IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE LAST WILL AND TESTAMENT AND TRUST AGREEMENT OF BETTY R. MOOR a/k/a ISABELA ELIZABETH MOOR, DECEASED.	)))))	C.A. No. 2231-S

MEMORANDUM OPINION

Date Submitted: April 29, 2005
Date Decided: June 8, 2005

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Charles J. Durante, Esquire, and Gregory J. Weinig, Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware, *Attorneys for Respondents April L. Hudson and Richard S. McCann, Esq.*

STRINE, Vice Chancellor

This opinion denies an untimely motion for reargument filed by the stepson and granddaughter of the settlor of various trusts. Having now moved for reargument three times, each time in a tardy fashion, I conclude that the stepson is too late. So is his daughter, who belatedly joined him as a co-petitioner and presents identical arguments. As important as the untimeliness of their joint motion is the failure of the petitioners to demonstrate that the court erred in previous ruling: 1) that the settlor had the power to amend a key trust to substantially disinherit the stepson, and 2) that the stepson's decision to wait until after the testator's death to claim that she lacked the power to amend her trust constituted laches. Therefore, their motion for reargument is denied in all respects.

I. Factual Background

Betty R. Moor ("Mrs. Moor") died on April 5, 2002. Mrs. Moor was survived by her stepson, petitioner Robert Cooper Moor, Jr. ("Cooper"), and his daughter, Mrs. Moor's granddaughter, Marilyn Moor ("Marilyn"),[1] but predeceased by her stepdaughter, Cooper's sister, Judith Teal ("Judith"). Mrs. Moor left a valid will (the "1998 Will"), along with numerous other instruments.

Mrs. Moor's overall approach to estate planning can be fairly described as unusually active. Over the years, she created several trusts and as many as five wills, and executed numerous other estate planning documents, including amendments to and full revisions of her various trusts and codicils to her wills. For present purposes, the most important among Mrs. Moor's various estate planning documents are: 1) a trust that she created in 1985 (the "Main Trust"); 2) an amendment to the Main Trust executed in 1989

[1] Cooper and Marilyn shall be referred to collectively as "the Moors" in this opinion.

(the "1989 Main Trust Amendment"); 3) a second trust specifically governing the disposition of a residence in the Bon Ayre development in Hockessin, Delaware (the "Residence Trust"); and 4) an amendment to the Residence Trust executed in 2001 (the "Residence Trust Amendment"). Most but not all of those instruments, by virtue of express choice of law clauses, are governed by the law of the state of Florida, where Mrs. Moor lived from 1982 to 2000.

Mrs. Moor's pattern of amending her estate planning documents reflects a strained relationship between Cooper and herself. From the inception of the Main Trust, Mrs. Moor contemplated an unequal division of her estate between Cooper and Judith. The original Main Trust instrument instructed that "sixty percent (60%) of the Trust assets be set aside and known as the "JUDITH TRUST," and the balance of forty percent (40%) of the said Trust assets shall be set aside and designated the "COOPER TRUST." The original Trust instrument also included the caveat that the trustees could withhold distributions to Cooper if he was unemployed or debilitated due to drug or alcohol abuse.

Mrs. Moor changed the allocation to the "Cooper Trust" over time. Mrs. Moor amended the Main Trust for the first time in 1989, apparently motivated by the birth of her granddaughter, Marilyn. The 1989 Main Trust Amendment reallocated Trust assets from the "Judith Teal Trust" and the "Cooper Trust" to the newly-created "Marilyn Trust" for the benefit of Marilyn Moor. Notably, Cooper acknowledged his awareness of the 1989 Main Trust Amendment, and Mrs. Moor's expectation that the Trust was subject to amendment, by signing the instrument that effected that amendment. Mrs. Moor amended the Main Trust again in 1993 following the death of Judith. The 1993

Amendment reallocated Trust assets from the "Judith Trust," which was deleted entirely, to the "Cooper Trust," increasing that allocation to eighty percent of the Trust assets.

In 1994, however, Mrs. Moor amended the Main Trust again to disinherit Cooper entirely, stating "I have amply taken care of him during my life on a regular basis, and he has failed to show the necessary appreciation for the monies given to deserve additional bequests hereunder." Mrs. Moor's final amendment to the Main Trust in 2002 granted Cooper only a specific bequest of $10,000, but included a clause that would disinherit him entirely if he challenged any of her estate planning instruments. At the time of Mrs. Moor's death, Cooper was also a beneficiary of the Residence Trust that Mrs. Moor created in 1998, under which he was granted a right to occupy the Bon Ayre residence for his lifetime, subject to his payment of current expenses. The Residence Trust was also subject to the no-contest clause of the Main Trust.

On November 12, 2002, Cooper initiated this lawsuit challenging many aspects of Mrs. Moor's estate planning instruments, as well as the administration of her estate. The respondents in this lawsuit include the co-executors of Mrs. Moor's estate — Mrs. Moor's niece, April Hudson,[2] and Mrs. Moor's attorney, Richard McCann — and several beneficiaries of the estate. Although Cooper was represented by counsel when he first filed this lawsuit, his counsel withdrew on June 12, 2003, and Cooper pressed on as a pro se litigant.[3]

[2] Cooper has argued that Ms. Hudson is not, in fact, Mrs. Moor's niece. The court need not and does not make any finding on this issue.

[3] The litigation of this case to date has been marked by a number of redundant and prolix filings, discovery disputes, confidentiality disputes, and departures from stipulated scheduling orders.

II. Litigation Background

A. The November 29, 2004 Hearing

This case was partially resolved by a bench opinion following oral argument on various motions before the court on November 29, 2004. The primary issues that were then considered were: 1) whether or not the Main Trust was revocable, and 2) whether Cooper's failure to pay current expenses on the Bon Ayre residence had caused a forfeiture of his interest in the Residence Trust.

As to the first issue, Cooper argued that the original Main Trust instrument executed by Mrs. Moor in 1985 created an irrevocable Trust, that the Trust was properly amended with the consent of all trustees and beneficiaries in 1989 but all amendments to the Trust after the 1989 Amendment were invalid, that the 1989 Amendment controls administration of the Trust, and that, in accordance with the 1989 Amendment, he was entitled to thirty percent of the Trust assets.

By contrast, the respondents argued that the Main Trust was fully revocable, that all amendments made by Mrs. Moor over the years were effective, and that Mrs. Moor's final amendment in 2002 controls administration of the Trust. The respondents also argued that Cooper's challenge to Mrs. Moor's estate planning documents had caused the forfeiture of his interest in the Main Trust, in accordance with the no-contest provision of that Trust.

Mostly, this has resulted from Cooper's abrasive, overzealous, and yet frequently tardy submissions. Although he has felt free to make hurtful accusations of serious wrongdoing by the respondents, Cooper has not been shy about asking for leeway from his adversaries and the court in excusing his own non-compliance with court rules.

As to the Residence Trust, the respondents argued that Cooper's failure to pay current expenses on the Bon Ayre residence terminated his interest in the Residence Trust, and that Cooper's challenge to Mrs. Moor's estate had violated the applicable no-contest provision, causing the forfeiture of his interest in that Trust. Cooper did not respond to the respondents' main arguments. Instead, he alleged that the trustees of the Residence Trust had withdrawn excessive funds from that Trust for the payment of estate taxes.

Cooper raised additional issues for the first time during oral argument. Although, technically, those issues were improperly raised, the court entertained them in consideration of Cooper's pro se status. Those issues included the failure of the trustees to distribute a Uniform Gift to Minors Account (the "UGMA Account") that Mrs. Moor established in 1994 for the benefit of Marilyn, and the effectiveness of a memorandum that Mrs. Moor had annexed to her Will.

I ruled from the bench on November 29 on the issues of revocability of the Main Trust and the status of the Residence Trust.

