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Re: *IMO Trust for Grandchildren of Wilbert L. and Genevieve W. Gore*
C.A. No. 1165-VCN
Date Submitted: November 9, 2012

Dear Counsel:

Litigation over the Pokeberry Trust is drawing to a close.[1] Only applications for attorneys' fees and expenses remain:

[1] *See In re Trust for Grandchildren of Wilbert L. and Genevieve W. Gore*, 2011 WL 3444569 (Del. Ch. July 29, 2011) ("*Gore II*"), *aff'd sub nom. Otto v. Gore*, 45 A.3d 120 (Del. 2012)

1. The Co-Trustees seek reimbursement of their attorneys' fees and expenses. The principal challenges by Susan and the Otto Grandchildren are directed at the recovery of fees charged by tax counsel.[2]

2. The Objecting Grandchildren ask the Court to shift their fees (as well as the fees of the Co-Trustees and the Guardian *ad litem*) to Susan and the Otto Grandchildren. Alternatively, they ask the Court to approve payment of their fees by the Pokeberry Trust. Their first request is vigorously contested; there is no opposition to their alternative request.

3. Susan and the Otto Grandchildren request that the Court order payment of their attorneys' fees and expenses from the Pokeberry Trust.[3] Their applications are opposed by the Co-Trustees and the Objecting Grandchildren.[4]

("*Gore III*"). For convenience, terms used in *Gore II* are used here. Also, familiarity with the course of this litigation is presumed.

[2] The Guardian *ad litem* also questions the amount of tax counsel fees.

[3] The Court addresses both their initial and their supplemental applications. Neither Susan nor the Otto Grandchildren seek to recover the fees and expenses incurred in addressing the claims brought by Jan C.

[4] The Guardian *ad litem* joins in this opposition.

The Co-Trustees' Application

A trust should pay its trustee's attorneys' fees and expenses "when the attorneys' services were necessary for the proper administration of the trust" or "where the services otherwise resulted in a benefit to the trust."[5] The fees and expenses of the Co-Trustees' litigation counsel were substantial but these proceedings were protracted and required significant effort. Aside from some grumbling, there is no opposition, and the Court concludes that the fees and expenses of the Co-Trustees' litigation counsel were reasonable and necessary for the administration of the Pokeberry Trust.

The fees and expenses of tax counsel are more difficult to assess. The tax firm retained by the Co-Trustees is highly respected, and it is not a surprise that its work does not come cheap. The Co-Trustees, at their own risk, have paid the bills of tax counsel, but not with Trust funds. The Court has the advantage of having first-hand knowledge of the litigation efforts of the Co-Trustees' litigation counsel, but it has very little direct knowledge of the work of tax counsel. The tax issues associated with the Pokeberry Trust are complicated. Even more difficult were the

[5] *In re Nancy W. Couch Trust*, 723 A.2d 376, 384-85 (Del. Ch. 1998); *see also Chavin v. PNC Bank, Delaware*, 873 A.2d 287, 289 (Del. 2005).

tax ramifications of the settlement almost achieved through mediation in 2007. Spending large sums on tax advice about a potential settlement that did not occur may, at least initially, seem unnecessary. The Co-Trustees, however, concluded—and with some input from other parties—that ongoing and current tax analysis that kept up with the complex settlement negotiations and documentation made practical sense. Reaching agreement on a settlement accomplishes little if it falls apart because it is later submitted for review by tax counsel and insurmountable problems are identified. In short, the decision of the Co-Trustees to incur the costs of tax counsel during the negotiation process was reasonable. Moreover, although not free of some doubt, the fees and expenses were reasonable in amount and will be approved.[6]

[6] This is the only genuine debate about the extent of fees and expenses. More extensive documentation might have alleviated some of the concerns; review of detailed tax counsel time records carries the risk of disclosure of sensitive and privileged information—something to be avoided, especially in this context. Although there are times when the Court must insist upon detailed records, this is not one of them. The Court is persuaded that the fees are appropriate for a firm of the stature of tax counsel and that the hours were appropriately devoted to important tax questions.

Shifting of Co-Trustees', Objecting Grandchildren's, and Guardian Ad Litem's Fees and Expenses to Susan and the Otto Grandchildren

By 12 *Del. C.* § 3584, the Court, in its discretion, may allocate the fees of trust litigation to the Trust or to one or more of the parties involved in the proceeding.[7] This statutory empowerment supplements the Court's inherent authority under the American Rule to award fees as a consequence of bad faith conduct either preceding the action or during the action.[8] Although the statute grants the Court somewhat greater flexibility in exercising its discretion to shift attorneys' fees, the conduct which the Objecting Grandchildren cite in support of their application is tied to the concept of the bad faith exception to the American Rule.[9]

The Objecting Grandchildren have suggested three reasons for fee shifting. First, they argue that Susan's adoption of Jan C. was in bad faith because it

[7] 12 *Del. C.* § 3584 provides: "In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."
[8] *See Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998); *Paradee v. Paradee*, 2010 WL 3959604, at *15 (Del. Ch. Oct. 5, 2010).
[9] *Merrill Lynch Trust Co., FSB v. Campbell*, 2009 WL 2913893, at *13 (Del. Ch. Sept. 2, 2009).

