IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF Trust for Grandchildren of Wilbert L. and Genevieve W. Gore dated April 14, 1972	: : :	**C.A. No. 1165-VCN**

MEMORANDUM OPINION

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NOBLE, Vice Chancellor

I. INTRODUCTION

Wilbert L. and Genevieve W. Gore founded W. L. Gore and Associates, Inc. in 1958.[1] Since then, the Company has been successful, and the Gores' family has benefited from that success through the Gores' generosity.

One branch of the family, however, came to the conclusion that the distribution formula of an irrevocable trust that the Gores had set up for the benefit of their grandchildren (the "Pokeberry Trust") was unfair to the three children of the Gores' daughter, Susan, (the "Otto Grandchildren") because each of those grandchildren would receive less Gore stock from the Pokeberry Trust than would each of the Gores' other sixteen grandchildren. Nathan C. Otto, one of the Otto Grandchildren, reasoned that one way that the Pokeberry Trust's unfairness could be eliminated would be for his then sixty-two-year-old mother, Susan W. Gore, to adopt another child. Nonetheless, he perceived potential drawbacks to this course of action. In July 2002, he wrote to his mother:

> The worst case for family harmony is for [Vieve] to pass away and the rest of the family to learn that the Ottos adopted someone without telling anybody. This would most likely create a permanent fracture in

[1] For convenience only, the Court will at times refer to members of the extended Gore family by their first names or by the nicknames used in the trial exhibits. Thus, Wilbert and Genevieve Gore are "Bill" and "Vieve," respectively, or collectively, the "Gores." W. L. Gore and Associates, Inc. is "Gore" or the "Company."

> trust, with all kinds of consequences down the road. It would also be highly likely to cause a lawsuit.[2]

In hindsight, Nathan was right.

Susan filed this action after she revealed, in the month following her mother's death, that she had adopted her former husband, Jan C. Otto ("Jan C."), in an attempt to increase the portion of the Pokeberry Trust's assets that her children would receive upon Vieve's death. Specifically, Susan, one of the trustees of the Pokeberry Trust, petitioned the Court for construction of the October 1972 document that all involved had, until this litigation, believed governed the Pokeberry Trust (the "October Instrument"); she also sought to prevent her former husband from personally benefiting from the trust as a result of her adoption of him. Susan's sons, the Otto Grandchildren, join in her claims. The Gores' four other children, who are also trustees of the Pokeberry Trust (the "Co-Trustees") and their other sixteen grandchildren (the "Objecting Grandchildren") oppose their claims. Jan C. Otto seeks recognition as the Gores' twentieth grandchild under the Pokeberry Trust and repayment of any expenses that he incurred in connection with his adoption by Susan.

During the lawsuit's discovery phase, a document dated May 8, 1972 (the "May Instrument") was found among Bill's papers. The May Instrument appeared

[2] JX 167, July 29, 2002 Mem. from Nathan C. Otto ("Nathan") to Susan Gore ("Susan"), at SG000164.

to have created an irrevocable trust that was funded with the same stock as was used to fund the trust created by the October Instrument. Under the terms of the May Instrument, a large percentage of the corpus would have to be sold to pay estate taxes, but the remainder would be evenly divided among all of the Gore grandchildren. As a result, compared to what they would receive under the October Instrument, each of the Otto Grandchildren would receive somewhat more Gore stock under the May Instrument, and the Objecting Grandchildren would each receive significantly less.

This post-trial memorandum opinion announces the Court's decisions as to (1) whether the Pokeberry Trust is governed by the May Instrument or the October Instrument, (2) whether the terms of the controlling document are effective, (3) whether Jan C. is a Gore grandchild for purposes of the Pokeberry Trust, and (4) whether he is entitled to recoup any additional payments in connection with his agreement to be adopted by his former wife.[3]

[3]The Court has already ruled "that the unclean hands doctrine bars Jan C. from claiming any personal economic benefit (either as to income or as to disposition of principal) in the [Pokeberry] Trust." *In re Trust for Grandchildren of Wilbert L. and Genevieve W. Gore dated April 14, 1972*, 2010 WL 3565489, at *6 (Del. Ch. Sept. 1, 2010) (the "September Opinion"). The reasoning of the September Opinion, which turned on Jan C.'s inequitable attempt to retain the benefits of the Pokeberry Trust for himself after inducing his adoption by Susan by promising not to do so, applies equally whether the Pokeberry Trust is governed by the May Instrument or the October Instrument. Thus, regardless of which instrument is controlling, Jan C. is barred, as a result of his unclean hands, from claiming any personal economic benefit in the Pokeberry Trust.

II. BACKGROUND

A. *Parties*

The settlors of the Pokeberry Trust were Bill and Vieve Gore. Bill passed away in 1986, Vieve on January 20, 2005.[4]

Petitioner Susan W. Gore is a daughter of Bill and Vieve and a trustee of the Pokeberry Trust. Her sons are Respondents Nathan C. Otto, Jan Peter Otto ("Jan Peter" or "JP"), and Joel C. Otto ("Joel") (collectively, the "Otto Grandchildren").

The other trustees of the Pokeberry Trust oppose the petition; they are Bill and Vieve's other children: Respondents Robert W. Gore ("Robert"), Virginia G. Giovale ("Virginia" or "Ginger"), David W. Gore ("David"), and Elizabeth G. Snyder ("Elizabeth" or "Betty") (collectively, the "Co-Trustees").

The Gores' other grandchildren, Respondents Scott A. Gore, Thomas K. Gore, Sharon G. Rubin, Brian W. Gore, Peter R. Giovale, Daniel G. Giovale, Michael A. Giovale, Mark N. Giovale, Romy C. Gore, Jeffrey Chen Gore, Emily Chen Gore, Ryan Chen Gore, Bret A. Snyder, Keith A. Snyder, Sean A. Snyder, and Kelly J. Snyder (collectively, the "Objecting Grandchildren), also oppose the petition.

Respondent Jan C. Otto is the Otto Grandchildren's father, as well as Susan's former husband and adopted son.

[4] Trial Tr. (Susan) 9.

The interests of the Gores' minor and unborn descendants more remote than their grandchildren are represented by a guardian *ad litem* pursuant to Court of Chancery Rule 17(b).

B. *Facts*

1. Background to the Creation of the Pokeberry Trust

In 1962, the Gores gave their five children, Robert, Susan, Virginia, David, and Elizabeth (collectively, the "Gore Children"), 2,200 shares of Gore stock each.[5] In 1964, the Gores established an irrevocable trust for the benefit of their children, who were each to receive an equal share of the trust's principal, or 1,700 shares of Gore common stock each.[6] The 1964 Trust provided that, during the lifetime of each child, the child was to receive the income from his or her share of the trust and "[a]s much of the principal as the trust advisor may from time to time think is necessary for the welfare of the child . . . ."[7] The principal will pass to the children's estates upon the death of each respective child.

Thus, as of March 1965, the Gores had given each of their children 3,900 shares of the Company: 1,700 shares as each child's portion of the 1964 Trust and 2,200 shares an outright gift.[8]

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[5] JX 61, Oct. 19, 1971 Estate Analysis for Bill and Vieve Gore, at 6.
[6] JX 5, Copy of 1964 Trust of Wilbert L. Gore and Genevieve W. Gore (the "1964 Trust") at ES102000908.
[7] *Id.*
[8] JX 11, Mar. 19, 1965 Letter of Gores to Susan re: "gifts to the 1964 Trust"; JX 61, Oct. 19, 1971 Estate Analysis for Bill and Vieve Gore, at 6.

The Gores also used trusts to provide for their grandchildren. Between September 1970 and May 1971, for example, they created two trusts (one by Bill and one by Vieve) for each of their grandchildren; these trusts were initially funded with twelve shares of the Company.[9]

Bill eventually decided that he needed to adopt a new estate planning strategy. In a July 1971 memorandum to Al Simpler ("Simpler") of Fine Insurance Agency Service Corporation, Bill summarized what he viewed as his "estate problem." He expected the value of the Company's stock to grow tenfold over the next ten years, and believed that, as a result of that growth, estate taxes could put the Company at risk.[10] According to the memorandum, Bill's primary objective was for Gore "[t]o remain a private company by avoiding any large sale of stock to pay estate taxes . . . . Secondary objective – to minimize taxes."[11] The memorandum also noted that Bill and Vieve had already used their lifetime gift allowances and did not have cash available to pay gift taxes at the time.[12]

In response to this memorandum and other communications, Simpler provided the Gores with an Estate Analysis, dated October 17, 1971, which summarized their goals in more detail and emphasized the Gores' intention to

[9] JX 12-29, 52-59.
[10] JX 60, Jul. 13, 1971 Mem. from Bill to Simpler.
[11] *Id.* at ES102003609.
[12] *Id.*

minimize estate taxes and the expected difficulties involved in doing so, given the expected growth of the Company going forward.[13]

One month later, Bill sent a letter to his lawyer, Converse Murdoch, Esquire ("Murdoch"), in which he described a "possible way to prepare for the possibility of substantial growth in the value of Gore stock."[14] His plan involved (1) setting up a holding company into which the Gores would place most of their Company stock, (2) issuing preferred stock that would preempt the value of the Company's common stock and reduce the common stock's value to almost nothing, thereby allowing the Gores to (3) transfer the common stock to a trust that they would create for their grandchildren without incurring gift tax.[15] In the event the expected appreciation in the value of the Company's common stock then occurred, the gains would be realized by the grandchildren's trust instead of by the Gores' estates.[16] His intentions for the contemplated trust included, as of that letter:

> a. Income to grandkids: equalize income per capita of grandkids taking into account income to grandkids from all Gore stock sources.
>
> b. Principle [sic] to offspring of grandkids or in accordance with their will.
>
> c. All common stock in Private Holding Company put into this trust.

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[13] JX 61.
[14] JX 62, Nov. 18, 1971 Letter from Bill to Murdoch.
[15] *Id.*
[16] *Id.* at GT103000002.

> d. At the death of the last survivor of W.L. Gore and G. W. Gore the preferred stock (after estate taxes) goes into this trust: the trust is distributed into individual trusts when the youngest living grandchild reaches 21 years, in a fashion that as nearly as possible equalizes Gore stock and Gore stock expectations from parents and trusts which the grandchildren can be expected to benefit.[17]

The letter also included the following postscript: "If this is feasible it is urgent that we move very promptly."[18]

A response from Murdoch on January 13, 1972 indicated that Murdoch had spoken to someone at the Internal Revenue Service and received an informal indication that was "very encouraging on the proposition that you and [Vieve] can transfer your Gore stock to a new holding company even though it is contemplated (as contrasted with there being a commitment) to later transfer some of the holding company stock to family trusts."[19] Murdoch further suggested that the Gores could obtain a letter ruling within three months from the Internal Revenue Service formally blessing the plan and lessening the likelihood that the transfer of Gore stock to a holding company would later be treated as a taxable event.[20]

Bill responded on January 18, 1972, that "[t]he time required to get a ruling from the Internal Revenue Service is too long and we feel that it is a greater risk to wait than to go ahead without the ruling."[21]

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[17] *Id.*
[18] *Id.* at GT103000001.
[19] JX 63, Jan. 13, 1972 Letter from Murdoch to Bill.
[20] *Id.*
[21] JX 64, Jan. 18, 1972 Letter from Bill to Murdoch.

On January 20, Murdoch wrote to Bill expressing certain concerns about the general strategy.[22] He offered proposals for addressing those concerns and then continued:

> I recognize . . . that there may be some adverse income tax results flowing from various methods of taking cash out of Gore company and/or the holding company in order to pay death taxes. It seems to me to be futile at this point to adopt one plan as the plan which will be followed. . . .
>
> One thing of which I am sure is that failure to do anything towards moving Gore common stock out of your estate means sitting by and watching your estate tax problems become greater and greater.[23]

Murdoch then recommended going forward with the formation of the holding company.[24]

The holding company, Pokeberry Hill Securities, Inc. ("Pokeberry" or "PHS"), was formed as a Delaware corporation on January 28, 1972.[25]

Weeks later, in an April 3 memorandum to Murdoch, Bill and Vieve summarized their understandings of the communications that they had had with Murdoch in January, including how Pokeberry was to be funded, that a trust was to be set up for their grandchildren, and that, upon the later to occur of Bill or Vieve's

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[22] JX 65, Jan. 20, 1971 Letter from Murdoch to Bill at ES102000723 ("In any event, it is clear to me that there are better ways to handle the matter of death taxes attributable to your preferred stock in the holding company.").
[23] *Id.* (emphasis in original).
[24] *Id.* at ES102000724.
[25] JX 66, Certificate of Incorporation for Pokeberry Hill Securities, Inc.

death, the Pokeberry preferred stock was to be given to charity or disposed of as directed in the last survivor's will.[26] Specifically, the memorandum stated that the grandchildren's interest in the trust was:

> to be such as to equalize the Gore stock "expectations" at the time of the death of the last of G.W.G. and W.L.G. or at the time our daughter Betty reaches 45 years of age (or May 2, 1992) whichever occurs last – note: so that all our Grandkids are born.[27]

Soon after, the Gores acquired 1,000 common shares of Pokeberry in exchange for 7,000 shares of the Company's common stock, and they also received instructions from Peter Shanley, Esquire, Murdoch's colleague, regarding how to transfer Pokeberry's common stock to the trust that was to be set up for the Gores' grandchildren.[28]

On May 8, in a letter to Jack Paul Fine that was copied to Simpler, Bill wrote:

> We have now completed the "Pokeberry Hill Securities Inc." arrangement and will know before too long what the view point is of the I.R.S regarding the gift of the common stock to the trust for our grandchildren. In any case we think that our objectives have been pretty well accomplished.[29]

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[26] JX 71.
[27] *Id.*
[28] JX 72-75, Common Stock Certificates for Pokeberry; JX 76, Apr. 25, 1972 Letter from Peter J. Shanley, Esq. to Vieve.
[29] JX 79.