In brief, I held that, as to the Main Trust: 1) Mrs. Moor created a revocable Trust in 1985; 2) Mrs. Moor was entitled to amend the Main Trust, in accordance with the powers that she reserved for herself in the Main Trust instrument and in accordance with her intent as inferred through her course of conduct in frequently amending the Main Trust over the years; 3) all of the amendments made to that Trust were effective; 4) Cooper's participation in Mrs. Moor's amendment of the Main Trust in 1989 — particularly in light of the fact that he signed the instrument that effected that amendment

— and his failure to contest Mrs. Moor's power to amend the Trust during her lifetime constituted laches, which prevented him from contesting her power of amendment after her death; and 5) in accordance with Florida law, the no-contest provision of the Main Trust was unenforceable.

As to the Residence Trust, I held that: 1) both the Residence Trust and the 2001 Residence Trust Amendment are effective; 2) in accordance with Florida law, the no-contest provision applicable to the Residence Trust was unenforceable; 3) despite his failure to pay current expenses, Cooper should not yet forfeit his interest in the Bon Ayre residence;[4] and 4) Cooper's continued interest in the Residence Trust — and his occupancy of the Bon Ayre residence — are contingent upon his ongoing payment of current expenses.

The parties were instructed to submit a form of order implementing that bench ruling. The respondents' counsel submitted a form of order to the court on December 8, 2004. On the same day, however, Cooper filed a motion for reargument (the "December 8 Motion"), contending that the court's November 29 bench ruling misapprehended and misapplied relevant Florida law. Cooper hoped to persuade the court that Florida law supported his original argument that the Main Trust was irrevocable and that all amendments that followed the 1989 Main Trust Amendment were invalid.

[4] This ruling was the hardest to justify as a matter of pure legal reasoning, and I confess that it represents a desire by this court of equity to avoid reducing Cooper and his family to a state of homelessness. The ruling gave Cooper a chance to correct his failure to comply with the terms of the Residence Trust while making the point that future non-compliance would jeopardize his entitlement to live in the Bon Ayre residence.

B. The December 20, 2004 Hearing

The court was not prepared on November 29 to consider matters that Cooper had raised for the first time, namely the status of Marilyn's UGMA Account and the effectiveness of the memorandum annexed to Mrs. Moor's Will. The parties appeared before the court again on December 20 in connection with Cooper's December 8 Motion and for argument of matters that remained following the November 29 ruling.

I denied Cooper's December 8 Motion as untimely, and for failing to advance any misunderstanding of fact or legal principle that would have changed the outcome of the November 29 bench ruling. I also explained to Cooper that the only outstanding issue related to the November 29 ruling that he was entitled to argue at that time was whether the form of order submitted by counsel for the respondents faithfully implemented that ruling.[5] Cooper made no argument on that issue.

In accordance with Chancery Court Rule 59(f), a motion for reargument may be filed "within 5 days after the filing of the Court's opinion or the receipt of the Court's decision." The Supreme Court of Delaware addressed the event that triggers the five-day period in *Pinkert v. Wion*, holding that:

> Court of Chancery Rule 59(f) provides that a motion for reargument may be filed "within 5 days after the filing of the Court's opinion or the receipt of the court's decision." . . . While the opinion needs to be implemented by an order, the opinion itself under the express language of Rule 59(f) is effective to commence the period permitted for a motion to reargue.[6]

[5] December 20, 2004 Tr. at 5.
[6] 431 A.2d 1269, 1270-1 (Del. 1981).

Under the rule announced in *Pinkert*, for purposes of evaluating the timeliness of a motion for reargument, the pronouncement of a court's opinion is the event that sets the five-day period running. Accordingly, an opinion announced from the bench will commence the period permitted for filing a motion to reargue, and the period during which Cooper could have filed a motion for reargument began to run on November 29, 2004, the date of the first bench ruling.

Under Court of Chancery Rule 6(a), Cooper's motion for reargument would have been timely if filed by December 6. Cooper was in court on November 29 and he received the court's decision at that time, yet he did not order the transcript promptly and did not file his motion for reargument until December 8, two days after the five-day period had elapsed. His December 8 Motion was, therefore, untimely. Cooper's failure to order a transcript of the November 29 ruling is no excuse for his late filing. Had he wished to obtain a copy of the ruling immediately, he could have gotten one within 24 hours. All he had to do was ask.

Although Cooper's December 8 Motion was untimely, I considered the merits of that Motion, applying the relevant standard under Rule 59(f), in reaching my decision to deny it. Rule 59(f) requires that the moving party demonstrate that the court overlooked a decision or principle of law, or the court misapprehended the law or the facts, so that the outcome of the decision would be affected.[7] Attempts to relitigate claims already

[7] *See Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995); *see also Mainiero v. Microbyx Corp.*, 699 A.2d 320, 321-22 (Del. Ch. 1996) (noting that "[r]econsideration of issues already presented and decided rarely serves the parties' interests or the public's interest").

asserted and considered are inconsistent with the purpose of Rule 59,[8] however, and motions for reargument are not intended "to rehash arguments already decided by the court."[9]

Cooper's December 8 Motion raised only two issues: 1) the validity of Mrs. Moor's Main Trust; and 2) the revocability of that Trust. The first issue was never a matter of dispute in this case, and bears no further mention. In seeking reargument of the second issue, Cooper cited no legal principle or factual matter that was not previously considered by the court. More importantly, Cooper failed to raise any issue that would have changed the outcome of the court's November 29 decision.

After denying Cooper's motion for reargument from the bench on December 20, I restated, for the record, the critical bases for my November 29 ruling that Mrs. Moor's Main Trust was revocable. Noting initially that the key question was the intent of the settlor, I recounted that: 1) the overwhelming evidence demonstrates Mrs. Moor's intent that the Main Trust be revocable and amendable; 2) the only evidence favoring Cooper's assertion that the Main Trust was irrevocable was a single inconsistent use of the term "irrevocable" in the original Trust instrument, and that inconsistency did not raise a genuine issue of material fact in view of the overwhelming evidence supporting Mrs. Moor's intent to create a revocable trust; 3) Cooper himself, during Mrs. Moor's lifetime, signed a very important document indicating his belief and acceptance that the trust was

[8] *See In re Will of Mansfield*, 1990 WL 176795, at *1 (Del. Ch. Nov. 5, 1990) (noting that this principle "is well established").
[9] *McElroy v. Shell Petroleum, Inc.*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992).

revocable and subject to amendment; and 4) laches barred Cooper's claim that the Main Trust was irrevocable, because he did not raise it while Mrs. Moor was still living, prejudicing Mrs. Moor by denying her the opportunity during her lifetime to refute that contention or to implement her clear intent to reduce his share by any of several options (including withdrawing all of the Main Trust assets) that were indisputably available to her.[10]

At the December 20 hearing, Cooper also orally argued that the 2001 Residence Trust Amendment was invalid because it was witnessed by respondent Richard McCann. That argument was not raised at the November 29 hearing or in his December 8 Motion, nor had it been fairly presented in Cooper's previous briefing on the merits of his claims.[11] I therefore declined to hear any argument on that issue. Cooper also sought to argue that the trustees of the Residence Trust had withdrawn excessive cash from that Trust. I ruled that Cooper lacked standing to contest transactions involving trusts in which he had no interest.[12]

Concluding the December 20 hearing, I strongly encouraged the respondents to turn over control of the UGMA Account to Marilyn, and instructed that an amended form of order implementing the November 29 ruling be submitted. I further ruled that the order ultimately filed would become effective thirty days after the UGMA Account was

[10] December 20, 2004 Tr. at 3-4.
[11] Cooper had previously raised only vague, nonspecific arguments that the 2001 Residence Trust Amendment was somehow invalid because McCann was the sole witness to its execution. He did not cite 12 *Del. C.* § 3545, as he does now, as a basis for his argument in his past briefing or orally on December 20. Thus, he had never fairly presented the argument he now advances. *See* Pet'r Br. in Supp. of Summ. J. at 50-53; Pet'r Exceptions to Inventory & Mot. for Sanctions at 5-10.
[12] December 20, 2004 Tr. at 16.

turned over to Marilyn.[13] The remaining issue in the case — the effectiveness of one clause from the personal property memorandum annexed to Mrs. Moor's 1998 Will — was reserved for consideration at a later hearing.[14]

C. Events Following The December 20, 2004 Hearing

I executed an order implementing the November 29 bench ruling on January 31, 2005 (the "January 31 Order").[15] On February 8, 2005, however, Cooper again filed a motion for reargument of the court's November 29, 2004 bench ruling (the "February 8 Motion"). Cooper's February 8 Motion was identical to his December 8 Motion in every respect.