occurred shortly after Vieve rejected Nathan's efforts to persuade her to change the Pokeberry Trust's allocation. If Vieve's rejection of Nathan's arguments was based on her belief that the Pokeberry Trust's allocation methodology was appropriate, Susan pursued the adoption, so the argument goes, in an effort to frustrate her parents' intent. Second, the adoption was not disclosed; if Vieve and other family members had been informed of this development on a timely basis, steps could have been taken to confirm Vieve's intent and, perhaps, to avoid or to reduce the cost of ensuing litigation. The Objecting Grandchildren contend that waiting until after Vieve's death to share the news of the adoption was in bad faith. Finally, Susan, as a trustee (or knowing that she would soon be a trustee) of the Pokeberry Trust, is said to have breached her fiduciary duties by engaging in self-interested conduct with an overt purpose of thwarting the settlors' intent.[10]

Susan's adoption of Jan C. was apparently valid under Wyoming law, and the law of Wyoming apparently did not require that the adoption be made public.

[10] The focus is on the pre-litigation actions of Susan and the Otto Grandchildren. There is no criticism—nor could there be criticism—of their conduct and the conduct of their counsel during the proceedings in this Court.

Of course, conduct may have been undertaken in bad faith, even if in full compliance with the law.

Susan and the Otto Grandchildren believed—incorrectly in the Court's view—that the Pokeberry Formula would not implement Bill's intentions. Bill devised the Pokeberry Formula, and the better inference is that Vieve acceded to his wishes. The Pokeberry Formula did not result in equal distribution for each of the branches of the Gore family from the Pokeberry Trust. The Otto branch received substantially less. The Otto Grandchildren wanted an equal *per stirpes* share, and, in the abstract and isolated from other considerations, that could reasonably have been characterized as a "fair" outcome. One way to achieve that outcome—in theory, at least—was the adoption of Jan C. by Susan. Indeed, Delaware law has accepted that adoption may change the dispositive scheme for an inheritance.[11] Susan's conduct may have been manipulative, but without condoning it, the Court concludes that it was not in bad faith, even under the arguably more relaxed standards of 12 *Del. C.* § 3584.

[11] *See In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993).

The decision to hide the fact of Jan C.'s adoption may plausibly be viewed in at least two fashions. The first, advanced by the Objecting Grandchildren, is that it was nefariously designed to deprive the Gore family of the benefit of Vieve's input—an opportunity lost on her death—and to gain a tactical advantage in their efforts to "equalize" the allocation of the Pokeberry Trust's assets among the Gore family. The second, offered by Susan and the Otto Grandchildren, is that imposing this conflict and its untidiness on the failing, elderly matriarch of the Gore family was inappropriate and not in her best interests. Susan's and the Otto Grandchildren's motivations were undoubtedly mixed, and the strategy of hiding the adoption was likely tactically important to them. Nonetheless, the Court does not find that their conduct warrants imposing large attorneys' fees on them. The Objecting Grandchildren's optimism that an early disclosure of Jan C.'s adoption would have materially facilitated resolution of this dispute seems unwarranted. A drawn out and complex litigation effort is likely to have been inevitable. Also, burdening Vieve's last days with family disharmony seems inappropriate.

Perhaps, more important is the discovery during the course of the litigation of the May Instrument which, if effective, would have given Susan and the Otto

Grandchildren what they were seeking. The debate over which trust instrument controlled was not easily resolved. Even though this Court and the Supreme Court accepted the October Instrument, as defined in the terms of the Pokeberry Trust, they did so for different reasons.[12] Judicial resolution of this question was necessary for the proper administration of the Pokeberry Trust and, without this litigation, the issue most likely would not have surfaced.

In sum, the Objecting Grandchildren have not provided an adequate basis to warrant imposing the attorneys' fees and expenses resulting from this litigation on Susan and the Otto Grandchildren. The fees were, indisputably, large, but, then again, so was the Trust corpus about which the parties were arguing.

The Trust's Payment of Susan's Attorneys' Fees and Expenses

The question of whether the Pokeberry Trust should be required to pay Susan's attorneys' fees and expenses is more difficult. Susan, as trustee, brought this action to obtain a judicial construction of the Pokeberry Trust, including whether Jan C. should be treated as a grandchild for its purposes, and the

[12] *Compare Gore II*, 2011 WL 3444569, at *16-19, with *Gore III*, 45 A.3d at 131-35.

Pokeberry Formula. It might be more accurate to report that she filed suit in an effort to obtain a bigger share of the Pokeberry Trust for her children.

A trustee may look to the trust for payment of her attorneys' fees and expenses "(i) where the attorney's services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust."[13] As a consequence of the litigation initiated by Susan, any questions regarding the term "grandchildren" in the trust instrument were resolved[14] and that allowed for proper distribution of the Pokeberry Trust's assets; any doubt—even though there may not have been much—about the proper application of the Pokeberry Formula was eliminated; the May Instrument was found; and which of the two instruments controlled was established.[15] Answering these questions assisted in the proper administration of the Pokeberry Trust and justifies its payment of Susan's fees.

