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KEEPING AHEAD OF THE CURVE AN UPDATE ON RECENT DELAWARE FIDUCIARY LITIGATION

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In the Matter of Trust for Grandchildren of William L. and Genevieve W. Gore Dated April 14, 1972 2011 WL 3444569

FACTS

William L. and Genevieve W. Gore founded W.L. Gore & Associates, Inc. ("Company") in 1958. The Company would eventually become enormously successful. However, at that time, the Company did not have much value.

In 1962, Bill and Vieve began a program of transferring stock in the Company to their children to minimize estate taxes. Initially, they gave 2,200 shares to each of their five children and later established a trust for each child funded with 1,700 shares of the Company. In total, the Gores transferred 3,900 shares of stock in the Company either outright or in trust to their children.

Bill and Vieve Gore also planned for their grandchildren. Between September, 1970 and May, 1971 they created two trusts (one created by Mr. Gore and one created by Mrs. Gore) for each of their grandchildren. Each trust was initially funded with 12 shares of the Company.

Through 1971 and into early 1972, the Gores, primarily through Bill Gore, began to plan for a greater transfer of wealth. They established Pokeberry Hill Securities, Inc. ("PHS, Inc.") as a holding company for their W.L. Gore & Associates, Inc. stock, transferred 7,000 shares of the Company to PHS, Inc. and received preferred stock in exchange for the transfer. The result was that the value of the Company was in the preferred stock leaving the common stock with very little value. The technique was commonly referred to as a preferred stock bailout. By freezing the value of the Gores' interest in the preferred stock, future growth in value would all be attributable to the common stock. In addition to receiving the preferred stock, the Gores also received 1,000 shares of common stock of PHS, Inc.

The Gores' plan was to transfer the 1,000 shares of common stock of PHS, Inc. (that would capture all of the future value of Company relative to the 7,000 shares of Company stock transferred to PHS, Inc.) to a trust for the benefit of their grandchildren. So, on May 8, 1972 before two witnesses and a notary public, the Gores signed a trust dated effective April 14, 1972 ("May Instrument") and transferred all 1,000 shares of PHS, Inc. stock to it. The May Instrument states that it is irrevocable and "no one shall have the power to modify, alter or terminate this agreement in whole or in part." The May Instrument provided that upon a specified event, the trust would terminate and the stock would be distributed outright to the grandchildren in equal shares.

The very next day, however, the Gores wrote to their lawyer about changing the terms of the May Instrument. Throughout the period from May of 1972 until October of 1972, the Gores worked on revised terms for a trust to hold the PHS, Inc. common stock. On October 12, 1972,

they signed another trust dated effective April 14, 1972 ("October Instrument") which incorporated the "Pokeberry Formula." Unlike the May Instrument which distributed shares to grandchildren equally (and by representation) the October Instrument included a formula. The formula embodied a concept that took into account the 3,900 shares of Company stock previously transferred to the children so that, if a Gore child had three children each of those three grandchildren would be attributed one-third of the 3,900 shares previously given outright or in trust to that child's parent for total of 1,300 shares (3,900 ÷ 3). If a Gore child had four grandchildren each of those four grandchildren would be attributed 975 shares of stock (3,900 ÷ 4). Under the October Instrument, the deficiency between the family lines would be taken into account so that each of the four grandchildren would receive 325 shares more than each of the three grandchildren to account for the deficiency. The actual computations are more complex in that they take into account the fact that 7,000 shares of Company were transferred to the trust in exchange for 1,000 shares PHS, Inc. common stock. The October Instrument held the shares in further trust for the grandchildren.

Bill Gore died in 1986. Vieve Gore died on January 20, 2005, thereby triggering the dispositive provisions of the Pokeberry Trust.

At that time, four of the Gore children each had four children. One of the Gore children, Susan, had only three children. Under the terms of the October Instrument, which included the Pokeberry Formula, Susan's children stood to receive significantly less than their cousins simply by virtue of the fact that Susan only had three children.

In anticipation of this problem, Susan chose to adopt so she too would have four children. The issue for Susan was who to adopt. In the end, she chose to adopt her former husband, Jan C. Otto ("Jan C."). The adoption had the legal effect of giving Susan a fourth child.