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[13] Although it was the sincere hope of this court that at least one act of benefit to all parties in this case could proceed without contention, the transfer of control over the UGMA Account was greatly complicated. Merrill Lynch, the holder of the Account, was reluctant to distribute the Account absent a court order to do so. Merrill Lynch's reluctance was not unreasonable, given the volume of litigation that Mrs. Moor's estate had already generated and the fact that the Moors had previously brought a civil suit concerning the UGMA Account against the trustees of that Account, including Merrill Lynch, and even Mrs. Moor herself, in 2001. The court accommodated Merrill Lynch by reopening the civil matter, which had been closed in January 2002, for the limited purpose of issuing an order for distribution of the UGMA Account. Cooper created further delay by objecting to any requirement that Marilyn sign a release favoring Merrill Lynch. The order for distribution of the UGMA Account was entered on February 7, 2005, stipulating that distribution was contingent upon Marilyn's signing releases in favor of Merrill Lynch and the Custodian of the Account, April Hudson. In an accompanying letter to the parties, the court noted the impropriety of Cooper's attempts to represent Marilyn, he not being a lawyer and she no longer being a minor, and the court's belief that Marilyn's best interests would be served by signing the required releases.

[14] That remaining issue is resolved in a separate opinion issued on the same date as this opinion.

[15] In addition to the holdings described above, the January 31 Order required Cooper to reimburse the Residence Trust for arrearages in the payment of current expenses for the Bon Ayre residence. The arrearage was to be satisfied in part with the specific bequest of $10,000 that Cooper was entitled to receive from the Trust fund in accordance with the Main Trust instrument as revised and amended. The right of the trustees to distribute the Residence Trust to residuary beneficiaries in the future if Cooper failed to pay current expenses for the residence going forward was explicitly reserved. Tangible personal property listed in the Property Memo was to be distributed, but the remaining issue in the case — the effectiveness of a clause in the Property Memo calling for the disbursement of proceeds from the sale of personal property not listed in the Memo — was to be resolved after briefing on a schedule to be submitted.

On February 9, 2005, attorneys David N. Williams and John L. Williams filed an entry of appearance on behalf of Marilyn, stating their intent to file a motion for reargument of the January 31 Order on her behalf. On February 23, 2005, the same attorneys filed a second entry of appearance on behalf of both Cooper and Marilyn. Finally, Cooper and Marilyn, through their new attorneys, filed an "amended motion for reargument" on April 8, 2005 (the "April 8 Amended Motion"). Although the timing of the Moors' various motions for reargument was, to put it mildly, questionable, I permitted the parties to brief those motions. Oral arguments on those motions, and on the personal property memorandum dispute, were heard on April 29, 2005. This is the court's opinion on the Moors' motions for reargument.

III. Motions For Reargument

I hesitate to delve too deeply into the Moors' various motions for reargument of issues that were resolved, at the time of this writing, more than six months ago, as my consideration may inspire future litigants to believe that they may be able to exploit this court's patience to get two, three, or even more bites at the apple. Although this court has on at least one past occasion considered "a motion for reargument of a motion for reargument,"[16] such indulgence is the exception and not the rule. The grant of reargument under Rule 59(f) continues to be, as it always has been, a matter of the court's discretion in preventing injustice.[17] I address these motions and the issues raised in some

[16] *Quigley v. State Bd. of Pension Tr.*, 1987 WL 10529, at *1 (Del. Ch. Apr. 29, 1987).
[17] *See McElroy*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992) ("A decision on a motion for reargument will be affirmed unless it involves an abuse of discretion."); *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000) ("Rule 59

depth *only* because Cooper's relentless attempts to reargue my bench rulings of November 29, 2004 persuade me that a reiteration of those rulings should be commemorated in a more formal written opinion, and because it seems prudent to provide as complete a record as possible for review, should Cooper later seek to appeal this decision.

A. Cooper's February 8 Motion And The Moors' April 8 Amended Motion Are Both Untimely

On February 8, 2005, Cooper filed a motion for reargument that was identical to his December 8 Motion, which had already been heard and denied for the reasons described above. On April 8, 2005, the Moors filed a motion purporting to amend Cooper's February 8 Motion.

The Moors argue that Cooper's re-filing of the December 8 Motion on February 8 occurred within five days of the court's entry of its January 31 Order, and was thus timely under Rule 59(f). In their briefs, the Moors seem to suggest that by re-filing his December 8 Motion, Cooper somehow "cured" his previous failure to file within the five-day period, although they have cited no legal authority suggesting that "cure" of a late-filed Rule 59 motion is possible. The April 8 Amended Motion was filed more than two months after the January 31 Opinion. Although that filing was certainly not within the

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relief is available to prevent injustice. . . ."); *St. Thomas African Union Methodists Protestant Church v. Conference of African Union Methodists Protestant Church*, 1996 WL 361513, at *2 (Del. Ch. June 24, 1996) ("[T]he granting of a motion for a new trial or for reargument is addressed to the judicial discretion of this Court. . . . The rationale behind granting a motion for a new trial or for reargument is to prevent injustice."); *Filasky v. Von Schnurbein*, 1992 WL 187619 at *1 (Del. Ch. July 29, 1992) (denying a motion for reargument that was not "required here to prevent an injustice"); *Matter of Weir*, 1981 WL 88254 at *1 (Del. Ch. Feb. 20, 1981) ("A motion for reargument is addressed to the sound judicial discretion of the Court.").

five-day period, the Moors contend that, as an amendment to Cooper's February 8 Motion, the April 8 Amended Motion relates back to February 8 and is therefore timely filed under Rule 59(f).

At any rate, in accordance with Rule 6(a), the five-day period for filing a motion to reargue an order executed on Monday, January 31, 2005 would have ended on Monday, February 7, 2005, and Cooper's motion, filed on February 8, was untimely. The Moors' arguments concerning timeliness of their various motions for reargument, at least to the extent that reargument of issues decided in the November 29 bench ruling is sought, are frivolous. Each argument relies in the first instance upon the validity of Cooper's December 8 Motion — an untimely motion that was nevertheless considered, but denied and disposed of on December 20, 2004. The court will not tolerate yet another belated attempt to revive those previously-decided issues.

Furthermore, the Moors misunderstand the range of issues that could have been contested in a timely motion for reargument challenging the January 31 Order. In such a motion, they could only have challenged the Order's fidelity in implementing the November 29 bench ruling. The time for seeking reargument of the November 29 bench ruling itself had expired on December 6, 2004.

B. Marilyn's Tardy Entrance Does Not Cure The Untimeliness Of The Motions

The Moors' counsel first stated their intent to seek reargument of the January 31 Order on Marilyn's behalf in a letter filed on February 9, 2005, asserting that Marilyn had never received any notice in this matter. I permitted briefing on the Moors' most recent

motion for reargument, but expressed concern about Marilyn's tardy attempt to enter this litigation after having chosen not to participate at earlier stages.