Also on May 8, before two witnesses and a notary public, the Gores signed the May Instrument, a seven-page document titled "Trust for the Grandchildren of Wilbert L. and Genevieve W. Gore." The May Instrument, which has an effective date of April 14, 1972, provides that, upon termination of the trust (which was to happen upon the last to occur of the deaths of Bill or Vieve, or the day on which Elizabeth turned forty-five, May 2, 1992), "the principal and any undistributed income shall be divided into shares with one share for each grandchild of trustors then alive and one share for grandchild who is then dead but who has then living issue."[30] The May Instrument also states that "[t]he trust hereby created shall be irrevocable and no one shall have the power to modify, alter or terminate this agreement in whole or in part except" that a beneficiary was permitted to relinquish his or her interest in the trust so as to accelerate the next succeeding interest as if the beneficiary had died.[31] The May Instrument recites that the trust was funded by 1,000 shares of Pokeberry common stock.[32]

The very next day, Bill wrote a letter to Murdoch that included the following instructions:

[30] JX 78, the May Instrument.
[31] *Id.*
[32] *Id.* at ES102000048.

Two things:

> 1. Let's break this trust into individual trusts for each grandchild alive on May 2, 1992 (or at the death of the last of us), continuing these as long as legally possible, including the availability of principle [sic] for support if needed and with freedom of grandchild to designate beneficiary by will.
>
> 2. At termination we would like to establish the shares in this trust for each grandchild to equalize as nearly as possible the expectations of Gore stock of each grandchild. For this purpose we consider that each of our grandchildren have an expectation of sharing in 3,900 shares of Gore stock from their parents, and that the 1,000 shares of Pokeberry Hill Securities Common stock represents 7,000 shares of Gore stock. Therefore the following sum should be equal for each grandchild:
>
> $\frac{3{,}900}{\text{number of children}}$ plus 7 times $\frac{1}{1000}$ of assets of trust,
>
> where the number of children is equal to one plus the number of brothers and sisters of the grandchild.
>
> The above formula would be multiplied for any future splits of Gore stock.
>
> Until termination the grandchildren would share equally in the income (as now drafted).[33]

The May 9 Letter appears to have been the last written reference that either of the Gores made to the May Instrument, which the Gores apparently filed away and never discussed with any of their family members.

[33] JX 80, May 9, 1972 Letter from Bill to Murdoch (the "May 9 Letter").

During the summer of 1972, Bill and Murdoch exchanged letters regarding the formula set forth in the May 9 Letter (the "Pokeberry Formula," as the final version of this formula became known). On August 10, 1972, Bill sent a letter to Murdoch that included draft wording and a hypothetical example of how he intended the formula to work.[34] The letter indicates that the "expectations" of each grandchild would include (1) a share of his or her parent's 3,900 shares equal to 3,900 divided by the number of grandchildren in the sibling group and (2) a share of the Pokeberry Trust's 7,000 "units" of Gore Stock that would raise the total of (1) and (2) to 26,500[35] divided by the total number of living grandchildren.[36] Considered together, the Gores believed that the two sources of Company stock would result in each grandchild having equal expectations regarding the amount of Company stock each would eventually receive.[37]

Murdoch responded that the formula and the language Bill proposed were "nearly perfect for purposes of carrying our [sic] your intention," but, apparently referring to earlier discussions, wrote that:

> we keep coming back to the same problem – doing it this way is going to give the IRS a basis to attack the plan and to include the trust assets in your taxable estate . . . based on the proposition that through your method of handling the distribution, you are indirectly retaining the power to control the amounts going to each grandchild.

[34] JX 81 (the "August 10 Letter").
[35] 26,500 represents the total number of shares given to all the Gore Children (3,900*5=19,500) and those held by the Pokeberry Trust (7,000).
[36] *Id.*
[37] *Id.*

* * *

> Also, you are assuming that each of your children will continue to hold Gore stock and will distribute it eventually in equal shares to each of their children. I realize that this is your hope, but, to be realistic, you should recognize that in the next twenty years, things can happen to your children and their children. Property settlements with former spouses, judgments held by various creditors, and myriad other developments which neither you nor I can even imagine at this point can arise to completely thwart your plan.[38]

Bill's response the next day confirmed his and Vieve's intentions:

> We appreciate that we can not expect to preserve gore stock intact through two or three generations. . . . Our objective is to do <u>our</u> best <u>now</u> to equalize the expectations of our grandchildren for assets <u>derived</u> from Gore stock.
>
> My understanding is that we can legally set up a method of distributing assets from our trust among our grandchildren, that we cannot change this method in the future, that we can not enjoy any benefits from the trust ourselves, including the restriction that we cannot legally enforce the retention of Gore stock or Pokeberry Hill stock in order to retain voting control of Gore Associates by us or any member of our family. Does my proposed wording accomplish our objectives and meet these legal requirements? If so, let's go. If not, let's talk.[39]

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[38] JX 83, Aug. 13, 1972 Letter from Murdoch to Bill. Bill, in handwritten comments on that letter, wrote "Not retaining. The die is cast."

Vieve was also aware of Murdoch's objections. On August 11, she wrote to her daughter, Ginger, explaining in relevant part:

> Dad and I are re-doing our will to include the Pokeberry Hill Securities, Inc. stock and it is pretty complicated. We have spent time with Connie Murdoch and are drafting some formulae for dividing the stock which Connie says he "will insert exactly as we write it with misspelled words and all" so that he will not be responsible for the non functioning of it when the time to divide it comes.

JX 72, Aug. 11, 1972 Letter from Vieve to Ginger.

[39] JX 84, Aug. 22, 1972 Letter from Bill to Murdoch (emphasis in original).

On October 5, 1972, Murdoch mailed the Gores what he termed the "final draft of an instrument which reflects the terms of a trust you created on April 14, 1972."[40] He reiterated his concerns regarding the Pokeberry Formula, but wrote, "If you are firm in your resolve to do it this way, all I can say is that we have done our best."[41]

The Gores tweaked the language of the Pokeberry Formula over the next few days, and they also specifically changed the language in response to their decision to include "adopted grandkids" in the trust.[42] Murdoch sent them a draft of the instrument that incorporated these changes on October 12.[43] The Gores signed this document (the "October Instrument") in the presence of a notary public on October 16, 1972, and they requested an identification number for the trust from the Internal Revenue Service the same day.[44]

Unlike the May Instrument, the October Instrument incorporates the Pokeberry Formula into its distribution mechanism as follows. The October Instrument divides the trust into an initial term and a secondary term.[45] The initial term was to cover the period from April 14, 1972 through the last to occur of

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[40] JX 85, Oct. 5, 1972 Letter from Murdoch to Bill (the "October 5 Letter").
[41] *Id.*
[42] JX 86, Oct. 9, 1972 Letter from Bill to Murdoch (the "October 9 Letter").
[43] JX 87, Oct. 12, 1972 Letter from Murdoch to Bill.
[44] JX 90, the October Instrument; JX 91, Oct. 16, 1972 Letter from Vieve to the Internal Revenue Service.
[45] October Instrument at ES102000077-78.

(1) Bill of Vieve's death or (2) May 2, 1992 (provided that that date was not more than twenty-one years after the later of Bill and Vieve's death).[46] During the initial term, income from the trust was to be distributed on a per capita basis to those of the Gores' grandchildren alive on January 1 of the year in which the distribution occurred.[47]

The secondary term described in the October Instrument incorporates the finalized language of the Pokeberry Formula, illustrated with the very same "Hypothetical Case" that was used as an example in Bill's August 10 Letter to Murdoch:

> At the termination of the initial term, the then trust principal shall be divided into shares with one share for each grandchild of trustors then alive and one share for each grandchild who is dead and who has then living issue. Each of such separate shares shall be treated thereafter as a separate trust.
>
> The division of the trust principal into separate shares shall be done as follows:
>
> A. The principal of the trust shall be distributed to the separate share trusts for the benefit of our grandchildren per capita (or in the case of a share for the class consisting of then living issue of a deceased grandchild, on a per stirpes basis) in proportions that, as nearly as possible, equalize the expectations (on April 14, 1972) that each of our present and future grandchildren will have for receiving assets derived from us. For this purpose, it shall be conclusively presumed that each of our grandchildren have or will have an expectation of sharing with their siblings 3,900 units of such assets through their parents and that the total present and future assets of this trust

[46] *Id.* at ES102000077.
[47] *Id.*

represents 7,000 units of such assets. We do not intend that any person (whether acting as trust fiduciary under this instrument or in any other capacity) shall be required (or even admonished) to retain stock of W. L. Gore and Associates, Inc., Pokeberry Hill Securities or any other entity.

We emphasize that for purposes of the division into shares there be a conclusive presumption that each grandchild will share with his siblings 3,900 of assets derived from us even though in fact this is not so.

For purposes of division into shares, the following procedure shall be used:

1. The expectation of units of assets from their parents will be determined by dividing 3,900 by the number of living children (or dead children in the case of a dead grandchild with then surviving issue) in the family of the grandchild (one plus the number of brothers and sisters equals this number).

2. The assets of the trust shall be divided into 7,000 "units". These "units" are to be distributed among our living grandchildren (or for then living issue of a deceased grandchild) in a fashion that makes the sum of "expectations of asset units" from 1 above, plus the number of "units" from the trust assets equal for each of our grandchildren) including dead grandchildren with surviving issue). This sum for each grandchild will therefore be equal to 3,900 times 5 [i.e., the number of our children] (=19,500) plus 7,000 (=26,500 divided by the total number of living grandchildren and dead grandchildren with surviving issue. It is understood by us that the possibility exists that even with zero "units" from the trust, the expectations for a grandchild from 1 may exceed the figure of 26,500 divided by the total number of grandchildren, and therefore it may not be possible to exactly equalize among the grandchildren.

The following hypothetical example demonstrates the procedure for division into shares:

> Hypothetical Case
> Suppose:
> Our 1st son has 4 children → 3900/4 ≒ 975 + 583.8 units from trust = 1558.8 units per child
> Our 1st daughter has 3 children → 3900/3 ≒ 1300 + 258.8 units from trust = 1558.8 units per child
> Our 2nd daughter has 4 children → 3900/4 ≒ 975 + 583.8 units from trust = 1558.8 units per child
> Our 2nd son has 1 child → 3900/1 ≒ 3900 + 0 units from trust = 3900 units per child
> Our 3rd daughter has 5children → 3900/5 ≒ 780 + 778.8 units from trust = 1558.8 units per child
> Total grandchildren = 17
> Total "expectations" per grandchild = 26,500/17 = 1558.8 units[48]

The October Instrument includes provisions specifying how to distribute principal and undistributed income to the issue of a deceased grandchild.[49]

The October Instrument provides that the trust it creates "shall be irrevocable and no one shall have the power to modify, alter or terminate" it,[50] and, like the May Instrument, the October Instrument funds the trust with 1000 shares

[48] *Id.* at ES102000078-79 (emphasis in original). In the "Hypothetical Example" above, the Pokeberry Formula would call for the distribution of more from the Pokeberry Trust than the 7,000 units that the trust actually held: (583.8*4)+(258.8*3)+(583.8*4)+0+(778.8*5)=9340.8 units.
[49] *Id.* at ES102000080-85.
[50] *Id.* at ES102000083.

of Pokeberry common stock.[51] The remaining terms of the October Instrument are not relevant to this lawsuit.

2. Events occurring after creation of the Pokeberry Trust.

For nearly the next forty years, all involved believed, and acted in reliance on the belief, that the October Instrument governed the Pokeberry Trust. The deepest roots of this lawsuit, however, grew from the way Susan dissipated the Gore stock that she had received as gift from her parents and as disbursements from the 1964 Trust during Vieve's life.

Susan's marriage to Jan C. ended in a difficult divorce in 1981.[52] After her divorce, Susan became involved in the Transcendental Meditation movement, which she now regards as a serious mistake.[53] She stayed with the movement until approximately 1995, and she testified that she was in "very, very bad shape during these years."[54] Near the end of this time, she became gravely ill, and after leaving the movement she needed to spend three years convalescing in a series of monasteries.[55]

After she recovered, Susan found herself in a precarious financial position. Years before, during her marriage, she had sold a portion of the Gore stock that her

[51] *Id.* at Schedule A, ES102000087.
[52] Trial Tr. (Susan) 10, 37.
[53] *Id.* at 39.
[54] *Id.* at 40-41.
[55] *Id.* at 42.

parents had given her in order to support her family.[56] She had placed more than half (1,340 of 2,200 shares) of the Gore stock she had owned personally[57] in trusts for the benefit of her children and their children, putting it beyond her control,[58] and she had sold additional shares in order to finance her sons' business ventures.[59] As a result of these factors and her experiences with the Transcendental Meditation movement, Susan faced the prospect of personal bankruptcy by the end of the 1990s.[60]

Susan, who knew that 1,700 shares of Gore stock were held for her benefit in the 1964 Trust, wrote a letter in 1999 to her mother, who was the trustee, asking for help; specifically, she asked that her mother release to her 368 shares of Gore stock from the 1964 Trust in order to allow her to feel that she was participating equally as a director of the Company and "to participate in the lifestyle of the family and be a better contributor."[61] Over the objections of her brother Robert and the trust advisor, Roy Kinsey, who thought Vieve should release only seventy

[56] *Id.* at 37-38, 42. Susan testified that she, and not Jan C., had provided the majority of financial support for the family during the twenty-three-year marriage.
[57] For her benefit, 1,700 shares were still held in the 1964 Trust.
[58] *Id.* at 43.
[59] *Id.* at 46-48.
[60] *Id.* at 43.
[61] JX 131, July 18, 1999 Letter from Susan to Vieve.

shares to Susan, Vieve authorized the release of 336 shares from the 1964 Trust to Susan.[62]

It was around this time that Susan's children began to think about their own estate planning needs and the future of the Gore family.[63] In particular, Nathan, perhaps at Susan's request, began to evaluate issues surrounding the Company and the various family trusts and to investigate "what wealthy families tended to do in order to be successful."[64] As a result of this research, Nathan wrote a whitepaper titled "Tangible Effects of the Belief Space: Making a Successful Transition from Nouveaux Riches to Sustainable Wealth," and circulated it among the members of the Gore family and others.[65] Therein, Nathan made the argument that certain beliefs and assumptions of the Gore family, such as that taxes were to be avoided at all cost and that Gore stock should not be sold other than to associates of the Company, reduced the potential of the Gore fortune and could eventually lead to the family losing control of the Company.[66] In particular, he judged that the family's belief that "[a]nything above a middle-class lifestyle is ostentatious,

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[62] JX 132, Sept. 3, 1999 Letter from Robert to Susan; JX 134, Sept. 4, 1999 Letter from Roy Kinsey to Susan; JX 139, Dec. 28, 1999 Letter from Vieve to Susan.