The adult adoption of Jan C. came to light after Vieve's death. Susan filed a petition for instruction asking the Court to determine the effect of the adoption on the Pokeberry Formula in the October Instrument. At that time, no one knew of the existence of the May Instrument. It was only through discovery during the litigation that the original of the May Instrument was produced, still intact with the original signatures of Mr. and Mrs. Gore, the witnesses and the notary.

In an effort to resolve the litigation, the parties agreed to mediation. The mediation took place in 2007 and one representative of each of the five family lines participated. Chancellor William B. Chandler III served as the mediator. The mediation resulted in a document entitled "Pokeberry Trust: Resolution of Share Allocation Issue" dated September 27, 2007. The trustees did not sign the mediation agreement. Each representative of the five family lines and the Chancellor did. Of significance to the Court was that five great grandchildren had become adult during the litigation and they did not participate in the mediation.

ISSUES PRESENTED

The Court ruled on the following key issues: (1) whether the Pokeberry Trust was governed by the May Instrument or the October Instrument; (2) whether the Pokeberry Formula

was effective; (3) whether Jan C. should be treated as a grandchild of the Gores for purposes of the Pokeberry Trust; and (4) whether the mediation agreement entered into by the parties was enforceable.

ANALYSIS

(a) The Governing Instrument.

The Court had before it two Pokeberry Trusts. Both were virtually identical during what was described as the initial term (the period of time before the death of both Bill and Vieve Gore) in that income was distributed to the grandchildren in equal shares per capita. They differed significantly however in the secondary term (after both deaths). The May Instrument required an equal distribution among the nineteen living grandchildren. The October Instrument required the application of the complex Pokeberry Formula. Both trusts were stated to be irrevocable.

The Court found that Bill and Vieve Gore were both intelligent and had executed numerous trusts and other legal documents before May, 1972. The Court therefore concluded that the Gores "intended to create, and did create, a trust (the 'May 1972 Trust') when they affixed their signatures to the May Instrument. The more difficult question for the Court was whether the Gores intended the May Instrument to be irrevocable. The Court stated that although "the question is close" the Gores intended to retain the right to modify the terms of the May Instrument.

The Court found that the Gores intended for the May, 1972 trust to serve as a "placeholder" that would provide some protection from taxes in case they died before the October Instrument. Therefore, despite the fact that the May Instrument said it was irrevocable, the Court found it was intended by the Gores to be revocable.

The Court therefore determined that the operative Pokeberry Trust was the October Instrument.

(b) The Pokeberry Formula.

There were many arguments concerning the Pokeberry Formula including its complexity. Under the Pokeberry Formula, there was an enormous difference between the transfer of wealth to the grandchildren of families with four siblings as opposed to Susan's family with only three siblings. Susan's children argued that the Formula failed to accomplish the Gores goal of making each of Bill and Vieve's grandchildren equal with their other grandchildren in the stock of the Company. The Formula was also flawed because mathematically it would have caused more shares than those held by the Pokeberry Trust to be distributed in most of the years the Pokeberry Trust was in existence because of the number of different grandchildren born to family lines. The Formula did work by its terms when the triggering event occurred.

The Court concluded that the Pokeberry Formula was enforceable. Bill and Vieve Gore acknowledged that the Pokeberry Formula was imperfect. In fact, the example of the application of the Pokeberry Formula in the trust itself failed. The Court held that the fact the Gores acknowledged the Formula was imperfect and yet still included it in the trust was evidence of their intent to see it enforced.

The Court also noted that the Formula worked when applied to the facts of this case. Therefore, the Court upheld the Pokeberry Formula finding that the Gores intention to account for the gifts they had given to their children outright and in trust when directing distributions from the Pokeberry Trust to their grandchildren was "both rationale and well considered."

(c) The Adult Adoption.

The Pokeberry Formula depended upon the number of grandchildren living at the time of the triggering event and how many siblings each grandchild had. Because Susan only had three children and her four siblings each had four children, Susan's three children stood to receive far fewer shares than their cousins resulting in an enormous differential in the amount of wealth transferred to Susan's three children when compared with their sixteen cousins. Susan therefore adopted Jan C. to make him a fourth child.