Contrary to the intent stated in counsel's February 9 letter, neither Cooper's February 8 Motion nor the Moors' April 8 Amended Motion address any failure of the January 31 Order to correctly implement the court's earlier bench rulings. Instead, both Motions sought to reargue issues that were initially heard on November 29, 2004. The April 8 Amended Motion also sought to raise additional issues that were not raised previously. Further, despite my prompting on the issue, the Moors did not attempt to establish any basis for reargument on Marilyn's behalf — beyond counsel's initial assertion that Marilyn received no notice in this matter.

The record does not support that assertion, however. In fact, the argument that Marilyn was unaware of this litigation and not given a prior chance to protect her interests is, frankly speaking, entirely false. Marilyn was aware of this litigation at an earlier stage when her deposition testimony was requested. Marilyn refused to be deposed and refused to otherwise participate in this lawsuit at that time.[18] Marilyn also disclosed her awareness of this lawsuit in an August 21, 2003 letter to respondent April Hudson, in which she wrote: "My father has informed me that he has a lawsuit in Chancery Court regarding my trusts and some other things regarding [Mrs. Moor's]

[18] Resp't Br. in Supp. of Resp't Mot. for Summ. J. & in Opp'n to Pet'r Mot. for Partial Summ. J. at 34, n. 8.

estate."[19] Marilyn also knew that her father was raising arguments on her behalf, particularly that her UGMA Account should be released.

Marilyn is not a small child; she is a young adult. Although one might fear that she has, perhaps too easily for her own best interests, acceded to her father's unusual approach to litigating this case,[20] she has at all time aligned herself with him, never taken the opportunity to voice a different perspective, or to engage counsel of her own. There is no basis in law or in equity to excuse her late, tactically-driven decision to enter as a party. Having declined to give testimony earlier when asked, Marilyn's application — undoubtedly inspired by counsel's and Cooper's desire to resurrect their tardily asserted arguments — comes with ill grace.

Marilyn's recent decision to become an active participant in this litigation does not create a basis for her to seek reargument of resolved issues. Her motion seeking reargument of those issues is as untimely as Cooper's motions are.

C. The Moors' Amended Motion For Reargument Is Improper Under Rule 59 Because It Rehashes Old Arguments And Raises New Arguments

Cooper's original untimely December 8 Motion and his identical untimely February 8 Motion raised only two issues: 1) the validity of Mrs. Moor's Main Trust; and 2) the revocability of that Trust. The Moors' April 8 Amended Motion, in contrast, raised four issues: 1) the withdrawal of funds from the Residence Trust by its trustees for payment of estate taxes; 2) the validity of the 2001 Amendment to the Residence Trust;

[19] Resp't Ans. Br. Regarding Mot. for Reargument App. B-460.
[20] One might also fear that Marilyn's personal funds, recently received from her UGMA account, are now the sole source being used to fund her father's ardent litigation strategy.

3) the appointment of a new trustee to the Residence Trust; and 4) the amendability of the Main Trust. The April 8 Amended Motion attempts not only to reargue issues that have already been resolved, but also to raise issues that were not raised in the untimely February 8 Motion — which it purports to amend — and issues that were not raised in Cooper's previous briefs or at any prior hearing.

A court will grant reargument under Court of Chancery Rule 59(f) when "the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[21] But "a motion for reargument is not intended to rehash the arguments already decided by the court."[22] Likewise, new arguments that were not previously raised cannot be considered for reargument.[23] The Moors' April 8 Amended Motion is therefore not only time-barred; it seeks to rehash old arguments and raises several new issues that are not proper for reargument under Rule 59(f), and for those further reasons, it must be denied.

D. The Moors' Arguments Fail On The Merits

The Moors have filed untimely motions that raise arguments that are not cognizable under Rule 59. I could, and perhaps should, stop the analysis at that. I am persuaded, however, in large part due to Cooper's litigiousness, that I should again explain why the Moors' arguments lack legal merit.

[21] *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).
[22] *McElroy*, 619 A.2d 91 (Table), 1992 WL 397468, at *1 (Del. Nov. 24, 1992).
[23] *See Kern v. NCD Indus., Inc.*, 316 A.2d 576, 584 (Del. Ch. 1973).

1. Withdrawal Of Funds From The Residence Trust

The Moors argue that the trustees of the Residence Trust withdrew more cash from the Trust than was required to satisfy the Trust's proportional estate tax obligation, and seek to have $77,201 returned to that Trust. Cooper raised this issue in his briefs and during oral argument both on November 29 and on December 20.[24] Cooper did not raise this issue, or any other issue related to the Residence Trust, in his December 8 Motion or February 8 Motion, however.

At oral arguments on November 29, I noted that two charities, the Union Hospital and the Meeting Ground, are the only residual beneficiaries of the Residence Trust; that Cooper has no interest in the Residence Trust other than a right to occupy the Bon Ayre residence; and that, absent an interest in the cash assets of the Residence Trust, Cooper lacks standing to object to any act of the trustees affecting those assets.[25] At oral arguments on December 20, Cooper tried to raise this same issue again, despite not having raised the issue in his December 8 Motion. I refused to consider that issue, reiterating my November 29 comments concerning standing to challenge the administration of trusts on that occasion.[26] I reiterate once again that, because Cooper's

[24] Strangely, Cooper argued solely for the return of those withdrawn funds to the Residence Trust, making no reply to the respondents' arguments that by failing to pay current expenses on the Bon Ayre residence or that, in light of the no-contest provisions of the Residence Trust, by challenging Mrs. Moor's estate planning instruments, Cooper had triggered a forfeiture of his beneficial interest in the Residence Trust — arguments that, if successful, would have left Cooper and his family homeless. As adverted to previously, the court sua sponte exercised its equitable powers as flexibly as possible to protect Cooper (and his family) from the dire consequences that might have resulted from his own failure to pay expenses on the home his family occupies. *See supra* note 4.

[25] November 29, 2004 Tr. at 90-93.

[26] December 20, 2004 Tr. at 5-9, 16.

beneficial interest in the Residence Trust is limited to a right to occupy the Bon Ayre residence, Cooper lacks standing to challenge any disposition of funds held by the Residence Trust.

The Moors' April 8 Amended Motion raises no issue of law or fact that the court misapprehended in reaching this conclusion, and the court will not reconsider that issue. The residual beneficiaries of the Residence Trust have been given notice of the allegedly improper withdrawal of funds by the trustees and have not chosen to challenge any act of the trustees in the administration of that Trust. Cooper has no standing to challenge the trustees on the behalf of the residual beneficiaries.

2. Validity Of The 2001 Residence Trust Amendment

The Moors argue that the 2001 Residence Trust Amendment is void for failure to comply with the required formalities of execution set forth in 12 *Del. C.* § 3545. That argument was hinted at — vaguely, and without reference to any specific legal principle — in Cooper's briefs,[27] but was not raised at oral arguments concerning the Residence Trust on November 29. Cooper's December 8 Motion also neglected to raise this issue, although Cooper did approach the issue at oral argument on December 20 — again, without logic or evidence.[28] That argument was finally fleshed out and placed in the more concrete legal context of § 3545 for the first time in the Moors' briefs in support of their April 8 Amended Motion.

[27] See Supra note 11.
[28] December 20, 2004 Tr. at 7.

Mrs. Moor created the Residence Trust in 1998, granting Cooper and Marilyn a right of occupancy in the Bon Ayre residence, contingent upon Cooper's payment of current expenses, and granting Marilyn a right of appointment. In 2001, Mrs. Moor executed an amendment to the Residence Trust that removed Marilyn as a beneficiary. Noting that this amendment operated to take away Marilyn's remainder interest in the residence when she was only 17 years old, the Moors argue that the amendment was not executed in accordance with § 3545, which requires that the modification of a trust instrument be witnessed by at least one disinterested person or two credible persons. The execution of the 2001 Residence Trust Amendment was witnessed only by Richard McCann. The Moors argue that Mr. McCann is not a disinterested person because: 1) he was Mrs. Moor's attorney; 2) he had been appointed co-executor of Mrs. Moor's estate; 3) he had a "questionable professional reputation," 4) he drafted the 2001 Residence Trust Amendment instrument; and 5) he was paid to draft that instrument.