[63] Trial Tr. (Nathan) 203. Perhaps they were also cognizant that almost all of the stock that Susan had given to her children or had put into trust for their benefit was gone by this point, having been used to pay for their education, business ventures, and other pursuits; as the balance of the 2,200 shares Susan had personally owned had also been sold by them. *Id.* at 225, 232; *id.* at (Susan) 45-47.

[64] Trial Tr. (Nathan) 203-4.

[65] JX 141, July 21, 2001 mem. from Nathan to Gore family members, et al.

[66] *Id.*

wasteful and bad . . . keeps the family fragmented and working, keeps [family members] from working together due to time, work, and travel constraints. Violates the birthright of wealth."[67] Nathan summed up his memorandum: "A major, wealthy family, is living out lives of middle-class workaday. Losing the opportunity to benefit the company, the world, and themselves."[68]

In a later memorandum to his father, Nathan further described his views of the situation: "The most damaging attitude, which you identified, and I believe all of the Ottos (with the partial exception of Susan) have overcome, is the apotheosis of Bill and Vieve. This results in a 'don't rock the boat' approach, which will continue to paralyze the family and eventually destroy the company."[69]

By January 2002, Nathan, perhaps along with others of the Ottos, had developed a plan for the future of their family and the Company; he described it to his father:

> 1. Encourage Susan to distribute the remaining 1,360[70] remaining shares of the 1964 trust by repudiating the income. The details need to be worked out, but it is possible that we could distribute this into trusts for your [Jan C.'s] grandkids. This is actually Plan B, but both A and B are not exclusive.

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[67] *Id.*
[68] *Id.* at OGH-0029.
[69] JX. 146, Jan. 3, 2002 Mem. from Nathan to Jan C.
[70] This number approximately equals the 1,700 shares that originally constituted Susan's share of the 1967 Trust after subtracting the 330 shares that Vieve had released to Susan in 1999.

2. Plan A: encourage enough family education and communication among the Gores to create momentum for Gore to go public in about two years

    a. Family control would be maintained through issuance of a super-voting stock, similar to the Fords and the Lauders (Estee Lauder cosmetics)

    b. Once Gore goes public, then all of the trusts have liquid assets in them. The trusts would need to diversified and professionally managed

    c. The liquidity of Gore stock and the need to manage the trusts would create momentum to create a family office, family governance, and family unity around the preservation of human, intellectual and financial capital.[71]

In furtherance of this plan, Nathan wrote a memorandum to his mother and his brother Joel explaining in more detail his vision for the Gore family's future and suggesting ways to build consensus among other members of the family.[72] The memorandum argued that, at a minimum, the transition of the Gore family to its next stage should feature:

- Gore going public with an IPO
- Management transitions . . . .
- Diversification of the trusts, at least the ones that concern me and mine
- Creation of a family governance structure that is effective, at least for the Susan Gore branch
- Creation of a family office, preferably for all the Gores
- Regular family meetings, at least twice per year.[73]

[71] *Id.* at jo000000007.
[72] JX. 148, Jan. 17, 2002 Mem. from Nathan to Susan and Joel.
[73] *Id.* at OGH0041 (handwritten notes omitted).

During the next few months, Joel requested and received copies of the various trust documents, including the October Instrument, that pertained to his estate.[74] After the trust documents were circulated to Nathan, Nathan wrote to Susan to alert her to his understanding of how the Pokeberry Trust would operate upon Vieve's passing:

> I have been looking at the distribution rules for the Pokeberry trust. It currently holds 1,000 shares of Pokeberry, Inc, which holds 7,000 shares of Gores stock. I assume for all practical purposes all of Pokeberry Inc is in the trust.
>
> Upon Vieve's death, the trust is divided into one trust for each grandchild. In the division, there is a calculation to equalize the distribution to each grandchild, with a firm presumption that each grandchild shares equally in 3,900 shares given to each of the five children.
>
> In the calculation, Pokeberry is added to 3,900 shares for each of the five siblings for a total of 26,500 shares. This total of 26,500 is then divided by the number of grandkids to arrive [at] an equalization number. With 19 grandkids, this number is 1,395.
>
> Then, for each of the five siblings, the number of kids they have is divided into the 3,900 they were given, and then Pokeberry shares are used to add in until the total reaches 1,395.
>
> So for instance, Bob was allocated 3,900 shares, and he has four kids. His 3,900 shares are presumed to be equally divided among his kids to reach 975 shares apiece. Then, 420 Pokeberry shares are added in to make up the total to 1,395 per child.

[74] JX 149, Feb. 18, 2002 Letter from Joel to Mark Olson, Esq.; JX. 152, May 9, 2002 Letter from Mark Olson to Joel enclosing the three trusts of which he is a beneficiary; JX 153, May 9, 2002 Letter from Mark Olson to Joel enclosing Irrevocable Trust for Benefit of the Great-Grandchildren of Wilbert L. and Genevieve W. Gore.

> Because each of your siblings has four children, the calculation is the same for everyone except the Ottos. For the Ottos, 3,900 is divided among three children, making 1,300 presumed to be inherited from you. Then the Pokeberry shares are added into make the total 1,395: 95 share per Otto boy.
>
> So there you have it: 420 shares for each grandchild except the Ottos, who would receive 95 each.
>
> If you had one more child before Vieve's death, then the calculation would even out among all the branches, each of the 20 grandchildren would receive 350 shares from Pokeberry.
>
> The difference to the Otto branch of three vs four children is 285 shares vs 1,400 shares, a difference of 1,115 shares of Gore stock . . . . The hypothetical fourth child would also receive 350 shares, of course.[75]

Thus, for Nathan, the main issue in this case comes down to: if Susan were to have one more child, the Otto branch of the family would receive 1,115 more shares from the Pokeberry Trust than if Vieve were to die while Susan had only three children.

Four days later, Nathan made his allusion to "one more child" more explicit in a memorandum that he wrote to his mother in which he advocated that Susan adopt her granddaughter, Jenna Otto, who was, at that time, a minor.[76] In doing so, Nathan wrote, "there may be a requirement that you notify Vieve, and hence Charlie and Mark Olson, regarding your adoption of Jenna, as she would begin

[75] JX 154, May 17, 2002 Email from Nathan to Susan (the "May 17 Email") (handwritten notes omitted).
[76] JX 155, May 21, 2002 Mem. from Nathan to Susan, at SG000173.

receiving checks as a beneficiary of Pokeberry. This would also establish her as a legitimate beneficiary before the final division on Vieve's death."[77]

Jan C. strenuously objected to idea that Susan would adopt Jenna, and he explained his reasoning, which involved his concern over her well-being, to Jan Peter and Nathan in emails of May 25 and May 26, respectively; Jenna was excluded as a candidate for adoption soon after.[78] Nathan began to evaluate other candidates, including three of his friends.[79]

Jan Peter set up a meeting of the Gore grandchildren to be held on June 21, 2002.[80] In advance of this meeting, Joel raised the possibility with several of his cousins that Susan might adopt someone,[81] and the idea was discussed in detail at the June 21 meeting.[82] It was not well received by the Gore grandchildren other than the Ottos: Sharon Rubin testified that reactions ranged "anywhere from negative to extremely angry and negative."[83] Nathan testified that his cousins "thought it was reasonable to consider an equitable distribution of the Pokeberry

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[77] *Id.* at SG000173.
[78] JX 157, May 26, 2002 Email from Jan C. to Nathan; Trial Tr. (Nathan) 248-52.
[79] Trial Tr. (Nathan) 252.
[80] JX 156, May 22, 2002 Letter from Jan Peter to Danny and Melissa Giovale.
[81] The handwritten notes of Sharon Rubin indicate that "Joel says Susan has gone thru the 3900 shares talked about under #1 in Pokeberry, so Joel, Nathan, and JP won't get any of that so out of fairness they want to equalize the 2nd part #2 of Pokeberry." JX 158, June 2, 2002 Notes of Sharon Rubin.
[82] Trial Tr. (Nathan) 256-57.
[83] *Id.* (Sharon Rubin) at 621. Scott Gore described the conversation as "incendiary." *Id.* (Scott Gore) at 634.

Trust, but they didn't think it was reasonable to consider adoption."[84] Nathan told his cousins that he would not go forward with the idea of an adoption if they did not support it.[85]

Nonetheless, roughly one month later, Nathan recommended to his mother that she proceed, privately, with an adoption while attempting to build consensus around the idea of modifying the Pokeberry Formula.[86] Susan initially intended to adopt one candidate, Rusty Hoffman, and was ready to proceed with an August 2002 adoption hearing until she changed her mind after deciding that he was not sophisticated enough with regard to estate planning.[87] Later that summer, however, she wrote a memorandum to Nathan and Jan C. in which she stated: "[t]he best way to do this is not through adoption, if such a solution exists. If adoption is necessary to achieve the goal, the ground rules of adoption should be agreed upon."[88] Susan met with her brother David in early September, and following that meeting, he wrote, "Again, I don't feel my own grandchildren's

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[84] *Id.* (Nathan) at 257. Nathan presumed that obtaining the unanimous consent of the Pokeberry Trust's beneficiaries would allow its terms to be amended.
[85] *Id.* at 259.
[86] JX 167, July 29, 2002 Mem. from Nathan to Susan at SG000164 ("Course of action: 1. Proceed with the adoption as planned. 2. Move to build family consensus with a deadline of Oct. 1, or Oct. 15. 3. If there is a consensus to create an even Pokeberry distribution, then work on the process by which it can be accomplished, and make people as comfortable with it as we can. Do not mention the backup plan. 4. Implement a workable plan with the family, by finding a suitable adoptee, and move forward. 5. Pray that our karma does not include [Vieve] passing away while we are working this out.").
[87] Trial Tr. (Susan) 16-17, 98.
[88] JX 170, Aug. 23, 2002 Mem. from Susan to Nathan and Jan C.

welfare would be threatened by your adopting some person. On the other hand, not everyone may feel the same way."[89]

Nathan tried to build a consensus among the members of his generation that changing the Pokeberry Formula was desirable. In an October 5, 2002 memorandum to his sixteen adult cousins,[90] Nathan explained why he believed that the Pokeberry Formula both is mathematically flawed and "skews distribution among cousins in ways which Bill and Vieve were unlikely to foresee in 1972."[91] As to the first point, Nathan demonstrated that the death of a childless cousin would greatly affect the share of the Pokeberry Trust to be received by the surviving siblings; further he showed that under certain circumstances, the formula called for the distribution of more shares to the cousins than were held by the trust.[92] As to the second, Nathan explained why he believed that the presumption embedded in the Pokeberry Formula was invalid:

> The 3,900 shares given to each sibling will not come to cousins. The distribution assumes that each sibling would [be] most likely to pass all of their WLGA shares on to his or her children. Yet shares personally owned by siblings have been used to:
>
> - Build schools and universities
> - Support research projects
> - Create charitable foundations

[89] JX 173, Sept. 4, 2002 Email from David to Susan.
[90] Two cousins, Emily Chen Gore and Ryan Chen Gore, were minors at the time.
[91] JX 175, Oct. 14, 2002 Mem. from Nathan to Sharon Rubin, et al. (the "October 14 Memorandum" or the "Oct. 14 Mem.").
[92] *Id.* at OGI0061.

- Create trusts for later generations
- Support comfortable lifestyles[93]

He then argued that "creating an even distribution" of the Pokeberry assets would eliminate uncertainties related to the formula's dependency on the number of cousins who were alive at the time of Vieve's death and would "create a basis for long term cooperation" that would allow the cousins to preserve and grow the Company and the collective wealth of the cousins and future generations.[94] Nathan offered his cousins two possible courses to equalize distributions from the Pokeberry Trust: unanimous agreement among the cousins to amend the Pokeberry Formula or an adoption. He cautioned that "[i]f unanimous agreement among the cousins cannot be achieved, then the future value of Pokeberry is very much in doubt. In this case, the value of adoption in order to secure some other larger piece of a shrinking pie is questionable."[95]

David Gore responded to this memorandum by suggesting that if Nathan was concerned about fairness, then Nathan should consider not only distributions from the Pokeberry Trust, but also the amounts that Susan had received from her parents and the fact that these gifts had allowed Susan to give much to Nathan and his siblings:

[93] *Id.* at OGI0064.
[94] *Id.* at OGI0066.
[95] *Id.* at OGI0067.