It should be noted that Jan C., as a condition of the adoption, had promised that he would personally derive no benefit from the shares he would inherit as the twentieth grandchild. The Court found that Jan C. agreed he would distribute the net income (after expenses and taxes) equally to the other nineteen grandchildren and that he would ensure that whatever shares passed to him would pass to the other nineteen grandchildren through the exercise of a power of appointment. Accordingly, there was no economic benefit to be derived by Jan C. from the adult adoption.

The Court focused on two Delaware cases dealing with adult adoption. The first, In re: Adoption of Swanson, 623 A.2d 1095 (Del. 1993) ruled that where an adult adopted another adult who had been his companion for seventeen years to formalize a close relationship and facilitate estate planning, the adoption was valid. The adoption in Swanson allowed the transfer of inherited wealth to the adoptee without significant inheritance taxes.

The second case cited was Wilmington Trust Co. v Chichester, 369 A.2d 701 (Del. Ch. 1976), aff'd, 377 A.2d 11 (Del. 1977). In Chichester, a stepfather adopted two adult stepchildren so they would inherit under his sister's Will and benefit under two trusts she created. The difference between Swanson and Chichester is that the Swanson adoption allowed the adopting party to leave his wealth to the adoptee while in Chichester the adoption allowed the adoptee to inherit from someone other than the adopting party, i.e. the adopting party's sister. In both cases, the adoptee derived a benefit from the adoption. The Court found that Susan's adoption of Jan C. was a strategic adoption that was not intended to benefit Jan C. It was not done to "formalize an existing emotional relationship" and was purely a "device to even the Pokeberry distribution." Moreover, the adoption occurred before Vieve's death and was concealed from her.

Because the adoption was concealed and was done for strategic purposes not intended to benefit the adoptee, the Court held that Jan C. would not be treated as a twentieth grandchild for purposes of the Pokeberry Formula.

(d) The Mediation.

The Court's opinion is seventy-seven pages. Only one and a half of these pages deal with the mediation.

The Court noted that the settlement agreement achieved through the mediation was signed by one representative of each of the five family lines and by the mediator "a judge of this Court." However, the remaining Gore grandchildren did not sign. The trustees did not sign. Five great grandchildren who became adult during the litigation were not invited to the mediation. The Court found that because there was no "evidence that all beneficiaries of the Pokeberry Trust consented to the agreement, an attempt to amend the terms of the Pokeberry Trust must be deemed ineffective."

The Court therefore ruled that the mediation failed to produce a settlement and the parties were not bound by the mediation agreement.

Bessemer Trust Company of Delaware, N.A. v. Wilson
2011 WL 4484409

FACTS

On February 12, 2010, John B. Goodman ("Mr. Goodman") allegedly ran through a stop sign and struck a car being driven by Scott Patrick Wilson ("Decedent") killing him. The Decedent's parents, Lili M. Wilson and William A. Wilson, Jr. ("Wilsons") sued for the wrongful death of their son.

The Wilsons allege that Mr. Goodman was driving under the influence when he ran through the stop sign and struck their son's car. The Decedent's car was propelled into a nearby canal and submerged. The Decedent was found dead inside. However, the cause of death was not the trauma of the accident. It was drowning. Mr. Goodman allegedly fled the scene and made no effort to rescue the Decedent or contact authorities.

As part of the wrongful death action, the Wilsons sought punitive damages against Mr. Goodman. Mr. Goodman reportedly has assets of approximately $11 million. The Wilsons focused their attention on trusts created in 1991 ("1991 Trusts") by Mr. Goodman and his then wife for the benefit of their future children. The beneficiaries of the Trusts at the time of the accident were Mr. Goodman's two children, Harriett and John, both of whom are minors. Each trust was reported to be valued at $200 million. The Wilsons argued in the Florida court that Mr. Goodman's management control of a significant portion of the 1991 Trust assets and his use of

certain residential properties owned by the Trusts should cause the assets of the Trusts to be taken into account in connection with the calculation of the punitive damages award they sought. On December 6, 2010, the Wilsons served subpoenas for depositions duces tecum on George W. Kern V, Principal, Senior Resident Officer of Bessemer Trust Company of Delaware, N.A. ("BTDel").