The evidence that the Moors adduce of Mr. McCann's interest in the Residence Trust has no relation to the type of disqualifying interest contemplated by § 3545. That section explicitly defines "disinterested person" for the purposes of that statute as "one who has no beneficial interest in the trust, that would be materially increased or decreased as a result of the creation, modification or revocation of the trust." Mr. McCann has no such beneficial interest in the Residence Trust, and accordingly, the Moors' argument fails.

The Moors cite the case of *Stegemeier v. Magness*[29] for the proposition that an attorney serving as an estate administrator is not per se disinterested, even when he has no financial interest in the estate. *Stegemeier* considered the validity of a self-dealing transaction by an interested co-administrator of an estate that was ratified by the other co-administrator — an attorney whose firm represented the estate and had in the past worked for the decedent. The court held that the attorney's "independence and/or disinterest is . . . a material fact issue that must be determined at a factual hearing."[30]

Notably, the context in which disinterestedness was assessed in *Stegemeier* is materially different from the context in which disinterestedness is questioned here. The sensitive nature of the approval of a self-dealing transaction by a fellow fiduciary was what motivated the *Stegemeier* court's ruling that the disinterestedness and independence of an estate administrator must be determined through a factual inquiry. Here, we are addressing solely the question of whether an attorney who is a co-executor of an estate can witness the execution of a trust amendment. Further, the test for determining disinterestedness here, unlike in *Stegemeier*, is statutorily defined.

Respect for the General Assembly requires that the disinterestedness inquiry here begin and end with the language of § 3545. That section explicitly states that the type of interest necessary to disqualify a witness to the execution of a trust instrument be a "beneficial interest in the trust." McCann had no such interest, and § 3545 does not consider him disqualified from being a witness.

[29] 1996 WL 549832 (Del. Ch. Sept. 20, 1996).
[30] *Id.* at *4.

Frankly, a contrary ruling would cause great inconvenience and cost to individuals executing estate plans. It is common practice for lawyers and their office staff to witness wills and other instruments. Indeed, the Moors' attorneys admit that is what they do in their practice. They suggest that McCann could have had one of his employees witness the signature and that would have been sufficient to satisfy § 3545. But, of course, Delaware is an at-will employment state. If McCann was interested, under § 3545, and therefore disqualified as a witness to Mrs. Moor's Residence Trust Amendment because he was to be an executor of Mrs. Moor's will, why would one of his employees be disinterested? Would not his employees fear McCann's wrath if they refused to be witnesses?

To go down that path would be to disrespect common sense. McCann stood to gain nothing by witnessing Mrs. Moor's Residence Trust Amendment. To put in place a rule that would require clients to schlep in witnesses with them would waste the valuable time of friends and family, and cause delays in legal practice, with no compensating increase in integrity.

3. Appointment Of A New Trustee To The Residence Trust

The Moors' April 8 Amended Motion argues that a new trustee to the Residence Trust should be appointed. This issue is raised for the first time, and is therefore an improper ground for reargument. Further, the contention has no grounding in law. This issue seems to have been prompted by the court's suggestion during the November 29 hearing that Ms. Hudson, the current trustee of the Residence Trust, consider stepping

down from that position for her own sake.[31] This suggestion was made as an observation of the no-win situation Ms. Hudson would find herself in vis-à-vis the Residence Trust in the context of a hypothetical enforcement, by the Trust's residual beneficiaries, of Cooper's obligation to pay the current expenses on the Bon Ayre residence. As Ms. Hudson has no economic interest in the Residence Trust, I suggested that perhaps one of the residual beneficiaries would be a better choice for all concerned. This suggestion was in no way an invitation for the Moors to argue for a court order replacing Ms. Hudson as the trustee of the Residence Trust.

4. The Effectiveness Of Mrs. Moor's Amendments To The Main Trust

Cooper argued on November 29, 2004 that the Main Trust, in accordance with the terms of the instrument executed to create that Trust in 1985, was irrevocable under Florida law. He made the same argument in his December 8 and February 8 Motions. Cooper never argued that Mrs. Moor lacked, specifically, a power to *amend* the Main Trust. Nevertheless, the Moors' April 8 Amended Motion raises the new argument that the Main Trust was revocable, but not amendable. The Moors' briefing on that Motion attempts to explain this departure from Cooper's past arguments, stating: "Contrary to the court's understanding, Mr. Moor did not argue that the Main Trust was 'irrevocable' in all respects. His argument when read in context was that the Main Trust was 'unammendable,' [sic] although he, as a layman, chose the word 'irrevocable.'"[32]

[31] November 29, 2004 Tr. at 91.
[32] Pet'r Reply Br. in Supp. of Mot. for Reargument on Interpretation of Main Trust & Residence Trust at 6.

This explanation mischaracterizes Cooper's past arguments. Cooper always maintained that the Main Trust was irrevocable. He never claimed that the Trust was unamendable. To the contrary, he always explicitly maintained that the Main Trust was amendable with the consent of all the original beneficiaries. Indeed, Cooper has always argued that the 1989 Amendment of the Main Trust, and not the original 1985 Main Trust instrument, controls the administration of Mrs. Moor's estate.[33] Cooper did not present his arguments in terms of revocability for lack of understanding the concept of amendability — he always believed, or at least always maintained, that the Main Trust was amended by the consent of Mrs. Moor, his late sister Judith, and himself, as the original named beneficiaries. The argument raised in the April 8 Amended Motion — that the Main Trust was revocable but not amendable — is new, and therefore improper under Rule 59(f).[34]

I ruled on November 29 that the Main Trust, as a matter of Florida law, was revocable. I found nothing in Cooper's December 8 Motion or his February 8 Motion to persuade me that this ruling was reached in error. Likewise, I find nothing in the reformulated and untimely April 8 Amended Motion to convince me that my

[33] Pet'r Mot. for Partial Summ. J. ¶¶ 5 and 8(A); Pet'r Mot. for Default J. ¶ 4(A); Pet'r Br. in Supp. of Partial Summ. J. at 1, 3, 16-17, 21-22, 29-30, 54; Pet'r Exceptions to Inventory & Mot. for Sanctions at 8, 13.
[34] *See Kern*, 316 A.2d at 584.

November 29 ruling was in error. Moreover, none of the Moors' motions for reargument attack the equitable considerations that form an independent basis for my November 29 ruling.[35]

In the discussion that follows, I revisit and reaffirm my prior ruling that, under Florida law, the Main Trust was fully revocable. First, I review the Moors' past and present arguments why the Main Trust was either irrevocable or unamendable. Next, I explain why Florida law did not prevent Mrs. Moor from amending the Main Trust, even though the original Main Trust instrument does not enumerate a specific power of amendment. Finally, I explain why, under Florida law, equitable considerations and the doctrine of laches require that all of Mrs. Moor's amendments to the Main Trust during her lifetime be given force.

a. The Moors' Argue That The Main Trust Was Irrevocable Or Unamendable And That Mrs. Moor's Clear Intentions Should Be Disregarded

Cooper has consistently maintained that the Main Trust was irrevocable, and asserted two theories to support that contention. First, Cooper argued that the Main Trust is expressly irrevocable, looking to the second sentence of the first page of the original 1985 instrument, which states: "WHEREAS, the settlor desires to create an *irrevocable* trust . . . ."[36] Second, Cooper argued that, under Florida law, a valid trust is presumed to be irrevocable. In support of the second theory, Cooper cited Florida case law that adopts language from the Restatement (Second) of Trusts § 330(1), holding that: "[t]he settlor

[35] *See Silver Lake*, 1998 WL 157370, at *1 (Del. Ch. Mar. 20, 1998) (ruling that a motion for reargument that fails to attack an independent basis for a prior decision cannot be outcome-determinative, and therefore must be denied).
[36] Emphasis added.

has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power."[37] Both of those arguments fail for similar reasons.