> I believe she set up her own trust, and plans to assign about 1400 shares to your children and their cousins. She bought a ranch for you all to use and subsidized JP in his aviation business. If you want to talk about what is fair, you need to factor in these gifts. Even if after all is said and done your descendants receive less than some others, is that necessarily a cause for concern? Maybe Susan believed that too much wealth in the hands of her descendants would be bad for them. It is her right as a parent and grandparent to make that call for her own wealth.
>
> * * *
>
> So my intention is not to look a gift horse in the mouth. On the other hand, if the great majority of your cousins want to change the trust, I wouldn't stand in the way. I don't think it will make much difference to the happiness of my descendants, even if the Pokeberry common shares are eventually liquidated or (as you assume too readily) even pay significant dividends.[96]

Nathan next made his arguments directly to Vieve in a letter he sent to her on March 13, 2003.[97] Susan and Nathan then spoke to Vieve during her ninetieth birthday party on March 23.[98] As of that time, Vieve was frail, and Susan believed that she was "vulnerable" and "mentally compromised," although she testified that she formed this judgment only after seeing Vieve at the birthday party.[99] Nonetheless, Nathan made a forceful and passionate appeal to his grandmother, asking both that she change the Pokeberry Formula and that she take the lead in convincing the family to accept such a change. Susan thought the presentation was

[96] JX 182, Dec. 2, 2002 Email from David to Nathan.
[97] JX 191, Mar. 13, 2003 Letter from Nathan to Vieve.
[98] JX 188, Feb. 5, 2003 Email from Susan to Jan Peter.
[99] Trial Tr. (Susan) 161.

too forceful,[100] and Vieve became very upset as a result of it.[101] Susan testified that Vieve later told her, "It almost killed me."[102] As to Nathan's requests of Vieve, Nathan "got a firm 'no.'"[103] The issue was never raised with Vieve again.[104]

After the birthday party, when it was clear that a plan to change the Pokeberry Formula would not receive either unanimous consent from the cousins or the backing of Vieve, the Ottos decided that adoption was their best option. Various adoptee candidates were considered, and, during a conversation that took place approximately two weeks after the birthday party, Jan C. suggested in a joking manner that Susan should just adopt him.[105]

To the surprise of Jan C., these discussions turned serious. Jan C. wrote to Nathan, stating that he was "not averse to having the rumor spread that Susan is considering 'adopting' me, if it will lead Vieve, and the other siblings, back to the negotiation table, with the goal of changing [the] Pokeberry distribution

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[100] *Id.* 166-67.
[101] *Id.* 21.
[102] *Id.*
[103] JX 204, April 28, 2003 Mem. from Nathan to Susan, Jan C., Jan Peter and Joel.
[104] Nathan testified that Susan reported to him that "after one of her trips in the spring of 2003, that out of the blue Vieve said to her 'Why don't you just adopt.'" Trial Tr. (Nathan) 210; *see id.* at 272 ("I knew that Vieve had said 'Why don't you go ahead with the adoption?"). Susan did not testify regarding this statement at trial, and it is not mentioned in Nathan's memorandum detailing what happened at Vieve's birthday party. Joel did report the same statement to his cousin after the revelation of Jan C.'s adoption. *See* JX 253, Typewritten notes of Mar. 12, 2005 conversation between Bret Snyder and Joel. ("Joel said that Grandma suggested the adoption to Susan. This would be incredible as they kept it secret from Grandma!").
[105] *See* JX 194, Apr. 8, 2003 Email from Jan C. to Nathan.

formula. . . . But if it moves any further toward reality, I need to think about it a lot more."[106]

Nathan provided him with food for thought by explaining to his father how an adoption might work. He wrote that Susan would not have any legal power over Jan C.'s life, but that he would be a beneficiary of the Pokeberry Trust; Jan C. would receive checks for the income from the trust, which Nathan thought should be distributed to the nineteen cousins for "political" reasons, and Jan C. would devise his share of the trust's principal to the cousins in his will; Nathan offered, "if you do go through with the adoption, then if Pokeberry gave significant income, then JP, Joel, and I would be enjoying it because of you, and I'm sure that we could arrange for a comfortable income for you as well."[107]

Jan C. responded that he was willing to participate in the plan, apparently believing at that time that it was only part of a negotiating strategy to force an agreement with Vieve, the Co-Trustees, and the Objecting Grandchildren: "[I]f you, your brothers and Susan are reasonably convinced that the adoption will bring Vieve and [Susan's] siblings to the negotiating table, then I think you should do it."[108] Jan C. also suggested that Nathan and Susan draft a codicil to Jan C.'s will

[106] *Id.*
[107] JX 195, Apr. 9, 2003 Email from Nathan to Jan C.
[108] JX 196, Apr. 9, 2003 Email from Jan C. to Nathan.

to direct the principal as they saw fit.[109] On April 18, Nathan informed Jan C. that Susan wanted to move forward with the adoption.[110]

The next day, Susan wrote to Jan C. and Nathan directly in order "to clear up communication" regarding the adoption.[111] She explained that, if the adoption were to occur—she was still seeking an agreement to amend the terms of the trust at that point—"[t]he financial benefit to [Jan C.] would be nice, but not substantial, as we would have to frame our agreement so that inheritance of principle [sic] and any huge dividends [unlikely possibility] would go to the cousins and their heirs."[112]

Jan C. responded to assure Susan that (1) although his offer to be adopted was meant humorously, he thought it an appropriate negotiation tactic; and (2) he "did not expect any financial benefit from Pokeberry should the adoption actually occur . . . . The only thing I ask is that I not incur any out-of-pocket expenses as this proceeds."[113]

Around this same time, Nathan circulated a memorandum bearing the subject line "Creating an independent destiny" to Susan, Jan C., Jan Peter, and Joel.[114] In it, Nathan advocated an "Otto Exit Plan," the goals of which were to:

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[109] *Id.*
[110] JX 198, Apr. 18, 2003 Email from Nathan to Jan C. ("Sooner is better. Like today.").
[111] JX 200, Apr. 19, 2003 Email from Susan to Jan C. and the Otto Grandchildren.
[112] *Id.*
[113] JX 201, Apr. 21, 2003 Email from Jan C. to Susan, Nathan, and Joel.
[114] JX 204.

Secure financial benefit for the Otto family
Secure separate trustees for our family trusts
Diversify completely away from Gore stock.[115]

The plan assumed the adoption of Jan C., and that any income he would receive from the Pokeberry Trust would be distributed to the nineteen natural-born cousins, and that the principal of the trust would be split equally among the natural-born cousins upon Jan C.'s death.[116] Nathan understood that implementing the plan would require the cooperation of the rest of the Gore family.[117]

In May, Susan asked Jan C. why he was willing to be adopted, and Jan C. responded on May 15 with two written memoranda. One explained his view that the October Instrument (referred to by Jan C. as the "Pokeberry Trust") is a "seriously flawed document."[118] The other explained that he was "convinced that the allocation procedure is unnecessarily and arbitrarily discriminatory," and that, therefore, he was willing to go along with the adoption in order to achieve a more equitable distribution for his children.[119] He explained that he was the "best

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[115] *Id.* at jo000000039.
[116] *Id.* at jo000000045.
[117] *Id.* at jo000000041-42 ("Perhaps ways can be found to ease the pain of draining the Company's cash reserves [in order to secure family members' consent to the plan].").

Work on the plan itself continued throughout the next two years. *See, e.g.*, JX 225, July 16, 2003 Notes by Jan C. ("I worked pretty intensively yesterday and today on the 'Otto exit plan', exchanging several emails with Nathan on the topic, especially with regard to strategy."); JX 230, Sept. 1, 2003 Notes by Jan C. ("I have been involved with my sons, especially Nathan, in what he calls the 'Otto Exit Plan.'"); JX 244, Jan. 1, 2005 Journal Entry of Jan C. ("Susan is pushing to change the trustees for her 1964 Trust share and my kids will be doing the same for their individual trusts . . . .").
[118] JX 210, May 15, 2003 Mem. from Jan C. to Susan re: Intent of Pokeberry Trust.
[119] JX 209, May 15, 2003 Mem. from Jan C. to Susan re: Adoptee Status.

choice" because (1) he had living issue, which would prevent his share of the trust from reverting back to the other beneficiaries in the event his death preceded Vieve's; (2) he was familiar with all the involved parties; and (3) he had the best interests of all the involved parties at heart.[120] He also represented that any income or principal he received from the trust would be distributed to the nineteen grandchildren, less taxes or expenses incurred.[121] Jan C. urged that the adoption occur as quickly as possible, since in order to effect its intended purpose, it had to occur before Vieve's death.[122]

On May 21, Susan called the "memo explaining [Jan C.'s] reasons for volunteering . . . unassailable."[123] Susan filed a Petition for Final Decree of Adoption of Adult Person in a Wyoming state court on June 30, 2003, and her adoption of Jan C. became final on July 10, 2003.[124]

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[120] *Id.* at jo000000112.
[121] *Id.*
[122] *Id.* at jo000000112-13.
[123] JX 213, May 21, 2003 Email from Susan to Jan C.
[124] JX 218, Petition for Final Decree of Adoption of Adult Person Pursuant to Wyoming Statute § 1-22-113 (the "Adoption Petition"); JX 221, Final Decree of Adoption of Adult Person Pursuant to Wyoming Statute § 1-22-113 (the "Adoption Decree").

When Jan C. was adopted, Wyoming law provided, "Any person may be adopted who is within this state when the petition for adoption is filed." Wyo. Stat. § 1–22–102 (1977). Section 1-22-102 was amended in 2009 to read:

> (a) Any child may be adopted who is within this state when the petition for adoption is filed.
>
> (b) Any adult may be adopted, regardless of his residence within or outside of this state at the time the petition is filed, provided:
>
> > (i) The adopting parent was a stepparent, grandparent or other blood relative, foster parent or legal guardian who participated in the raising of the adult when the adult was a child; and

As early as July 15, 2003, Jan C. began contemplating the consequences of retaining the income from the Pokeberry Trust, or a portion of it, for himself.[125] By July 17, he had decided to modify the original plan for distributing the corpus of the trust by devising it not only to the nineteen cousins but also to others of his stepsons, nieces and nephews, and his sons' cousins on the Otto side of the family.[126] In September, Jan C. decided that if the Gores contested his adoption, he would use the income from the trust to "fight to enforce [it]," as necessary and would otherwise "dispose of the income as I see fit."[127] With regard to the trust corpus, he began to think of some of his "deferred dreams," such as purchasing a vacation retreat in New Mexico and building his "next Harley FLHT custom."[128] As a result of a series of disputes that Jan C. had with his son Jan Peter in 2004, Jan C. decided, in December of that year, to keep all the income from the Pokeberry Trust for himself.[129] Also as a result of this conflict, Jan C. decided:

(ii) The adult files a consent to the adoption with the court.

Wyo. Stat. § 1-22-102 (2009); *see also* WY LEGIS 65 (2009).

[125] JX 223, July 15, 2003 Notes by Jan C. ("If I were to retain [1/20th of the income], then their share would drop from 1/19th (5.26%) to 1/20th (5%). As a percentage, they would receive 95% of what they were formerly receiving. So the financial impact would be small, but not negligible."); JX 225, July 16, 2003 Notes by Jan C.

[126] JX 227, July 17, 2003 Notes by Jan C.; *see also id.* at jo000000079 ("The other factor, quite honestly, is cupidity on my part. I hate to see the work of my sons [related to Nathan's proposed plans to diversify the Pokeberry Trust] (and my work, as well) go strictly to the other sixteen Gore cousins, without some of it sticking to my fingers).").

[127] JX 230, Sept. 1, 2003 Notes by Jan C.

[128] *Id.* at jo000000083.

[129] *See* JX 240, Dec. 25, 2004 Email from Joel to Jan C.; for additional details, *see Sept. Op.*, 2010 WL 3565489, at *4.

> My entire focus is to get [the adoption] out in the open, and see whether it is real or not. . . .
>
> If it is valid, then I stand to get immediate income, and ultimately 350 shares of Gore stock at whatever value it has then.
>
> If it is not valid, then I get nothing – but I have nothing now.
>
> And if it is not valid, my kids stand to lose 255 shares each from the Pokeberry distribution, leaving them with their original 95 shares.[130]

These decisions came to Susan's and the Otto Grandchildren's attention after a January 3, 2005, conversation between Jan C. and Nathan.[131] In February, Susan wrote to her sons asking, "Should I 'unadopt' [Jan C.]?"[132] She asked her sons to reach a consensus as to whether she should either (1) de-adopt, in which case she would "desist from informing everybody about the adoption"; or (2) allow Jan C. to remain her adoptee, in which case Jan C. would need "to have the boundaries delineated by lawyers; your lawyers talking to his lawyers."[133]

Susan's siblings received notice of the adoption in mid-February 2005, and Robert immediately wrote to Susan in order to express his—very negative—reactions to the news and in order to offer to allow Susan to diversify her portion of the 1964 Trust on the conditions that she agreed to:

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[130] JX 242, Dec. 30, 2004 Journal entry by Jan C.
[131] JX 243, Jan. 3, 2005 Journal entry by Jan C.
[132] JX 246, Feb. 6, 2005 Br. of Susan W. Gore, Thoughts on Pokeberry Distribution.
[133] *Id.*

1. Stop the artifice of adoption regarding the Pokeberry Trust
2. Resign as a director of Gore
3. Enjoy life much more independently of the W. L. Gore and Associates, Inc. business.[134]

Susan responded on February 23 by explaining her belief that Vieve would have supported her effort to solve the problem of unequal distribution of the Pokeberry Trust through adoption and by attempting to allay Robert's fears of family discord.[135]

C. *Procedural History*

Susan filed her Petition for Construction with this Court on March 10, 2005. A mediation, conducted in 2007 under Court of Chancery Rule 174, failed to produce a binding agreement, and the action moved forward. The Court denied the Co-Trustees' Motion for Partial Summary Judgment on December 14, 2009. The Court bifurcated this action on December 23, 2009, and after a March 16, 2010 trial addressing certain equitable defenses asserted against the economic rights of Jan C. under the Pokeberry Trust, the Court held, "that the unclean hands doctrine bars Jan C. from claiming any personal economic benefit (either as to income or as to disposition of principal) in the [Pokeberry] Trust."[136]

[134] JX 247, Feb. 16, 2005 Letter from Robert to Susan.
[135] JX 250, Feb. 23, 2005 Letter from Susan to Robert.
[136] *Sept. Op.*, 2010 WL 3565489, at *6.

Trial on the remaining claims, except for Jan C.'s counterclaims for unjust enrichment and specific performance (which the Court will resolve on the briefs), was held on January 10-12, 2011.

III. CONTENTIONS

Susan and the Otto Grandchildren contend that the Court should recognize Jan C. as the grandchild of Bill and Vieve for purposes of the Secondary Term of the Pokeberry Trust if that trust is governed by the October Instrument. In the event that Jan C. is not held to be Bill and Vieve's grandchild for this purpose, they contend that the Pokeberry Formula should be held unenforceable and that the Pokeberry Trust's assets should be distributed equally among the Nineteen Grandchildren. Next, they argue that the Court should enforce an agreement they say was reached at the 2007 mediation. Finally, they argue in the alternative that the May Instrument controls the Pokeberry Trust.

Jan C. joins the arguments of Susan and the Otto Grandchildren and additionally argues that the September Opinion does not prevent him from benefiting under the Pokeberry Trust if the May Instrument is held to control it. He also seeks specific performance of a purported agreement among him, Susan, and the Otto Grandchildren that he is entitled to payment of his attorney fees, a "comfortable retirement," and repayment of his other expenses related to his participation in the "Otto Exit Plan."

The Co-Trustees and the Objecting Grandchildren seek a declaration that the October Instrument governs the Pokeberry Trust, or, in the event that the May Instrument is controlling, that the May Instrument should be reformed to incorporate the Pokeberry Formula. They also argue that Jan C. should not be considered a "grandchild" of Bill and Vieve under the Pokeberry Trust.