In response, BTDel filed a declaratory judgment action in the Court of Chancery seeking a declaration from the Court: (1) reaffirming the Court's jurisdiction over the 1991 Trusts; (2) declaring those Trusts to be irrevocable; (3) declaring that Mr. Goodman is not a beneficiary of the 1991 Trusts; and (4) declaring that the Wilsons are not entitled to discovery of confidential financial information from BTDel concerning the 1991 Trusts.

The case was initially assigned to a Master who stayed the action pending the outcome of Florida proceedings. BTDel and Mr. Goodman took exceptions to the Master's ruling. A guardian ad litem ("GAL") appointed by the Court in another matter moved to intervene in the proceeding and also took exceptions. Vice Chancellor Donald F. Parsons, Jr. decided the matter.

ISSUES PRESENTED

Was the case properly stayed by the Master because there was no actual case or controversy presented to the Court or because of the McWane doctrine which requires deference to a foreign Court?

ANALYSIS

The Wilsons refused to enter their appearance in the Delaware proceedings. While the case was being litigated in Florida, they were successful in obtaining significant discovery concerning the 1991 Trusts. By the time the case came before the Vice Chancellor, the relief requested by BTDel had been narrowed to a request that the Court: (1) reaffirm its jurisdiction over the 1991 Trusts; (2) declare the 1991 Trusts to be irrevocable; and (3) declare that Mr. Goodman is not a beneficiary of the 1991 Trusts. The request for a declaration that the Wilsons were not entitled to confidential financial information concerning the Trusts was withdrawn. BTDel requested that the Court lift the stay and issue a Rule to Show Cause why the Court should not grant the relief requested.

The Court first considered whether there was an actual case or controversy because the Wilsons had not appeared in the Delaware proceeding and there was no pending action by the Wilsons against the 1991 Trusts. The Court listed the four factors necessary to find an actual case or controversy. An actual case or controversy is a dispute (1) that involves the rights or legal relations of the parties seeking declaratory relief; (2) in which the claim of right or other legal interest is asserted against one who has an interested in contesting the claim; (3) between parties whose interests are real and adverse; and (4) where the issue involved is ripe for determination. The Court had no problem with the first two factors finding that BTDel, as a Delaware trustee, was obligated to protect the rights and interests of the beneficiaries of the 1991 Trusts and the Wilsons had manifest an interest in attempting to invade the Trusts as part of the punitive damages claim in the Florida action. The Court also found that the interest of the parties

were "real and adverse" because of the Wilsons' discovery requests seeking information concerning the 1991 Trusts in an effort to determine punitive damages against Mr. Goodman because such damages could foreseeably exceed Mr. Goodman's net worth and leave the 1991 Trusts susceptible to an action to invade them.

While the Court struggled with the issue of ripeness, it stated the standard is one of "common sense" and includes a practical evaluation of the interests of a party for a prompt resolution of the issue and the hardships that could result from further delay. Here the Court found that BTDel had a legitimate interest as trustee in protecting the 1991 Trusts and the 1991 Trust beneficiaries. The Court further found that the ongoing litigation in Florida threatened to encroach upon the Trusts and that a delay in providing relief could deny BTDel its choice of forum and also "deprive the Florida Court of useful information regarding issues likely to come before it." The Court therefore found that BTDel's claims for relief presented an actual case or controversy.

The Court then focused on the McWane doctrine. Under McWane "a court may exercise its discretion freely to stay an action 'when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues. The Court noted that the McWane doctrine may have applied when the Master stayed the proceeding in favor of the Florida action with respect to the discovery issue. However, with the discovery issue removed from the case, the Court found that McWane no longer applied to the narrow relief sought by BTDel. The Court noted that: (1) the parties in the Florida action are not the same as the parties in the Delaware action (neither BTDel nor the GAL were parties in the Florida action) and the parties in the Florida action are not the same as the parties in the Delaware action (the Palm Beach International Polo Club and The Player's Club Restaurant were not parties in the Delaware action); (2) the issues in the Florida action and the Delaware action were not the same because the main issue in Delaware was whether Mr. Goodman had a beneficial interest in the 1991 Trusts established for the benefit of his children while in the Florida action the issue was whether Mr. Goodman was liable for the death of the Decedent and, if so, the amount of damages.