Although the term "irrevocable" appears on the first page of the original Main Trust instrument, the use of that term appears to be a scrivener's error. The title of the instrument, located at the top of the same page, expresses precisely the opposite intent: "BETTY R. MOOR'S REVOCABLE TRUST AGREEMENT." The term "irrevocable" included in a "whereas" clause of the instrument is the only reference in the entire document that supports Cooper's contention that the Main Trust is expressly irrevocable. Given that the first page of the instrument announces two inconsistent statements concerning revocability of the Trust, the presence of the term "irrevocable" cannot be viewed as determinative; at best it creates ambiguity.[38]

It is a well-established principle of Florida law that "the intent of the settlor of a trust is controlling."[39] The intent of the settlor should be ascertained from the expression of the trust instrument itself when the instrument is unambiguous.[40] When a trust instrument fails to unambiguously express the settlor's intent, however, a court may consider extrinsic evidence in order to determine the settlor's intent.[41] When a trust

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[37] *See Florida Nat'l Bank of Palm Beach County v. Genova*, 460 So.2d 895, 896 (Fla. 1985); *Macfarlane v. First Nat'l Bank of Miami*, 203 So.2d 57, 60 (Fla. Dist. Ct. App. 1967).
[38] *See First Union Nat'l Bank of Florida v. Frumkin*, 659 So.2d 463, 464 (Fla. Dist. Ct. App. 1993) (ruling that ambiguity exists in a trust instrument that contains two conflicting provisions).
[39] *Knauer v. Barnett*, 360 So.2d 399, 405 (Fla. 1978).
[40] *See id.; see also Reid v. Barry*, 112 So. 846, 873 (Fla. 1927) ("[In construing a trust,] the donor's or grantor's intention is to be collected from the words used by him.").
[41] *See Frumkin*, 659 So.2d at 464; *Reid*, 112 So. at 874 ("[W]here it is impossible to ascertain the intention of the trustor from the language used, the court will consider all the surrounding circumstances of the case, and, when proper and necessary, it will receive parol evidence for the purpose of ascertaining the intent of the parties.").

instrument fails to explicitly reserve a power of revocation, that power will nevertheless be found to exist when the intent of the settlor to create a revocable trust is inferable.[42] Further, powers may be validly reserved in a trust instrument even when a method of exercise is not defined.[43]

Although the term "irrevocable" appears on the first page of the original 1985 Main Trust instrument, all other language contained within the four corners of that instrument controverts Cooper's theory that the term "irrevocable" is the determinative expression of Mrs. Moor's intent in creating that Trust. As noted above, the title of the instrument itself specifies that the Trust is revocable. Further, Mrs. Moor reserved powers for herself under the Main Trust that would permit her to revoke the Trust. The reserved powers include the right to withdraw any or all of the Trust's assets at any time and the complete power of appointment over the Trust's assets. Mrs. Moor also made herself the sole trustee of the Main Trust. In short, Mrs. Moor was entitled to exercise powers by which she could have revoked the Trust by removing all of the Trust assets. Her reservation of these powers is inconsistent with the reference to irrevocability that Cooper cites as indicative of her intent in creating the Main Trust. In fact, the single use of the term "irrevocable" on the first page of the Trust instrument is the only evidence within the four corners of the instrument that suggests Mrs. Moor intended to create an

[42] The case of *Genova* is instructive. In concluding that a settlor had reserved a power of revocation, the Florida Supreme Court looked beyond the explicit language of the trust instrument that purported to enumerate reserved powers, relying instead on manifestations of the settlor's intent that the trust be revocable as expressed in general language of the instrument. The Court found that the language ". . . unless this Trust Agreement shall have been otherwise revoked or amended . . ." expressly manifested the settlor's intention to create a revocable trust. *See* 460 So.2d at 896.

[43] *See id.; see also Macfarlane*, 203 So.2d at 60.

irrevocable Trust. All of the other text of the Main Trust points to the contrary conclusion: that Mrs. Moor intended to create a revocable Trust.

To the extent that the contradictory use of the terms "revocable" and "irrevocable" on the first page of the 1985 instrument creates residual ambiguity that cannot be resolved by reference to the document itself, extrinsic evidence of Mrs. Moor's intent in creating the Main Trust may be considered. And *all* of the extrinsic evidence points to the conclusion that Mrs. Moor intended to create a revocable Trust. All evidence of Mrs. Moor's behavior as toward the Trust suggests that she intended to retain absolute control and exercise unlimited powers over the Trust, including the power to add or remove the Trust's assets, the power to reallocate or reapportion assets among the Trust's intended beneficiaries, and the power to amend the Trust in any way she wished. It is undisputed that Mrs. Moor did, in fact, exercise all of those powers during her lifetime. Accordingly, the argument that Mrs. Moor intended the Main Trust to be irrevocable is simply not persuasive.

Cooper's argument that the Main Trust was expressly irrevocable fails because Mrs. Moor's intent, as expressed within the four corners of the 1985 instrument itself and as inferred from Mrs. Moor's behavior toward the Trust over the next seventeen years, was that the Main Trust be revocable. Although Florida law holds that a trust may be presumed irrevocable, the presumption applies only when the settlor fails to reserve a power of revocation. Here, Mrs. Moor's power of revocation was adequately and obviously reserved, and the presumption of irrevocability does not apply.

Although Cooper attaches great significance to the single use of the word "irrevocable," that use is the only shred of evidence supporting his theory that Mrs. Moor intended to create an irrevocable trust. The evidence in support of the contrary conclusion — that Mrs. Moor intended to create a revocable trust — is so substantial that no rational fact-finder could conclude that the Main Trust was irrevocable, and therefore, the respondents were entitled to summary judgment.[44] Likewise, no rational fact-finder could conclude that Mrs. Moor did not intend to reserve for herself both the greater power to revoke the trust and the lesser power to amend its terms. For the foregoing reasons, I ruled on November 29 that, as a matter of Florida law, the Main Trust was revocable.

The Moors' April 8 Amended Motion attempts to recharacterize Cooper's previous arguments, acknowledging that the Main Trust is revocable, but arguing that the Main Trust was not amendable. The main thrust of the present argument, as stated in the text of the April 8 Amended Motion, is that: 1) the 1985 Main Trust instrument reserved Mrs. Moor's power of appointment and power of withdrawal, but no power of amendment; 2) applying the two prong analysis set forth in *Macfarlane v. First National Bank*, which proceeds by looking first at whether a trust agreement prescribes a method of revocation, and second, whether the prescribed method was exercised,[45] Mrs. Moor's attempts to amend the Main Trust instrument were not in conformity with the two

[44] Summary judgment is appropriate where no rational finder of fact could find in favor of the non-moving party. *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150-1151 (Del. 2002).
[45] 203 So.2d at 60.

specific methods of revocation — withdrawal and appointment — granted under the terms of the Trust and are therefore invalid; and 3) the Main Trust could only be altered by Mrs. Moor's exercise of her power of appointment in a will or by withdrawing funds from the Trust account.

Distilled to its essence, the Moors' new version of their argument as to why the Main Trust could not be amended goes as follows: Florida trusts and estates law is very technical. We now concede that Mrs. Moor could have effectively revoked the entire Main Trust by exercising her explicitly-reserved powers of withdrawal and appointment. As a practical matter, therefore, Mrs. Moor could have achieved exactly the *ends* reflected in her various amendments. But, because Florida law demands precise technical formality, she had to do so through the proper *means*. Having failed to use the proper *means* to accomplish the *ends* that were within her power to accomplish, Mrs. Moor (in the sense of effecting her intended wishes) must lose. By disregarding Mrs. Moor's plainly-expressed wishes and exacting a toll on someone who has been silenced by death, this court can send a strong message to the living about the painstaking estate planning scrupulosity expected of them by the powers that be in Tallahassee.