IV. DISCUSSION

At the outset, the Court notes that the record demonstrates that the Gores loved all their children and grandchildren.[137] The Gores' choice to use one method instead of another to distribute their material wealth among their family members does not change that fact.

Nonetheless, the Court's role in a case such as this is "to ascertain and give effect to the testator's or settlor's intent, bearing in mind his or her dominant purpose."[138] The Gores' intent regarding their gifts to their descendants is, therefore, central to the Court's analysis of the documents at issue in this case, and the Court hopes that the following pages harmonize what the record shows their intentions were with a view of the Pokeberry Trust that also satisfies the other legal principles that are applicable to the Court's analysis.

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[137] *See*, *e.g.*, Trial Tr. (Joel) 325; JX 127, Apr. 4, 1995 Letter from Joel to Vieve (thanking her for a substantial gift); JX 190, Mar. 18, 2003 Letter from Nathan to Vieve ("Thank you very, very much for the Pokeberry income. I am deeply appreciative of the money and the love behind it.").

[138] *See*, *e.g.*, *Chinn v. Downs*, 421 A.2d 915, 917 (Del. Ch. 1980).

The Court begins by determining whether the May Instrument or the October Instrument will control disbursement of the 1,000 shares of Pokeberry common stock (representing 7,000 shares of Gore common stock) held in trust for the Gores' grandchildren.

A. *Whether the May Instrument Created an Irrevocable Trust*

The May Instrument is, in many respects, similar to the October Instrument, except that it does not incorporate the Pokeberry Formula and, instead, provides that the trust assets will be distributed to the Gores' grandchildren on an equal basis *per stirpes*.[139] Like the October Instrument, the May Instrument funds the trust it creates with the 1,000 outstanding shares of Pokeberry common stock. Also like the October Instrument, the May Instrument recites that it is "irrevocable." Bill and Vieve signed the May Instrument in the presence of two witnesses and a notary public on May 8, 1972.[140]

Susan, the Otto Grandchildren, and Jan C. argue, perhaps understandably, that the Gores' signatures on the May Instrument should be regarded as a clear and unequivocal declaration of trust. They contend that, because the May Instrument created an irrevocable trust, the Gores had no power to revoke that trust or to amend its terms by executing the October Instrument, and that, because the Gores transferred their Pokeberry common stock to the trust created by the May

[139] JX 78, May Instrument.
[140] *Id.* at ES102000046-47.

Instrument, those shares were not available to fund the trust created by the October Instrument.

The Objecting Grandchildren and the Co-Trustees argue that no trust was created by the May Instrument because (1) there is no evidence that the Gores intended to create a trust by signing the May Instrument; (2) the May Instrument could not have accomplished the Gores' estate planning objectives, and (3) the idea that the Gores created a trust in May 1972 amounts to an accusation that the Gores committed tax fraud, perjury, and intentional mendacity by holding out the October Instrument as the document governing the Pokeberry Trust for forty years.

If the Gores' notarized signatures on the May Instrument were all the evidence that the Court had available to it here, the Court would have little trouble finding that the Gores had intended, by executing the May Instrument, to create an irrevocable trust. The evidence of the circumstances leading up to and surrounding the execution of that document, however, leads to a different conclusion.

Those seeking to prove the existence of a trust must do so by a preponderance of the evidence, but "[n]o particular words or form are required in order to create an express trust."[141] If a trust was created, the Court interprets its terms according to the intent of the settlor:

[141] *Cravero v. Holleger*, 566 A.2d 8, 13, 17 (Del. Ch. 1989).

> The cardinal rule of law in a trust case is that the intent of the settlor controls the interpretation of the instrument. "Such intent must be determined 'by considering the language of the trust instrument, read as an entirety, in light of the circumstances surrounding its creation.'" All other rules of construction must be subordinate to determining [the] settlor's intent, their value being as aids in ascertaining that intent as precisely as possible.[142]

It is undisputed that Bill and Vieve were both intelligent and involved in their estate planning. They had executed numerous trusts and other legal documents before May 1972, and the Court must presume that they understood that their signatures, especially when witnessed and notarized, had legal significance. The May Instrument is titled "Trust for Grandchildren of Wilbert L. and Genevieve W. Gore," and it includes express words of trust: "Wilbert L Gore and Genevieve W. Gore . . . hereby transfer to themselves as trust fiduciaries the property set forth in Scheduce [sic] A attached to and made part of this instrument."[143] The Court must, therefore, conclude that the Gores intended to create, and did create, a trust (the "May 1972 Trust") when they affixed their signatures to the May Instrument.[144]

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[142] *Chavin v. PNC Bank*, 816 A.2d 781, 783 (Del. 2003) (quoting *Chavin v. PNC Bank,* 2002 WL 385543 at *2 (Del.Ch. Mar. 4 2002). *See also* Restatement (Third) of Trusts § 13 cmt. b (2003) (Relevant evidence of intent includes "[a]cts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust.").

[143] May Instrument at ES102000040.

[144] The Court is unable, in the face of this clear expression of intent to create a trust, to determine that the Gores' decision not to employ a particular protocol in executing the May Instrument indicates that the signed May Instrument should be considered a legal nullity. The Objecting Grandchildren and the Co-Trustees argue that the Gores followed the same detailed process—which included, for example, affixing a blue backer to a trust document—when executing

The more difficult question is whether the Gores intended that the trust be irrevocable. Although the question is close, the Court finds that, despite the text of the May Instrument, the Gores intended to retain the right to modify the terms of, or to revoke, the May 1972 Trust.

The circumstances that resulted in the execution of the May Instrument began in the summer of 1971, when Bill realized that he had an "estate problem."[145] Seeking a way to transfer Gore stock, which he expected to appreciate dramatically in the coming years, to his grandchildren without

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twenty-seven other trust agreements drafted by Murdoch, both before and after May 1972. It is possible, as discussed below, that the decision not to follow the same protocol with regard to the May Instrument indicates something about the Gores' intentions regarding the May Instrument, but it does not mean, for example, that their decision to sign the document in the presence of witnesses and a notary public was somehow accidental or meaningless.

The Co-Trustees and the Objecting Grandchildren invoke three cases from outside Delaware for the proposition that a signed trust agreement is not determinative evidence of intent to create a trust. Each of these cases, however, is distinguishable.

The Colorado Supreme Court found in *In re Daniels*, 665 P.2d 594, 596 (Colo. 1983), that "the mere signing of the trust agreement would not activate it" unless the settler funded the trust and filled out the "property schedules attached to the trust agreement"; here, the Gores did fill out a property schedule and they attached it to the May Instrument, thereby funding the trust with 1,000 shares of Pokeberry stock.

In contrast to the clear language of the May Instrument, the language of the document at issue in *Palozie v. Palozie*, 927 A.2d 903 (Conn. 2007), was "unclear" as to "whether the decedent intended to create a presently enforceable trust, with all of the rights, duties and responsibilities that such a trust entails, or whether she intended to execute a testamentary document, which would become effective and enforceable only after her death." *Id.* at 912.

Finally, in *Porreca v. Gaglione*, 265 N.E. 2d 348 (Mass. 1970), the court affirmed a finding (based on extrinsic evidence) that a signatory to a purported trust instrument had signed it "'merely to put the properties in question beyond the reach of a claimant'; he never intended to create a valid and binding trust. He never divested himself of control of the property through the trust instrument and at all times during his life retained control and possession over the property and the proceeds derived therefrom for his own use." *Id.* at 368. Here, there is no evidence that the Gores signed the May Instrument with an intention other than to create a trust.

[145] *See* JX 60.

triggering estate or gift taxes, Bill worked with Simpler to generate a plan he believed would accomplish that goal.[146] As early as November 1971, that plan incorporated Bill's desire to create a trust to be "distributed into individual trusts when the youngest living grandchild reaches 21 years, in a fashion that as nearly as possible equalizes Gore stock and Gore stock *expectations from parents and trusts* which the grandchildren can be expected to benefit."[147]

When he presented the plan to his lawyer, Murdoch, however, Murdoch expressed concerns that it would not pass muster with the Internal Revenue Service, and suggested that Bill wait several months until an Internal Revenue Service opinion letter would be obtained.[148] Bill felt that speed was more important than waiting for the Internal Revenue Service to approve the plan, and Murdoch, despite any misgivings he may have had, agreed and, critically, gave the following advice to Bill in January 1972:

> I recognize . . . that there may be some adverse income tax results flowing from various methods of taking cash out of Gore company and/or the holding company in order to pay death taxes. It seems to me to be futile at this point to adopt one plan as <u>the</u> plan which will be followed. . . .
>
> One thing of which I am sure is that failure to do anything towards moving Gore common stock out of your estate means sitting

[146] *See* JX 61, JX 62.
[147] JX 62 (emphasis added).
[148] JX 63.

> by and watching your estate tax problems become greater and greater.[149]

Thus, as of the first quarter of 1972, Bill understood from his lawyer that (1) there were multiple courses of action available to him, no one of which had to be adopted to the exclusion of others; and (2) failure to act quickly was the worst option.

Over the next months, the Gores did move quickly to incorporate Pokeberry. The Internal Revenue Service had not issued, by the second quarter of 1972, an opinion letter blessing the plan to create a trust that would transfer Gore stock to their grandchildren in a manner that would equalize what each grandchild would be expected to receive when accounting for stock received both from the trust and from his or her parents; nor had Bill or Murdoch yet developed language that would accomplish the Gores' goals as Bill had stated them in the fall of 1971 and as Bill and Vieve had re-emphasized them in an April 3, 1972 memorandum to Murdoch.[150] On the other hand, Bill knew that, considering the continued appreciation of Gore stock, if something were to happen to him and Vieve while that stock was still part of their estate, the consequences would have been disastrous from an estate tax perspective.

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[149] JX 65 (emphasis in original).

[150] JX 79, May 8, 1972 Letter from Bill to Jack Fine ("We . . . will know before long what the viewpoint is of the I.R.S. regarding the gift of common stock to the trust for our grandchildren."); JX 71, Apr. 3 Mem. from Bill and Vieve to Murdoch (stating that the each grandchild's interest in a trust should "be such as to equalize the Gore stock 'expectations' at the time of the death of the last of G.W.G. and W.L.G. . . . .").

It was in this context that the Gores signed the May Instrument. They did not sign it under a lawyer's supervision, and they did not employ the same formal procedure they used when signing other irrevocable trusts both before and after this date.[151] Unlike they did for other trusts, they never requested a taxpayer identification number in connection with the May 1972 Trust. Further, the Gores never told anyone about the May 1972 Trust. Although these formalities are not required to create an irrevocable trust, their absence here indicates that the Gores' intentions regarding the May 1972 Trust differed from their intentions regarding the other trusts they created.

The Court concludes the Gores intended for the May 1972 Trust to serve as a placeholder that would provide their estate some protection from taxes in case something happened to them before they could draft a trust instrument that more accurately reflected their intentions and that they were satisfied would be acceptable in the eyes of the Internal Revenue Service.[152] In other words, although the Gores intended to create a trust by signing the May Instrument, they

[151] *See*, *e.g.*, JX 24, Genevieve Walton Gore Trust for Sharon Beth Gore, dated Sept. 1, 1970; JX 96, Genevieve Walton Gore Trust for Romy Chen Gore, dated Dec. 16, 1974 (both bearing blue backers).

[152] The Objecting Grandchildren and the Co-Trustees argue that signing the May Instrument did not create a trust because the treatment of the Gores' estate under that document would compare unfavorably to the treatment under the October Instrument. The Gores understood that the trust they created in May 1972 would not accomplish all their goals; they apparently believed that having something in place while they worked out the remaining details was preferable to "sitting by and watching [their] estate tax problems become greater and greater." JX 65.

also intended—in spite of the words indicating that the trust created was "not revocable"—to reserve the power to revoke the May 1972 Trust.

This conclusion is supported, in part, by the Gores' decision not to reveal the existence of the May 1972 Trust to anyone: although notification to beneficiaries is not required to create a trust, "the failure of the property owner to notify anyone of the declaration . . . may be some evidence that although a trust is created the declarant reserves a power to revoke it."[153]

The Gores' actions in the days and months after they signed the May Instrument also demonstrate their intention to reserve a right to revoke the May 1972 Trust.[154] On May 9, the very day after the Gores signed the May Instrument, Bill wrote to Murdoch that he wanted to "break this trust into individual trusts for each grandchild . . . ," and proposing to incorporate into the trust what would eventually become the Pokeberry Formula.[155] He also clarified that "[u]ntil termination the grandchildren would share equally in the income [from the trust]

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[153] Restatement (Third) of Trusts § 14 (2003).

[154] *Id.* at § 13 cmt. b (Relevant evidence of intent includes "[a]cts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust.").

[155] JX 80, the May 9 Letter. Although Bill referred to what must be assumed as the May Instrument in his May 9, 1972 letter to Murdoch, the Court finds no evidence in the record that Murdoch ever learned, and thus concealed, that the document had been executed. *See* JX 80. That the Gores never revealed the existence of the May 1972 Trust either to their family or to Murdoch does not, for example, amount to a finding that the Gores committed tax fraud or that they had been lying for thirty or forty years by holding out the October Instrument as the document that governed the Pokeberry Trust because the Gores never intended that the May 1972 Trust would be irrevocable.

(as now drafted)."[156] The Gores discussed the language of the Pokeberry Formula during the course of the next months,[157] believing that they were at least partially protected from the danger of delay of which Murdoch had warned Bill in his letter of January 2, 1972.[158]

The letter Bill wrote on May 9 does not indicate, as the Otto Grandchildren and Susan contend, that the Gores had created an irrevocable trust on May 8 and simply changed their minds on the next day. This situation is not akin to those described in the cases invoked by Susan and the Otto Grandchildren, in which years passed between the signing of an irrevocable trust and the signing of a purportedly superseding trust.[159] Instead, the events leading up to, and subsequent to, the execution of the May Instrument indicate that the Gores maintained a consistent view that their assets should be distributed to their grandchildren according to a formula that would account for stock that the grandchildren would be presumed to receive from their parents, as well as what they would receive from the trust and from all other sources.

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[156] *Id.*
[157] *See, e.g.*, JX 83, Aug 13, 1972 Letter from Murdoch to Bill.
[158] *See* JX 65.
[159] *See Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950) (upholding the transfer of stock to an irrevocable trust that was created in 1941 and voiding a trust purportedly funded with the same stock in 1946); *Mortimer v. Mortimer*, 285 N.E.2d 542 (Ill. App. 1972) (holding that a trust agreement signed six years after an irrevocable trust was created could not amend the original trust's terms).