For the foregoing reasons, the Court lifted the stay and issued the rule to show cause why the order sought by BTDel affirming the Court's jurisdiction, declaring the 1991 Trusts to be irrevocable, and declaring that Mr. Goodman has no beneficial interest in the 1991 Trusts should not be entered. The Court left it to the Wilsons to appear in Delaware on these important issues relative to the 1991 Trusts.

In re: Beulah Williams, No. CIV.A. 04193-N, 2011 WL 3925690 (Del. Ch. Aug. 25, 2011)

FACTS

Beulah Williams ("Beulah") was 93 years old and residing in the Kentmere Nursing Care Center ("Kentmere"). Her daughter, Doretha Williams ("Doretha"), was appointed as the guardian of Beulah's person in 2006. Doretha played an active role in her mother's care.

Beulah suffered from a variety of conditions including stroke, hypertension, neuropathy, and Alzheimer's type dementia. The case came to the attention of the Court when Kentmere sought guidance from the Court concerning Beulah's care and expressed concern that Doretha was interfering with that care. Specifically, Kentmere alleged that Doretha was opposing the dietary restrictions placed on her mother and the medical recommendations made by Kentmere. Doretha responded by accusing Kentmere of "trying to kill Beulah", falsifying documents, and engaging in a "cover up" to hide Kentmere's misconduct. The Court appointed an attorney ad litem to investigate the issues. The Court directed the attorney ad litem to retain a doctor to conduct an independent medical examination of Beulah and investigate whether the care she was receiving at Kentmere was appropriate.

Thereafter, the Court conducted an evidentiary hearing. During the hearing, evidence was introduced that Doretha would not allow Beulah to take medication to relieve her pain, would not consent to a pureed food diet, would not allow recommended changes to Beulah's blood pressure medication, would not inform Kentmere of the findings of other doctors to whom Doretha took Beulah, and would not permit tests required to determine if a mass on Beulah's jaw was cancerous.

Doretha testified that Kentmere was drugging Beulah and that Beulah should not be on a pureed food diet. She testified that portions of Beulah's medical records were fraudulent and that there was an "alliance" of people working against her and her mother.

Prior to the hearing, the attorney ad litem filed a report with the Court alleging that Doretha had taken Beulah from her room to a public bathroom at Kentmere to feed her non-pureed chicken. Doretha never denied this allegation. She denied that her actions violated any Court order and argued that her mother should not be eating only pureed food. Doretha argued that the results of a swallowing study performed by St. Francis Hospital were fraudulent.

ISSUE PRESENTED

What is the standard for removal of a guardian of the person of someone who is infirm?

LEGAL ANALYSIS

The Court applied a "best interest" test. The Court stated that it had discretion to "remove a guardian for any sufficient cause." Further, "a guardian must act with competency, rationality and integrity and in a manner that meets the best interest of the disabled person." In this case, the Court found that the record clearly showed it was not in Beulah's best interest for her daughter, Doretha, to continue to be the guardian of her person.

Doretha's refusal to allow Beulah to take her medication for pain relief or consent to a pureed food diet together with her refusal to change Beulah's blood pressure medication, and her failure to inform Kentmere of the findings of other doctors established that Doretha was not acting in Beulah's best interest. In fact, the Court held that Doretha was interfering with Beulah's care.

The Court acknowledged that "Doretha sincerely believes she is acting in Beulah's best interest." However, her conspiracy theory concerning Beulah's care was not rational. Doretha's heartfelt belief that there was an alliance against her mother led the Court to believe that Doretha would continue to interfere with Beulah's care.

Accordingly, the Court removed Doretha as Beulah's guardian and appointed the Public Guardian was appointed as successor guardian in Doretha's place.