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[13] *Merrill Lynch Trust Co., FSB*, 2009 WL 2913893, at *11; *see also In re Trust u/a McKinley*, 2002 WL 31934411, at *3 (Del. Ch. Dec. 31, 2002).

[14] A question involving construction of the term "grandchildren" was raised by counsel for Co-Trustees on February 24, 2005, not long after Vieve's death. Petitioner Susan W. Gore's Mot. for the Payment of Attorneys' Fees and Expenses Ex. E.

[15] Susan also points out that a mediation of the dispute was almost successful—and some parties reasonably believed that the dispute had been resolved. If successful, the mediation would have brought these proceedings to a prompt and relatively cheap conclusion.

The Objecting Grandchildren argue that Susan should not be awarded her attorneys' fees because she created the "problem" when she adopted Jan C., because she acted for her own benefit (or the benefit of her children), and because her claims are barred by the doctrines of laches and unclean hands.[16] The benefits accruing to the Pokeberry Trust (and the Gore family generally) from finding the May Instrument and obtaining a determination as to which instrument was controlling may supersede all of the objections lodged against payment of her fees. In addition, adoption, with an understanding of its potential effects on a wealth distribution scheme, has been used in the past. The adoption of Jan C. called into question the meaning of the term "grandchildren" within the trust document and the Pokeberry Formula. This, even though a question of Susan's own making, was a question that needed an answer for the proper functioning of the Pokeberry Trust. Susan did not act fraudulently and she did not breach any fiduciary duty when she adopted Jan C. or when she pursued this litigation. That one might be skeptical

[16] The Objecting Grandchildren also argue that the Pokeberry Trust should not pay Susan's (or the Otto Grandchildren's) attorneys' fees because they—who are entitled to 96% of the Trust's assets—would ultimately bear most of that expense. While that may be true, it does not negate the benefit conferred upon the Trust from Susan's (and the Otto Grandchildren's) litigation efforts.

about the wisdom of her actions does not raise her conduct to the level that would justify denying her fee application. Similarly, the concerns about the consequences of Susan's delay—not an unjustified concern—in informing the rest of her family about the adoption were addressed in the context of whether the legal fees of others should be imposed upon Susan.[17]

Thus, Susan is entitled to the payment of her attorneys' fees and expenses by the Pokeberry Trust.

The Trust's Payment of the Otto Grandchildren's Attorneys' Fees and Expenses

The Otto Grandchildren also seek to recover their attorneys' fees and expenses from the Pokeberry Trust. As beneficiaries whose interests would be directly affected by these proceedings, they were necessary parties. The circumstances were unusual and their efforts contributed to the accurate and proper administration of the Trust. The Pokeberry Formula, although well within Bill's discretion, was somewhat unusual.[18] Achieving certainty through judicial

[17] *See supra* page 8.
[18] That Susan adopted her ex-husband may be viewed as an unusual circumstance. The Otto Grandchildren were directly involved in the development of that strategy, and credit should not be given for creating the unusual circumstance with a purpose of aiding one's own position.

confirmation of the appropriate application of the Pokeberry Formula was a benefit to the Pokeberry Trust. The Otto Grandchildren deserve credit for discovering the May Instrument during a review of documents produced during discovery. That not only raised a substantial issue—which trust instrument governs the Trust—that was resolved, but it also facilitated a determination by the highest court of the State as to which document was effective and, thereby, avoiding a potential dispute with the taxing authorities.[19] In summary, the Otto Grandchildren did not prevail, but winning is not a necessary precondition to recovering attorneys' fees in litigation of this nature.[20] The unusual circumstances and the benefit conferred upon the administration of the Trust warrant an award of their reasonable fees and expenses.[21]

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[19] *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967). The benefits conferred outweigh the likelihood that Nathan in particular may have knowingly attempted to thwart the grantors' intent.

[20] The Objecting Grandchildren argue that the discovery of the May Instrument amounted to a lucky development, a windfall, that now is cited in support of Susan's and the Otto Grandchildren's positions. First, without this litigation, it is unlikely that the May Instrument would have ever been uncovered. Second, the measure of the benefit conferred to the administration of a trust is in the context of the proceeding as a whole, not simply what may have been anticipated at the outset. The May Instrument was found before the mediation effort, and most of the fees were incurred afterward. Thus, the May Instrument played an integral and fairly long-running role in this proceeding.

[21] *See Chavin v. PNC Bank, Delaware*, 830 A.2d 1220, 1223-24 (Del. Ch. 2003).

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In conclusion, the attorneys' fees and expenses incurred in this long-running proceeding are, under the policies evidenced by 12 *Del. C.* § 3584, properly paid by the Pokeberry Trust. With one exception noted and resolved above, the amount of fees and expenses is not subject to serious dispute. They were reasonable and consistent with the cost of complex litigation. Counsel are requested to confer and to submit a comprehensive implementing order.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Jason C. Powell, Esquire
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