The Gores intended to use the May 1972 Trust as a mere placeholder that would give the Gores' estate some protection from estate taxes until a document that would better accomplish their goals could be drafted and executed; they intended to retain the right to revoke the trust. The language of the May Instrument does not reflect that intent.[160] Because the grantors' intent is central to the Court's analysis, the Court's concludes that, despite the language of the May Instrument itself, the May 1972 Trust was revocable. The Gores revoked that trust by executing the October Instrument and funding the Pokeberry Trust with the 1,000 shares of Pokeberry that they had previously used to fund the May 1972 Trust.[161] Thus, the Pokeberry Trust is governed by the October Instrument (hereafter, the "Pokeberry Trust Instrument").[162]

B. *Whether the Pokeberry Trust and the Pokeberry Formula Accurately Express the Gores' Intent*

With the conclusion that the Gores revoked the May 1972 Trust by executing the Pokeberry Trust Instrument, which they believed better reflected

[160] The Court acknowledges that the Gores understood, at least as of the summer of 1972, the meaning of "irrevocable" as that term applies to trusts. *See* JX 84, Aug. 22, 1972 Letter from Bill to Murdoch. Nonetheless, the Gores' conduct surrounding the signing of the May Instrument convinces the Court that they intended to retain the right to revoke the May 1972 Trust.

[161] Because the May 1972 Trust was revocable, the gift to that trust was never completed, and the shares were available to the Gores to fund the later trust.

[162] As a result of reaching this conclusion, the Court need not address the Co-Trustees' and the Objecting Grandchildren's argument that the May Instrument should be reformed.

their intentions, the Court now turns to the question of whether, as drafted, the Pokeberry Trust Instrument accurately reflects those intentions.

The parties' chief point of contention regarding the Pokeberry Trust is whether distribution of its corpus according to the Pokeberry Formula would be consistent with the Gores' intentions. All concerned agree that, if applied according to the text of the Pokeberry Trust Instrument, the Pokeberry Formula would result in each of the Otto Grandchildren receiving a much smaller proportion of the Pokeberry Trust corpus than any of the Gores' other grandchildren. This is because, as shown by the examples included in both the Pokeberry Trust Instrument itself and in an August 10, 1972 letter Bill wrote to Murdoch,[163] the number of shares each grandchild was to receive from the Pokeberry Trust during its secondary term was dependant upon the number of siblings he or she had upon the later to occur of Bill or Vieve's death.

Thus, considering, for now, only the nineteen natural-born grandchildren, the Pokeberry Formula dictates that each grandchild has an expectation of receiving a total of 1,394.737 (26,500 ÷ 19) shares of Gore stock. Each of the Objecting Grandchildren, who are members of sibling groups of four, would be conclusively presumed to receive 975 shares from his or her parents and 419.737 (1,394.737-975) shares from the Pokeberry Trust. Each of the Otto Grandchildren,

[163] JX 81, the August 10 Letter; JX 90, Pokeberry Trust Instrument at ES102000078.

as members of a sibling group of three, would be conclusively presumed to receive 1,300 shares from Susan and 94.737 shares from the Pokeberry Trust. Here, the math works: the total to be distributed from the Pokeberry Trust under this scenario equals the 7,000 shares held by the Pokeberry Trust: (419.737*16)+(94.737*3)=7,000.

The Pokeberry Formula also works if Jan C. is considered to be the twentieth Gore grandchild. Under that scenario, each grandchild would have an expectation of 1,325 shares of Gore stock, and be presumed to receive 975 shares from his or her parent: (1,325-975)*20 = 7,000.

The Otto Grandchildren and Susan, however, contend that the Pokeberry Formula should be disregarded because (1) it fails to accomplish the Gores' goal of making "each of Bill and Vieve's grandchildren equal with each of their other grandchildren in the beneficial interests in WLGA stock deriving from Bill and Vieve";[164] (2) the Pokeberry Formula does not create a "conclusive presumption" (as that term is legally defined) that the Gores' children would actually give all their Gore stock to their children; (3) it attempts to restrain the Gores' children's alienation of their own Gore stock; and (4) the Pokeberry Formula would distribute more shares of Gore stock than were actually held by the trust under certain counterfactual scenarios.

[164] Opening Post-Tr. Br. of Pet. Susan W. Gore and Resp. Nathan C. Otto, Joel C. Otto and Jan P. Otto at 25.

Largely because of Susan's need to support her family, generosity, unfortunate investment decisions, difficulties she experienced as a result of her involvement with the Transcendental Meditation movement, and other factors, the majority of Susan's 3,900 shares of Gore stock will not be available for her to pass on to her children.

The large difference between the Otto Grandchildren's "expectations" in Gore stock (as defined by the Pokeberry Formula) and what it would actually be possible for them to receive from Susan is the source of the Otto Grandchildren's and Susan's perception that the Pokeberry Formula is unfair. If Susan were in a position to give to her sons (in equal proportions) all 3,900 shares of stock she had received from her parents, and all of Susan's siblings were in positions to give all the shares they had received from their parents to the Objecting Grandchildren, each of the nineteen grandchildren would end up with precisely the same number of shares of Gore stock. Only the fact that each of the Gores' children disposed of a portion of their Gore stock in ways other than giving it to their respective children in equal shares accounts for the difference between the grandchildren's "expectations" under the Pokeberry Formula and the total amount of Gore stock they will actually receive from their parents and the Pokeberry Trust.

That the Gores' Grandchildren's "expectations," as defined in the Pokeberry Trust Instrument, may diverge from what they may receive from their parents in

reality does not necessarily indicate that applying the Pokeberry Formula would frustrate the Gores' intent, however. Indeed, the record indicates that the Gores recognized that there would be a divergence, and that they intended to distribute stock from the Pokeberry Trust based on the "expectations" of the Pokeberry Formula, and not on the actual gifts from their children to their grandchildren, despite this divergence.

The Pokeberry Trust Instrument provides:

> We *emphasize* that for purposes of the division into shares there will be a conclusive presumption that each grandchild will share with his siblings 3,900 units of assets derived from us *even though in fact this is not so*.[165]

The communications between Bill and Murdoch in August of 1972 further illustrate the Gores' awareness of the issue and their intent to use the Pokeberry Formula despite it. On August 21, 1972, for example, Murdoch warned Bill when discussing a draft of the Pokeberry Formula:

> [Y]ou are assuming that each of your children will continue to hold Gore stock and will distribute it eventually in equal shares to each of their children. I realize that this is your hope, but, to be realistic, you should recognize that that in the next twenty years many things can happen to your children and their children. Property settlements with former spouses, judgments held by various creditors and myriad other developments which neither you nor I can even imagine at this point can arise to completely thwart your plan.[166]

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[165] Pokeberry Trust Instrument at ES102000078 (emphasis added).
[166] JX 83, August 21, 1972 Letter from Murdoch to Bill.

Bill's response was on point:

> We appreciate that we can not expect to preserve gore stock intact through two or three generations. . . . Our objective is to do our best now to equalize the expectations of our grandchildren for assets derived from Gore stock.
>
> My understanding is that we can legally set up a method of distributing assets from our trust among our grandchildren, that we cannot change this method in the future, that we can not enjoy any benefits from the trust ourselves, including the restriction that we cannot legally enforce the retention of Gore stock or Pokeberry Hill stock in order to retain voting control of Gore Associates by us or any member of our family.[167]

Thus, the Gores understood that equality of "expectations" in Gore stock would not necessarily result in equal ownership of Gore stock by their grandchildren. They understood that their children might sell some of their stock or otherwise not give it to their grandchildren. Far from causing the Gores to change the Pokeberry Formula to avoid this result, they instead "emphasize[d]" that the formula, including its conclusive presumption[168] that each sibling in a sibling group would receive an equal share of his or her parent's 3,900 shares should be applied, "even though in fact this is not so."[169] The Gores' intentions in this regard are clear.

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[167] JX 84, Aug. 22, 1972 Letter from Bill to Murdoch (emphasis in original).

[168] The Otto Grandchildren and Susan attack the conclusive presumption itself on the basis that there was no reason for the Gores to believe that their children would pass on all of their 3,900 shares, in equal portions, to the grandchildren. The conclusive presumption is actually one rational response to that uncertainty: it allowed the Gores to consider the gifts to their children when deciding on the method by which the principal of the Pokeberry Trust would be distributed even though they were unable to divine exactly what would happen to each child's 3,900 shares over the next twenty years.

[169] Pokeberry Trust Instrument at ES102000078.

Susan and the Otto Grandchildren argue, however, that even if the Gores intended to employ the Pokeberry Formula, it should be rejected as an attempted restraint on the alienation of the Gores' children's stock, in that any distribution of the 3,900 shares other than to the grandchildren would result in a "penalty": their own "children would end up with beneficial interests in fewer shares of WLGA stock deriving from Bill and Vieve than would the grandchildren whose parent or parents chose to comply" with the presumption.[170] The Pokeberry Formula, however, did not seek to restrict the Gores' children's ability to sell or give away their Gore stock; the record demonstrates that all of the Gore children felt free to alienate their Gore stock in a variety of ways,[171] and the Gores understood that their children were free to do so if they wished.[172] That the Gores chose to direct that the principal of the Pokeberry Trust be distributed based on a presumption that they would not do so does not amount to a restraint on alienation. The Pokeberry Formula specifies only the amount of stock that would pass from it directly to the grandchildren. The Gore Children were free to decide what to do with their own wealth, and, if their decisions affected the relative wealth of each of the Gore grandchildren, that was their prerogative.

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[170] Opening Post-Tr. Br. of Pet. Susan W. Gore and Resp. Nathan C. Otto, Joel C. Otto and Jan P. Otto at 30-31.

[171] *See, e.g.*, JX 175, Oct. 14 Mem. (noting the various reasons why each Gores' children had sold some of their Gore stock).

[172] JX 84, Aug. 22, 1972 Letter from Bill to Murdoch ("My understanding is that . . . we cannot legally enforce the retention of Gore stock . . . .").

Finally, Susan and the Otto Grandchildren attack the Pokeberry Formula as "flawed on its face" because under certain scenarios that did not come to pass, it would call for the distribution of more stock than was actually held in the trust. For example, in the "Hypothetical Example" included in the Pokeberry Trust Instrument itself, the Pokeberry Formula calls for the distribution of 9,340.8 units of the trust, even though the trust has only 7,000 units, to seventeen grandchildren in sibling groups of four, three, four, one, and five.[173]

Two factors drive the Court's conclusion that Pokeberry Formula is not fatally flawed and should be applied. First, the Gores acknowledged in the Pokeberry Trust Instrument that the formula was not perfect,[174] and they chose to

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[173] *See* Pokeberry Trust Instrument at ES102000079 *and* n.48, *supra*. The Objecting Grandchildren's and the Co-Trustees' expert, Robert Sitkoff, explained his belief that this error did not amount to a fundamental flaw in the formula. Trial Tr. (Sitkoff) 377-87. He explained that the standard practice for charging one generation with gifts to the previous generation was called "hotchpot" and that the Pokeberry Formula prescribes a calculation that was very close to a standard hotchpot calculation. The only step missing from the Pokeberry Formula was removing those who had received or could be expected to receive as an advancement more than they would be allotted under the hotchpot. *Id.* at 383-84. If this step were used in the Pokeberry Formula, Sitkoff explained, the calculation would work under every scenario.

It is helpful to understand how what the Gores were attempting to accomplish would be accomplished under general estate planning practices. Additionally, that a standard technique had been developed to charge a later generation with the gifts made to the previous generation shows that the Gores' goals in this regard were in no way irrational or outside the mainstream.

Nonetheless, there is no evidence in the record that the Gores were aware of the standard hotchpot method, and, therefore, the Court cannot reform the formula to reflect standard technique. Because the Pokeberry Formula works without modification given number of grandchildren living when Vieve died, however, the Court need not reach the issue of what should have been done in the case that the formula did not work.

[174] Pokeberry Trust Instrument at ES102000079 ("It is understood by us that the possibility exists that even with zero 'units' from the trust, the expectations for a grandchild [from his or her parent's 3900 shares] may exceed the figure of 26,500 divided by the total number of

proceed using the formula anyway. Although the Gores apparently did not identify the precise error that marked the "Hypothetical Case," the Gores were satisfied with the language as they had written it, even knowing that their attorney objected,[175] and they intended that the Pokeberry Formula be used to allocate distributions from the trust despite imperfections in the formula.

Second, when applied to the facts as they existed at the time of Vieve's death, and indeed, as they had existed for many years before that time, the Pokeberry Formula worked as the Gores intended. With either nineteen or twenty grandchildren in the sibling groups as they exist, the Pokeberry Formula equalizes the grandchildren's expectations in Gore stock without purporting to distribute more than 7,000 units of the trust. Any difference between a specific grandchild's "expectations" in Gore stock and what they actually receive from the Pokeberry Trust and from their parents is due to the decisions of the grandchild's parents, not those of the Gores. That certain of the Gores' children sold more of their Gore stock than the others did is not the Gores' fault, and the Gores were free to create a distribution scheme for the Pokeberry Trust that would not erase the consequences of a child's decisions regarding his or her 3,900 shares.

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grandchildren, and therefore it may not be possible to exactly equalize among the grandchildren.").

[175] JX 82, Aug. 11, 1972 Letter from Vieve to Ginger.

In sum, the Gores' intention to account for the gifts they had given their children when directing gifts to their grandchildren was both rational and well-considered. The Gores viewed the Pokeberry Formula, imperfect though they knew it to be, as the best way to give effect to their intentions, and, under the facts as they existed at the time of Vieve's death, the Pokeberry Formula works exactly as they intended. Therefore, the Court holds that the Pokeberry Formula is enforceable and should be used to determine distributions of the principal from the Pokeberry Trust.