The problem with this argument is that it fails both as a matter of law and as a matter of equity. I now explain why.

b. Under Florida Law, Mrs. Moor Retained An Implied Power To Amend The Main Trust As A Lesser Component Of Her Reserved Power Of Revocation

The Moors' argument fails as a matter of law because it relies on a mischaracterization of Florida trust law. Florida law does not cling to the hyper-technical

approach the Moors propound. Rather, Florida courts have consistently adopted the more flexible approaches set forth in the Restatements (Second and Third) of Trusts. This flexibility embraces the general principles that the terms of a trust may be ascertained by manifestation of a settlor's intent as well as by written expression;[46] that a settlor's powers, if not limited to a specific manner of exercise, may be exercised in any manner that sufficiently manifests the settlor's intention to do so;[47] and that a reserved power of revocation may be used to revoke a trust in whole or in part.[48] This flexible approach also reflects the additional principles that a power of modification may be inferred to have been reserved by a trust settlor;[49] and most importantly, that a settlor who has reserved the greater power of revoking a trust may exercise the lesser power of amending the trust.[50]

The Moors improperly characterize Mrs. Moor's powers under the Main Trust as being limited to a single power to revocation, the exercise of which is limited to two enumerated methods — withdrawal of Trust assets or appointment in a will. The Moors

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[46] *See* Restatement (Second) of Trusts § 330 cmt. a; Restatement (Third) of Trusts § 63(2); *Genova*, 460 So.2d at 896.

[47] *See* Restatement (Second) of Trusts § 330 cmt. i; Restatement (Third) of Trusts § 63(3); *Genova*, 460 So.2d at 896-897; *Macfarlane*, 203 So.2d at 60.

[48] *See* Restatement (Second) of Trusts § 330, cmt. n; Restatement (Third) of Trusts § 63 cmt. e; *Genova*, 460 So.2d at 897.

[49] *See* Restatement (Second) of Trusts § 330 cmt. a, § 331 cmt. a; Restatement (Third) of Trusts § 63 cmt. c ("If [ ] the settlor has failed expressly to provide whether the trust is revocable or amendable but has retained an interest in the trust . . . the presumption is that the trust is revocable and amendable by the settlor.").

[50] *See* Restatement (Second) of Trusts § 331 cmt. g ("It is a question of interpretation to be determined in view of the language used and all the circumstances whether a power to revoke the trust includes a power to modify it."); Restatement (Third) of Trusts § 63 cmt. g ("A power to revoke the trust includes the power to modify the terms of the trust, and a power to modify a portion of the trust includes the power to modify that portion."). *Accord Preston v. City Nat'l Bank of Miami*, 294 So.2d 11, 14 (Fla. Dist. Ct. App. 1974).

contend that, under *Macfarlane*, the Main Trust prescribes two methods of revocation, but the prescribed methods were not exercised. But, the Moors' assumption that Mrs. Moor's Main Trust prescribes methods of revocation is incorrect. Neither the plain language of the original Main Trust instrument nor Florida law governing the reservation of powers under a trust agreement support that assumption.

The Moors characterize references to rights of withdrawal and appointment in the Main Trust instrument as the prescribed methods for the exercise of Mrs. Moor's power of revocation. That characterization is not supported by a plain reading of the Trust instrument. Mrs. Moor's power of revocation is reserved in the title of the instrument. Mrs. Moor's rights of withdrawal and appointment are discussed in Article IV(F) of the instrument, which states that:

> Settlor expressly reserves the right at any time and from time to time to withdraw from the principal of the trust any and all of the assets held by the trust at such time and by specific provision in the Last Will and Testament of Settlor to withdraw any or all of the assets of the trust by specific reference thereto.

In Article IV(F), Mrs. Moor reserved rights of withdrawal and appointment without reference to any other power, neither expressly nor inferably designating methods by which any other powers should be exercised. Article IV(G) of the Main Trust further emphasizes that the rights described in Article IV(F) were not intended as limitations on the exercise of Mrs. Moor's more general power of revocation, stating that:

> It is an express condition and term of this trust that any of the powers which the Settlor reserves to herself are to be exercised by her only at her personal discretion, and not as a power to be subject to exercise by any other person or under any process of law . . . .

A plain reading of the original Main Trust instrument shows that Mrs. Moor reserved a power of revocation, the exercise of which was not limited in any way.

Florida law does not require that Mrs. Moor's rights of withdrawal and appointment be read as limiting the exercise of her right of revocation. In *Macfarlane*, Florida's Third District Court of Appeal stated, with respect to powers of revocation, that "[n]o magic art is necessary to revoke a trust. Where the right to revoke is reserved and no particular mode is specified in the trust agreement, any mode sufficiently manifesting an intention of the trustor to revoke is effective."[51] Most important, the Supreme Court of Florida announced the same rule in *Genova*: "If the settlor reserves the power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust."[52] Both *Macfarlane* and *Genova* express the policy of the state of Florida to permit revocation of a trust by the broadest possible range of methods. This is entirely consistent with the well-established principle of Florida law that the intent of the settlor of a trust is controlling.[53] Given that, under Florida law, Mrs. Moor had the flexibility to revoke the Main Trust in its entirety by *any* manner that reasonably expressed that intention, it is not at all difficult to conclude that she could permissibly do so by taking the lesser step of amending the terms of the Main Trust.

[51] *Macfarlane*, 203 So.2d at 60 (citing 54 Am. Jur. *Trusts* § 77).
[52] *Genova*, 460 So.2d at 896-897 (citing Restatement (Second) of Trusts § 330 cmt. i).
[53] *Knauer*, 360 So.2d at 405.

The best legal thinking on this question supports the proposition that a reserved power of revocation implicitly confers a power of amendment. The Restatement (Third) of Trusts § 36 comment g states, in part, that:

> A power to *revoke* the trust includes the power to modify the terms of the trust, and a power to revoke only a portion of the trust includes the power to modify that portion. It is not necessary for the settlor first to revoke the trust (or part thereof) and then to create a new one.[54]

Scott on Trusts § 331.1 sets forth a similar rule with greater emphasis on the reasoning that supports the existence of an implicit power of amendment:

> Where the settlor reserves power to revoke the trust, he can revoke it and immediately create a new trust of the property, designating the trustee of the old trust as trustee of the new. It would seem, however, that it is unnecessary to go through the formality of compelling the trustee to reconvey the property to him and making a new conveyance to the trustee. It is enough that the settlor, by an instrument sufficient for the revocation of the trust, directs the trustee to hold the property on the terms designated in the instrument. Thus it is held that where the settlor reserved a power of revocation, the execution of a new trust instrument declaring a trust on different terms from those specified in the original instrument is a sufficient revocation of the earlier trust.[55]

Although Florida case law has not explicitly held that a settlor's greater power to revoke a trust implicitly includes a lesser power to amend, Florida courts have recognized the logic that supports this general concept. The court in *Preston v. City National Bank* considered the amendment of an expressly irrevocable inter vivos trust that was modified with the consent of all of the trust beneficiaries. Although the factual context of *Preston* is different from this case, the *Preston* court expressed an important principle concerning

[54] Emphasis in original.
[55] 4 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 331.1 (4th ed. 1989).

lesser powers subsumed under a broad power to terminate a trust, which is fully applicable here: "Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old."[56] In other words, *Preston* holds that whoever has the power to terminate a trust, be it an individual or a group of persons, also has the lesser power to amend it.

