes were afoot in the Delaware General Assembly and the United States Congress, and it was this activity (not *Moore*) that contributed to the addition of the phrase "to the extent permissible" in the 1986 Exercise. Delaware abolished the common law rule against perpetuities in 1986, and replaced it with a 110-year limitations period (which was later repealed entirely in 1995). 65 Del. Laws. ch. 422 § 8; 25 *Del. C.* § 503. Further, the generation-skipping transfer tax, as well as other federal tax provisions, were overhauled in 1986. Op. Br. at 8, n.4; *id*. at 10, n.5; *id*. at 13, n.8; *id*. at 32. It is against this backdrop (not *Moore*) that the 1986 Exercise must be evaluated.

II. Because the 1986 Exercise is Partially Invalid, Phyllis's Trust Must be Distributed Pursuant to the Equitable Principles Provided in *Foulke*

A. *Foulke* applies to this case.

The Court of Chancery, and now James, incorrectly concluded that *Foulke*[9] has no application to this case. Op. at 31; Ans. Br. at 36. However, when properly considered and applied to the partial invalidity of the 1986 Exercise, it is clear that the circumstances of *Foulke* are remarkably similar to those of this case.

In *Foulke*, the donee of the original power of appointment exercised the power in a manner that was partially valid and partially invalid. *Foulke*, 40 A.2d at 717. Rather than give a windfall to certain beneficiaries, the Court invalidated the entire power of appointment because doing so more closely approximated the donee's scheme of disposition. *Id.* at 719.

Here, a portion of the 1986 Exercise is invalid. Without striking the entire 1986 Exercise, Mimi and James will receive a windfall.[10] In addition to receiving one-third of the Trust when Alice died in 2002, they will now each receive one-half of Phyllis's one-third share. This is contrary to Alice's scheme of disposition, which was to divide the Trust equally for her children and to allow them to appoint their

[9] *Equitable Trust Co. v. Foulke*, 40 A.2d 713 (Del. Ch. 1945).

[10] The shares of the Trust that they received in 2002, and the ultimate disposition of those shares, are not directly at issue in this case.

shares upon their deaths. This is also the type of inequitable result that the Court in *Foulke* avoided.

Not only does *Foulke* remain good law, but it is also cited as the model case for application of the restatement rule in the circumstances of a fully or partially invalid exercise of a power of appointment. *See* 2 Simes and Smith, *The Law of Future Interests* § 981 (3d ed.) (Dec. 2019 Update).

B. James's attempts to distinguish *Foulke* are unconvincing.

James argues that the Court of Chancery was correct in distinguishing *Foulke* because, in *Foulke,* "the Court of Chancery had to rely on equitable principles in the absence of an explicit direction from the settlor" because there was no default distribution provision in the will. Ans. Br. at 36; Op. at 31-32.

The Court in *Foulke* relied on equitable principles to avoid an inequitable result, not because of an absence of a default distribution provision in the donee's will. *Foulke*, 40 A.2d at 718-719; A195-A202. The primary purpose of the *Foulke* analysis is to effectuate a donee's scheme of disposition when a power of appointment is invalidly exercised. *Id.* at 719. Because Alice's 1986 Exercise became irrevocable on her death in 2002, her intended scheme of disposition must be determined as of that date (A195), at which time James was entitled to the share he currently has and no more. James should not be rewarded with a windfall after

intentionally delaying his challenge to his mother's ability to give Phyllis the Expanded Power until after Phyllis's death.

James also argues, without explanation, that the application of *Foulke* renders the 1986 Exercise "completely irrelevant," that adherence to *Foulke* would somehow contravene Delaware law, and that the result of applying *Foulke* to the present case would be "to effect a transfer not set forth in Alice's 1986 Exercise and that does not originate from within its four corners." Ans. Br. at 22, 35, 36.

Application of *Foulke* is entirely consistent with Felix's and Alice's intent, the Trust Agreement, and the 1986 Exercise. The 1986 Exercise contains a provision that addresses an ineffective exercise by *Alice* (as opposed to an ineffective exercise by an issue of Alice). A199. In the event that *Alice* failed to effectively exercise the Original Limited Power, she wanted the Trust to be distributed to her children in equal shares, outright and free from trust. This is consistent with Felix's intentions if *Alice* failed to effectively exercise the Original Limited Power.

In accordance with the Trust Agreement, the 1986 Exercise, and the intent of both Felix and Alice, if Alice failed to effectively exercise her power, fully or partially, the invalid portion would pass to Alice's then-living issue outright. Her then-living issue in 2002 were Mimi, Phyllis, and James. Pursuant to *Foulke*, Phyllis's Trust must be distributed to Phyllis's Estate. *Foulke*, 40 A.2d at 719.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's grant of judgment on the pleadings in favor of James 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.

/s/ Matthew P. D'Emilio
Matthew P. D'Emilio (#4845)
Joseph L. Christensen (#5146)
Kerry M. Porter (#6067)
McCollom D'Emilio Smith Uebler LLC
Little Falls Centre Two
2751 Centerville Road, Suite 401
Wilmington, Delaware 19808
(302) 468-5960

Attorneys for Respondent Below-Appellant James B. Wyeth in his capacity as the Executor of the Estate of Phyllis Mills Wyeth

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