C. *Whether Jan C. is a grandchild of Bill and Vieve for purposes of the Pokeberry Trust*

Because allocation of the Pokeberry Trust's assets depends on (1) the number living grandchildren the Gores had at the time of Vieve's death and (2) how many siblings each grandchild has, the Court must determine whether Jan C., who was adopted by Susan in 2004, qualifies as a grandchild of Bill and Vieve and a sibling of the Otto Grandchildren for purposes of the Pokeberry Trust. Although the question whether Jan C. was validly adopted is one of Wyoming law, the Pokeberry Trust Instrument, which was executed in Delaware by two Delaware residents, is interpreted under Delaware law.[176]

[176] The Objecting Grandchildren and the Co-Trustees attack both the legality of the adoption itself, by arguing that it was obtained by a fraud on the Wyoming court that decreed the adoption, and the adoption's collateral consequence, by arguing that to hold that the adoption made Jan C. a grandchild of the Gores under the Pokeberry Trust would frustrate the Gores' intent.

The Pokeberry Trust Instrument does not define the term "grandchild," but it defines a "child" of any person as the "child, children, or issue of that person by adoption as well as by blood."[177] Nonetheless, there is a question as to whether a person who has been adopted as an adult, for purely strategic reasons and in the absence of any intent to create or foster a parent-child or other emotional relationship, should be recognized as the Gores' grandchild under that definition.

As Susan and the Otto Grandchildren note, the chief Delaware authority regarding strategic adult adoptions is *In re Adoption of Swanson*, where an adult adopted another adult who had been his companion for seventeen years in order to accomplish two purposes: "to formalize the close emotional relationship that had existed between them for many years and to facilitate their estate planning."[178] Acknowledging that no previously existing parent-child relationship had existed between the two, and that no such relationship was intended to be formed, the Supreme Court nonetheless recognized the adoption. In reaching its conclusion, the Court reviewed a number of cases from within and without Delaware concerning "adoptions for the purpose of improving the adoptee's inheritance

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The Court's role here is not to pass judgment on the legality of the adoption or to delineate the scope of any legal rights and obligations that Susan and Jan C. may have vis-à-vis each other as a result of the adoption. Thus, the Court does not directly address the fraud-on-the-court argument. As will be seen below, Susan's and Jan C.'s motivations and the rights and obligations they did or did not *intend* to create vis-à-vis each other are relevant to the equitable question of whether the Court should recognize the adoption as having any effect on the distribution of the Pokeberry Trust's assets.

[177] Pokeberry Trust Instrument at ES102000077.

[178] *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993).

rights,"[179] and observed that "[i]n this case, our construction of the statute—permitting the adoption of one adult by another for economic reasons—is consistent with a policy promoting limited judicial inquiry into the purposes or motives behind such a relationship."[180]

The Supreme Court cautioned, however, that "[t]here are, of course, common sense limitations on any adult adoption," and recognized that adoptions for fraudulent, frivolous, or illegal purposes, or for purposes that are against Delaware's public policy would not be recognized.[181] Further, the text and purpose of the adoption statute remain central because, as the Supreme Court observed:

> A statute cannot be construed to produce an absurd, meaningless or patently inane result. However, where, as here, the petition contemplates an adoption that is not only within the scope of the statute, but which is also widely recognized as a proper exercise of the authority granted by the statute, we can divine no reason why this petition should be denied. [182]

Swanson dealt with the validity of an adoption, per se, rather than with the more limited question of whether the Court should recognize the collateral economic effects of an adult adoption on the implementation of a third party's estate plans. Guidance on the latter question may be found in *Wilmington Trust Co. v. Chichester*, in which the Court determined that two individuals who had

[179] *Id.* at 1097-98.
[180] *Id.* at 1099.
[181] *Id.*
[182] *Id.*

been adopted as adults by their stepfather thereby gained the right to inherit under their stepfather's sister's will and to benefit under two trusts that had been created by her.[183] No evidence was admissible in *Chichester* on the question of whether the testatrix had intended that the stepsons would benefit (as "issue" of the testatrix's mother) from the will or the trusts.[184] Thus, the Court was guided by the definition of "issue" in 12 *Del. C.* § 508 and held that "an adopted person is included [in the definition of 'issue'] without distinction as to whether the person was adopted as an adult or as a minor."[185] The Court recognized "the fear . . . that to permit adopted adults to share as lineal issue to the same extent as adopted minors would open the door for an expectant heir without issue to conspire with another adult so as to circumvent the intention of the testator or the deceased trustor."[186] The Court "conceded that this is a possibility" but, in holding that the adopted sons could take under the will and the trusts, focused on the harm that a per se rule against counting adopted adults as issue would cause by interfering with

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[183] 369 A.2d 701, 703 (Del. Ch. 1976), *aff'd,* 377 A.2d 11 (Del. 1977).
[184] *Id.* at 709.
[185] *Id.* The definition of 'issue' had changed to include adopted persons between the creation of the trusts in *Chichester* and the settlor's death. The Court also noted that, under *Wilmington Trust Co. v. Haskell*, Del.Ch., 282 A.2d 636 (1971), *aff'd*, 304 A.2d 53 (Del. 1973), "the testator or trustor is presumed, in the absence of any contrary context contained within the will or trust instrument, to have intended that the statutes in effect at the time the gift becomes operative be resorted to in order to determine membership in the class." *Id.* at 707.

Although the rule of *Haskell* has been overturned by statute, it still applies to trusts, such as the Pokeberry Trust, that became irrevocable before August 1, 1984. *See Annan v. Wilm. Trust Co.*, 559 A.2d 1289, 1292 n.2 (Del. 1989) (noting that *Haskell* was overturned by enactment of 12 *Del C.* § 213).
[186] *Id.* at 709.

the legitimate ability of stepparents to designate their stepchildren as their heirs.[187] That is, although it approved and enforced the economic effects of the particular adoption it considered, the *Chichester* court recognized the possibility that a line might some day be crossed.

The feared "possibility" identified by the Court in *Chichester* becomes a reality with Susan's adoption of Jan C. The adoption that the Court is asked to recognize as affecting the distribution of the Pokeberry Trust was undertaken for the purpose of thwarting the Gores' intentions regarding that trust and was therefore inconsistent with the purposes for which Delaware courts have previously condoned strategic adoptions as having their desired consequences.

Thus, unlike the man who adopted his longtime companion in *Swanson* and the stepfather who adopted individuals he had raised during their minority in *Chichester*, Susan did not want to adopt Jan C. in order to formalize an existing emotional relationship with him. Before the adoption, Susan had had no relationship with Jan C. since their 1981 divorce,[188] and the adoption was not intended to create any such relationship between the two.[189] The adoption was not

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[187] *Id.*

[188] Trial Tr. (Susan) 38 (explaining that she and Jan C. had no relationship in the two decades between their divorce and the adoption).

[189] *Id.* at 194 (acknowledging that she had testified truthfully at her deposition as follows:

> Q. . . . what you did was you made him a son, correct?
> A. No. Not in the traditional sense, no. This is a technical matter.
> Q. So --
> A. I never felt Jan Otto was my son.).

intended to affect Jan C.'s inheritance rights vis-à-vis Susan at all,[190] and that he would not retain a personal interest in the Pokeberry Trust was a condition of Susan's willingness to move forward with the adoption.[191] The adoption was not intended to give Susan any legal power over Jan C.[192] Susan did not even consider the adoption irrevocable.[193] Instead, Susan considered the adoption to be "purely a device to even out Pokeberry."[194]

In short, although the purpose and effect of a Delaware adoption are to ensure that:

> all the duties, rights, privileges and obligations recognized by law between parent and child shall exist between the petitioner or petitioners and the person or persons adopted, as fully and to all intents and purposes as if such person or persons were the lawful and natural offspring or issue of the petitioner or petitioners,[195]

and those of a Wyoming adoption are to ensure that "adopting persons shall have all of the rights and obligations respecting the child as if they were natural

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[190] JX 203, Apr. 21, 2003 Email from Jan C. to Susan at NCO000346 ("I want to emphasize again that I am not expecting any financial benefit as a result of the adoption.").

[191] JX 200, Apr. 19, 2003 Email from Susan to Jan C., et al. ("[W]e would have to frame our agreement so that inheritance of principal any huge dividends . . . would go to the cousins and their heirs.

[192] JX 195, Apr. 9, 2003 Email from Nathan to Jan C.

[193] JX 246, Feb. 6, 2005 Br. of Susan W. Gore, Thoughts on Pokeberry Distribution (questioning whether she should "unadopt" Jan C.).

[194] Trial Tr. (Susan) 128 (Q. "This was purely a device to even out Pokeberry, correct?" A. "Yes").

Similarly, the Court does not consider here the validity of the adoption per se; instead the Court considers only whether the adoption is effective to make Jan C. a grandchild of the Gores for purposes of the Pokeberry Trust.

[195] 13 *Del. C.* § 954.

parents,"[196] the only intent supporting Jan C.'s adoption was to affect the rights and obligations of persons *other* than the adoptor and the adoptee.[197]

Indeed, this adoption was pursued for the sole, and improper, purpose of thwarting or circumventing the Gores' intentions regarding the Pokeberry Trust. As discussed, the Gores intended that the corpus of the Pokeberry Trust be distributed to their grandchildren according to the Pokeberry Formula, which would equalize the expectations of the grandchildren when taking into account both the shares of Pokeberry and the 3,900 shares the Gores had given to their children. Susan and Nathan approached Vieve at her March 23 ninetieth birthday party, and Nathan passionately attempted to convince Vieve to amend the formula so that distributions from Pokeberry would be equalized without regard to the gifts the Gores' children had received. Nathan "got a firm 'no.'"[198]

That he, his brothers, and Susan put the adoption of Jan C. into motion just two weeks[199] after hearing this expression of Vieve's determination not to change the Pokeberry Formula indicates that the adoption was being pursued in a specific

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[196] Wyo. Stat. § 1-22-114

[197] Again, the Court does not speak to whether the legal, but entirely incidental, effect of the adoption was to confer any of these rights upon Jan C. Instead, the Court considers that Susan, and (initially) Jan C. actively sought to avoid any of the intended effects of the adoption vis-à-vis each other.

[198] JX 204, April 28, 2003 Mem. from Nathan to Susan, Jan C., Jan Peter and Joel.

[199] JX 193, Apr. 8, 2003 Email from Nathan to Jan C. ("Susan was fairly warm to the idea of adopting you into Pokeberry."). *See also* JX 198, Apr. 18, 2003 Email from Nathan to Jan C. ("Sooner is better. Like today.").

attempt to thwart the Gores' intentions regarding the distribution of the Pokeberry Trust.

Further evidence of improper purpose is found in the concealment of the adoption by Susan, Jan C., and the Otto Grandchildren from Vieve and the rest of the extended family until February 2005, the month after Vieve died.[200] Although Susan and her sons testified that they did not reveal the adoption publicly because they did not want family discord to upset Vieve,[201] this reasoning provides no excuse for not telling Vieve, or someone else (perhaps such as David, who had previously expressed openness toward the idea of an adoption),[202] about the adoption in private.[203] According to Susan and the Otto Grandchildren, Vieve

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[200] *See* JX 247, Feb. 16, 2005 Letter from Robert to Susan.

[201] Trial Tr. (Nathan) 274 ("What I wanted to protect her from was the dissent within the family that she would have had to deal with if the adoption had been revealed."); *id.* (Jan Peter) at 321 (testifying that, although he wanted to reveal the adoption, his brothers "persuaded me to preserve Vieve's health by avoiding contention when she was frail and not well.").

[202] *See* JX 173, Sept. 4, 2002 Email from David to Susan.

[203] Susan and the Otto Grandchildren contend that all of the nineteen cousins were aware that adoption was an option as early as June 21, 2003, and yet no one told Vieve about that possibility. This, of course, ignores the fact that Susan and the Otto Grandchildren did not merely decline to inform the Objecting Grandchildren that they were pursuing an adoption; they affirmatively represented that adoption would not be considered in the face of the Objecting Grandchildren's opposition. *See* Trial Tr. (Nathan) 259. There is a difference between deciding not to tell Vieve about the possibility of an adoption when there has been an assurance that it will not occur and deciding to conceal an adoption for two years after it has occurred.

The Co-Trustees and the Objecting Grandchildren assert that adopting Jan C. despite such assertions was a breach of fiduciary duty, and that Susan and the Otto Grandchildren should be barred from relying upon their inaction to justify their own concealment of the adoption from Vieve. Sharon testified that, had she known of the adoption before Vieve had died, she would have taken action, including seeking legal advice regarding how to respond, and this assertion is credible given the cousin's reaction at the June 21, 2002 family meeting to the idea that Susan might adopt. *See id.* (Sharon) at 623. Further, Jan C. recognized, and discussed with Nathan, the likelihood that revealing his adoption might set off an "adoption war." *See* JX 223, July 15,

privately expressed approval about the idea of adoption during the spring of 2003, but Susan, Nathan, and Jan C. were already moving ahead with plans for the adoption in that same time frame.[204] There is no reason to believe that, if Vieve was strong enough to have a conversation in which she seriously suggested the idea adoption in the spring of 2003, she could not have handled the news that Susan was pursuing the plan she herself had suggested unless those pursuing it knew they were doing so in way that would have frustrated and upset her. The inference the Court draws is that Susan and the Otto Grandchildren understood that they were acting in a way that was not compatible with Vieve's intentions.[205]

2003 Notes of Jan C. Otto at jo000000066. Thus, far from vindicating Susan's and the Otto Grandchildren's decision not to tell Vieve about the adoption, the Objecting Grandchildren's and Co-Trustee's inability to reveal it to her could actually lend credence to their unclean hands defense.

[204] JX 193; JX 198.

[205] The Court is also persuaded that Jan C. is outside the class of adopted grandchildren that the Gores intended to benefit through the Pokeberry Trust. Although the Pokeberry Trust clearly provides that adopted children or issue of the Gores' children are beneficiaries under the Trust (Pokeberry Trust at ES102000077), the record suggests that they did not intend to provide for adult adoptees with whom their children had no parent-child relationship, or, indeed, any relationship whatsoever.

The Gores did not decide on how to treat adopted grandchildren until late in the process of drafting the Pokeberry Trust. For example, until October 9, 1972, the drafts of the October Instrument indicated:

> For purposes of this trust instrument, "our grandchildren" shall not include any persons who are adopted children of our children if such adopted children are the natural children of a spouse of one of our children. . . . However, if a child of ours adopts a child which is not otherwise related to either our child or his spouse, such adopted child shall be treated as a grandchild of ours.