Accordingly, I can find nothing in Florida law to support the Moors' contentions that Mrs. Moor lacked the power to revoke her trust, or that her numerous amendments to the Trust were not valid exercises of her power of revocation.

c. Cooper's Current Attempt To Undermine Mrs. Moor's Clear Intent Is Barred By Laches

The most compelling justification for upholding Mrs. Moor's amendments to the Main Trust, in my mind, is equitable. Even if Florida law did not permit Mrs. Moor to exercise her power to revoke the Main Trust by amending it, Mrs. Moor could have effected all of her desired changes by exercising powers explicitly reserved in the Main Trust at any time during her lifetime, without limitation and at her whim, with no possibility of a successful legal challenge. That is, Mrs. Moor could have revoked or withdrawn all of the funds from the Main Trust and created a new Trust without being bound in any way by the original Main Trust. Had Cooper confronted Mrs. Moor at any time while she was still living, asserting that she could not amend the Trust, she could have exercised her reserved powers to effect her desired amendments by other means. Indeed, Cooper is only able to challenge Mrs. Moor's amendments to the Main Trust at

[56] *Preston*, 294 So.2d at 14.

this time because she is no longer alive, and thus no longer able to implement her testamentary intent through the exercise of her reserved powers. Under these circumstances, Cooper's present challenge, seeking essentially to limit Mrs. Moor's estate planning options after her death, is manifestly unfair. As a matter of equity, Cooper's late challenge to his mother's Main Trust Amendment must fail as barred by laches.

Laches is an equitable principle that operates to preclude the assertion of claims by one who has unreasonably delayed asserting them, particularly when the delay is detrimental to the opposing party.[57] "Unreasonable delay" warranting an application of laches has been characterized as "[d]elay in the assertion of a right under circumstances that make it unconscionable for a court of equity to lend aid to its enforcement . . . ."[58] A party is guilty of laches where: 1) a party had knowledge of a right that could be asserted, and 2) prejudice to the party against whom the right is asserted resulted from the unreasonable delay of the party asserting the right.[59]

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[57] *See Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992) ("[Laches] operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."); *Appalachian, Inc. v. Olson*, 468 So.2d 266, 269 (Fla. Dist. Ct. App. 1985) ("Laches is based upon an unreasonable delay in asserting a known right which causes undue prejudice to the party against whom the claim is asserted.") (citations omitted).

[58] *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922). *See also Ft. Pierce Bank & Trust Co. v. Sewall*, 152 So. 617, 618 (Fla. 1934) ("[To constitute laches], the delay must have been such as practically to preclude the Court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible . . .").

[59] *See Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000); *see also McCray v. State*, 699 So.2d 1366, 1368 (Fla. 1997) ("[Laches] requires proof of (1) lack of diligence by the party against whom [laches] is asserted, and (2) prejudice to the party asserting [laches].") (quotations and citations omitted).

In concluding that laches applies to bar Cooper's challenge to Mrs. Moor's power to amend the Main Trust, I assign considerable weight to Cooper's actions in conjunction with the 1989 Amendment of the Trust. The 1989 instrument is the first unambiguous expression of Mrs. Moor's intent that the Main Trust be revocable. That instrument, titled "REVOCABLE TRUST AGREEMENT," makes no reference to a desire to create an irrevocable trust. The opening sentence corrects the error in the original Main Trust instrument, stating: "WHEREAS, the Settlor desires to amend her *revocable* trust as originally dated April 10, 1985 . . . ."[60] Critically, Cooper explicitly acknowledged Mrs. Moor's unilateral amendment by signing the amendment and accepting appointment as a successor trustee to the Main Trust.

Application of laches requires that a party have knowledge of a right that could be asserted. Here, Cooper had knowledge at least since 1989 that Mrs. Moor understood that she could amend the Main Trust. By signing the amendment, Cooper acknowledged, under penalty of perjury, his understanding that the Trust was amendable, and indicated his acceptance of that understanding. To the extent that Cooper had a right to challenge Mrs. Moor's power to amend the Trust, he had knowledge of the need to exercise that right in 1989. But Cooper did not voice his contrary understanding of Mrs. Moor's powers under the Main Trust, or challenge specifically her power to amend the trust, at that time, or for nearly fifteen years thereafter. Mrs. Moor continued to amend the Main Trust as many as ten times, secure in her belief that her amendments were valid.

[60] Emphasis added.

Application of laches also requires an unreasonable delay in the assertion of a right, causing prejudice to the party against whom the right is asserted. Cooper's delay in challenging Mrs. Moor's power to amend the Trust was unreasonable, most obviously because he waited until after Mrs. Moor passed away, and could no longer argue on her own behalf or exercise any of her powers under the Trust, to make that challenge.[61] Mrs. Moor was prejudiced by Cooper's failure to act. She continued to amend the Main Trust freely over her lifetime, having no reason to suspect that Cooper would challenge her power to do so after her death. More importantly, because her lesser power to amend the Trust was not challenged, she did not exercise other greater powers that she explicitly reserved for herself in the Trust to achieve the same results that her amendments were intended to achieve.

The latter point, in my view, is critically important. One might imagine Mrs. Moor's response if Cooper had challenged the amendments to her Trust while she was living. If, for example, Cooper had objected in 1994 to Mrs. Moor's amendment to the Main Trust that disinherited him entirely, alleging that the original 1985 instrument failed to reserve a power of amendment, his "Gotcha" gambit would have had little, if any, force as a chess opening. Confronted with Cooper's clumsy frontal attack, Mrs. Moor could have exercised her power to withdraw all of the assets from the Main Trust and created a new trust exactly like the Main Trust in every way, except that it left Cooper

[61] *See Cooch v. Grier*, 59 A.2d 282, 287 (Del. Ch. 1948) ("It has been said that laches will apply where there is an unexplained delay in prosecuting the claim until death has closed the lips of the interested parties.") (quoting *Thrasher v. Ocala Mfg. Ice & Packing Co.*, 15 So.2d 32 (Fla. 1943)).

nothing. She could say "Gotcha back!" and implement her desire to disinherit Cooper using the powers that she explicitly reserved. That would have been checkmate for Cooper. As a matter of practical reality, Mrs. Moor's failure to explicitly reserve a power of amendment could never have prevented her from altering the Main Trust by other means in response to such a challenge. Cooper avoided checkmate only because he never challenged Mrs. Moor's power to amend the Main Trust during her lifetime, even though he knew in 1989 that she believed she had a power of amendment. Instead, Cooper sat on his right to contest Mrs. Moor's power of amendment until after her death, when her power to implement her desires by other means was extinguished.

The Moors' counsel, during oral argument, asserted the strange theory that Florida does not recognize laches. That claim is not consistent with Florida case law. The court in *Preston v. City National Bank* applied laches, on facts roughly analogous to those presented here, to bar repudiation of a trust amendment by a trust beneficiary who had signed and ratified the amendment ten years earlier.[62] And the court in *Clement v. Charlotte Hospital* ruled that the doctrine of laches does not bar claims against a trust by a beneficiary simply on the basis of the passage of time, but that laches could apply in "circumstances which would require such beneficiary to take timely action."[63] Because Florida courts have not hesitated to apply the doctrine of laches when appropriate in trust cases, the argument raised by the Moors' counsel does not persuade me that laches cannot or should not be applied here.

[62] *Preston*, 294 So.2d at 13.
[63] *Clement v. Charlotte Hosp. Ass'n, Inc.*, 137 So.2d 615, 617 (Fla. Dist. Ct. App. 1962).

IV. Conclusion

For the foregoing reasons, Cooper's February 8 Motion and the Moors' April 8 Amended Motion are DENIED as: 1) untimely; 2) raising arguments not properly the subject of a Rule 59 motion; and 3) lacking in legal and equitable merit. The January 31 Order of this court therefore remains in force. IT IS SO ORDERED.