See JX 87, Draft of October Instrument, attached to October 12, 1972 Letter from Murdoch to Bill and Vieve, at ES102000030.

That provision was eliminated in accordance with the Gores' instructions in the postscript to an October 9, 1972 letter from Bill to Murdoch: "We have changed our minds about adopted grandkids and have therefore deleted that paragraph." JX 86. This evidence suggests that the

In sum, the adoption of Jan C. was undertaken for purposes not "widely recognized as a proper exercise of the authority granted by the statute,"[206] in that it was never intended to affect the rights of the adoptor or the adoptee or, more particularly in this instance, the rights of the adoptor and the adoptee vis-à-vis each other. Where the adoption was not intended to have any of the effects contemplated by statute, the Court will not, in equity, recognize collateral economic consequences of the adoption vis-à-vis the Gores' estate plan, especially where the effort was aimed at circumventing the Gores' clear intentions. Rewarding this manipulation of the law by giving Jan C. the status of a grandchild under the Pokeberry Trust would be inconsistent with the "seminal rule of construction in Delaware trusts and wills cases: that the intent of the settlor or the

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when the Gores considered whether to provide for adopted grandchildren, the Gores were not contemplating that one of their children might adopt, at age sixty or older, an adult, but instead, that they might adopt a "child" or a "grandkid" into a typical parent-child relationship.

This conclusion is also supported by Bill and Vieve's memorandum of April 3, 1972 to Murdoch that restated their goals for the Pokeberry Trust: the Gores set forth their intention that the class of beneficiaries of the trust would close "at the time of the death of the last of G.W.G. and W.L.G or at the time our daughter Betty reaches 45 years of age (or May 2, 1992) whichever occurs last – note: *so that all our Grandkids are born*." JX 71, Apr. 3, 1972 Mem. from Bill and Vieve to Murdoch (emphasis added). Thus, in 1972, Bill and Vieve believed that by the time the youngest of their children turned forty-five in 1992, all of their grandchildren would be known. That belief suggests that they would not have considered the adoption by one of their children at age sixty or older of an adult person to create another "Grandkid." Instead, this letter suggests that when the Gore's considered their potential "grandchildren" in 1972, they were thinking of individuals who, while they were minors, were part of parent-child relationships with their natural or adoptive parents.

Because Jan C. was neither a minor nor in any sort of emotional relationship with Susan when he was adopted, he did not come within the class of individuals whom the Gores intended to benefit through the Pokeberry Trust when they created it.

[206] *Swanson*, 623 A.2d at 1099. Here, the Court is satisfied that the widely recognized purposes of the Delaware and Wyoming adoption statutes are substantially the same.

testator is central to interpretation of the given instrument and that such 'intent must be determined 'by considering the language of the trust instrument, read as an entirety, in light of the circumstances surrounding its creation.'"[207]

Instead, the Court holds that the Gores' nineteen natural-born grandchildren are the Gores' only grandchildren for purposes of the Pokeberry Trust.[208]

D. *Jan C.'s Claims for Specific Performance and Unjust Enrichment*

Jan C. asserts claims for unjust enrichment and for specific performance of a contract under which he says that Susan and the Otto Grandchildren agreed that Jan C. "would share in the beneficial results brought about by virtue of his agreeing to be adopted, and that they would pay for any and all expenses that he may incur as a result of his so agreeing,"[209] and also that they would provide him a comfortable retirement.

Jan C.'s unjust enrichment claim is based on the argument that, if the Otto Grandchildren personally benefitted from the adoption of Jan C., then Jan C. should share in those benefits. Because the Court has held that Jan C. is not a Gore grandchild for purposes of the Pokeberry Trust, there are no such benefits in which

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[207] *In re Barker Trust Agmt.*, 2007 WL 1800645, at *10 (Del. Ch. June 13, 2007) (analyzing the Court's discussion in *Chichester* and quoting *Annan*, 559 A.2d at 1292).

[208] Because the Court finds for the Co-Trustees and the Objecting Grandchildren on these grounds, it need not resolve whether the equitable defenses of unclean hands, laches, or waiver bar Susan's and the Otto Grandchildren's claims.

[209] Am. Answer of Jan C. Otto ¶ 34.

to share. Accordingly, the Court finds for Susan and the Otto Grandchildren with respect to this claim.

Similarly, the Court must rule against Jan C. to whatever extent he seeks specific performance of a contract allowing him to retain the share of the Pokeberry Trust that would have come to him had the Court determined him to be of the of the Gores' grandchildren for purposes of the Trust. What remains, then, is Jan C.'s claim that an agreement existed under which he was entitled him to "a comfortable retirement" supported by Susan and his sons and repayment of all his expenses, including attorneys fees, arising out of his agreements to be adopted and to participate in the "Otto Exit Plan."

Jan C. contends that such an agreement exists separately from an understanding for which Jan C. has already received relief from the Court:

> The understanding [among Susan, the Otto Grandchildren, and Jan C.] was that Jan C. would not bear any costs associated with cooperating with the adoption and reallocating the Trust's income and principal in accordance with his commitment. Application of the equitable principle of unclean hands should leave him no worse off. Thus, Jan C. is entitled to reimbursement of taxes and expenses that were or will be reasonably incurred in carrying out his commitment. This would, of course, not include those expenses incurred in trying to profit from his inequitable conduct.[210]

The genesis of Jan C.'s claim that, in addition to his fees and expenses related to his adoption by Susan, he is entitled to funds that would allow him to

[210] *Sept. Op.*, 2010 WL 3565489, at *6 n.74 (citations omitted).

enjoy a comfortable retirement[211] is found in certain pre-adoption communications among Jan C., his sons, and Susan. For example, Jan C. points to a memorandum in which Nathan represented to Jan C. that he would "personally like to see [Jan C.] enjoy the income from the trust" or, in the alternative, that Nathan and his brothers would "arrange for [Jan C.] a comfortable retirement.[212] He notes that Susan wrote to him on April 19, 2003, to indicate that Jan C. would receive a "nice, but not substantial benefit" as a result of agreeing to be adopted, and that she would like to see Jan C. in a comfortable retirement.[213]

Conveniently, however, Jan C. neglects to note that, in some cases, these offers were conditioned upon the adoption's success in creating more income for the Otto Grandchildren[214] or that, in all cases, they were made before Jan C. wrote, that he "did not expect any financial benefit from Pokeberry should the adoption actually occur . . . . The only thing I ask is that I not incur any out-of-pocket expenses as this proceeds."[215] He also answered Susan's questions regarding the reasons why Jan C. was willing to be adopted by assuring Susan that he would not

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[211] *See* Opening Post-Trial Br. Of Jan C. Otto on the Amended Claims at 27-28.
[212] JX 195, Apr. 9, 2003 Email from Nathan to Jan C.
[213] JX 199, April 19, 2003 Email from Susan to Jan C.
[214] JX 195 ("If you do go through with the adoption, then if Pokeberry gave significant income . . . I'm sure that we could arrange for a comfortable income for you as well.").
[215] JX 201, Apr. 21, 2003 Email from Jan C. to Susan, Nathan, and Joel.

keep any of the principal or income from the Pokeberry Trust, except for amounts necessary to cover taxes or expenses he incurred as a result of the adoption.[216]

Susan accepted these terms[217] and moved forward with the adoption. Her acceptance and Jan C.'s and Susan's mutual performance created an enforceable agreement based upon these terms: Jan C. willingly agreed to participate in the adoption plan without taking any personal benefit from the adoption on the condition that he would not incur any out-of-pocket expenses as a result of his participation. As a result of Jan C.'s representations to Susan that he did not seek any other benefits as a result of his participation and would instead distribute any portion of the Pokeberry Trust he received to the Gores' natural-born grandchildren, he cannot now claim that a right to other personal benefits was contemplated by the original agreement. Further, he is not entitled to the repayment of expenses he incurred after he breached that agreement by pursuing the right to retain a personal interest in the income or principal of the Pokeberry Trust.

The question remains whether, as Jan C. asserts, he, Susan and the Otto Grandchildren later, sometime after Vieve's death in January 2005, formed another agreement entitling him to receive additional benefits from the others. Jan C. has produced very little evidence supporting the existence of such an agreement or

[216] JX 209, May 15, 2003 Mem. from Jan C. to Susan re: Adoptee Status.
[217] JX 213, May 21, 2003 Email from Susan to Jan C.

defining its terms; absent that proof, the Court cannot grant specific performance of the alleged agreement.[218] Certainly no such agreement had been reached by the end of 2004, when Jan C. wrote in his journal:

> My entire focus is to get [the adoption] out in the open, and see whether it is real or not. . . .
>
> If it is valid, then I stand to get immediate income, and ultimately 350 shares of Gore stock at whatever value it has then.
>
> *If it is not valid, then I get nothing – but I have nothing now.*[219]

Jan C.'s best evidence that an agreement was reached after that date is a letter that Nathan wrote to Jan C. on September 12, 2007, and which reads as follows:

> Here is the offer than Jan Peter, Joel and I have put together. Again, sorry for the delay. If I don't hear from you I might send it directly to Hank Stone; from what I have gleaned of your relationship to him, that would be all right.
> Here's the offer:
>
> 1. A non-contingent part that we would do in the short term, say by June of 2008, no matter the outcome of Pokeberry. Our goal is to get you $30,000 per year, with a $1,000 increase each year for inflation. We would accomplish this by the three of us putting capital into a unitrust that pays 4% per year, with a commitment to increase the capital if it runs down, although 4% should be more than sustainable. The corpus would be returnable evenly to your grandchildren upon your death.

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[218] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("[S]pecific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms.").
[219] JX 242, Dec. 30, 2004 Journal entry by Jan C. (emphasis added).

2. A part contingent on Pokeberry "four hurdles" success in the areas of allocation, trustees, taxes and liquidity. We would then increase the capital in your income trust to generate $80k per year, with $2,000 per year increases for inflation.

   We would also pay a $100,000 cash "bonus" upon "four hurdles" resolution with Pokeberry.

We would have some tax issues to work out with the structuring of the unitrust, but are confident that can be addressed.

We hope this offer is taken in good faith, as we offer it in good faith and love, and desire your retirement years to be stress-free and happy.

Love,
Nathan[220]

As the letter makes clear, however, it represents not a reduction to writing of terms upon which Jan C. and his sons had already agreed, but instead, an "offer." "In order to form a valid contract there must be an offer, an acceptance of that offer, and consideration."[221] Even if the Court assumes that the consideration Jan C. contends was provided for this alleged contract is distinct from what Jan C. promised in agreeing to participate in the adoption plan,[222] the record includes no indication that Jan C. ever accepted the offer that his sons made or that there was otherwise a meeting of the minds regarding the parties' respective rights and

[220] Ex. A to Reply Br. of Jan C. Otto on the Amended Claims.
[221] *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc*, 2010 WL 5276991, at *6 (Del. Ch. Dec. 17, 2010).
[222] Jan C. argues that the consideration was his "promised complicity with the Otto Exit Plan which includes: standing strong in the face of litigation, enduring the hassle of trial, time exhausted in this matter, aggravation of litigation, and being publicly scorned while turned into a scapegoat for the Otto family."

obligations under this supposed agreement. Thus, Jan C. has failed to prove the existence of an enforceable agreement between him and his sons, and his claim for specific performance must therefore fail.

Jan C. remains entitled to the relief granted by the September Opinion. The Court notes that Jan C. has already had more than $289,000 in legal expenses paid by Susan and his sons pursuant to their agreement.[223] Jan C. has not proven the existence of any other agreement under which he would be entitled to additional payments from his former wife and sons, and the Court therefore finds for Susan and the Otto Grandchildren on Jan C.'s claims for specific performance.

E. *The 2007 Mediation*

Having resolved the merits of this dispute, the Court, perhaps tardily, turns to the question of whether the mediation proceedings in which the parties engaged in 2007 produced an enforceable settlement agreement. Susan and the Otto Grandchildren note that the document signed at the mediation indicates that "Pokeberry Trust Trustees and the Pokeberry Trust grandchildren beneficiaries agree[d]" to distribute the Pokeberry Trust's assets among the nineteen natural-born grandchildren according to a formula other than the Pokeberry Formula.[224]

[223] Jan Peter Otto Mar. 2, 2011 Dep. 26-27.

[224] JX 269, "Pokeberry Trust: Resolution of Share Allocation Issue," dated Sept. 27, 2007. The Court considers this exhibit only for purposes of determining whether an enforceable settlement agreement was reached.

The document was signed by one representative each of the Otto, David Gore, Robert Gore, Giovale, and Synder grandchildren sibling groups as well as by the mediator, a judge of this Court.[225] The remaining Gore grandchildren did not sign. Furthermore, the Co-Trustees have asserted that many of the contingent beneficiaries of the Pokeberry Trust, namely five great grandchildren who were adults in 2007,[226] were not invited to the mediation and have not agreed to the proposed share allocation.[227] Without evidence that all beneficiaries of the Pokeberry Trust consented to the agreement, an attempt to amend the terms of the trust must be deemed ineffective.[228]

Even if the Court were to assume that all the remaining beneficiaries had authorized the signatories to represent them in the mediation, however, the agreement purports to include the Co-Trustees and Susan as parties to the agreement, and the Co-Trustees have refused to sign it.

In the end, the 2007 mediation failed to produce a settlement agreement that was signed by all the beneficiaries of the Pokeberry Trust or by the Trustees, who were identified as parties to the settlement agreement. The purported agreement is unenforceable under such circumstances.

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[225] *Id.*
[226] Eleven are now adults.
[227] *See* Consol. Opp. of the Co-Trustees to the Mot. to Show Cause and Mem. in Supp. of their Mot. for Summ. J. at 11-13 and n.31.
[228] *See A.B. v. Wilm. Trust Co.*, 191 A.2d 98, 99, 103 (Del. 1963) (rejecting an effort by a settlor to terminate a trust where one contingent beneficiary did not consent).

V. CONCLUSION

As set forth above, the October Instrument governs the Pokeberry Trust: the Pokeberry Formula will be applied to determine how the corpus of the Pokeberry Trust will be distributed among the Gores' nineteen natural-born grandchildren; and Jan C. is neither a grandchild of the Gores for purposes of the Pokeberry Trust nor entitled to any relief other than what he was granted by the September Opinion.

Counsel are requested to confer and to submit an implementing order.