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Case No. 1165-VCN

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

Date Submitted: May 13, 2010
Date Decided: September 1, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

A woman adopted her ex-husband so that he would become a beneficiary of a trust. Her reason for doing so was to alter the trust's distributive scheme for the benefit of their children. Before the adoption, the ex-husband had promised his ex-wife, who is one of the trustees, and their children, who are among the beneficiaries of the trust, that he would not take any beneficial interest in the trust. After the adoption, the ex-husband changed his mind and decided to keep his beneficial interest. The woman has filed a petition for construction to determine whether, as an adopted grandchild of the trust's grantors, the ex-husband is a trust beneficiary and, therefore, the trust's assets are to be allocated differently. The ex-husband answered the petition to claim that he is indeed a beneficiary of the trust.

The woman's siblings, also trustees, joined by several trust beneficiaries, moved for partial summary judgment. The moving parties argued that, even assuming the ex-husband is a grandchild of the grantors, he may not take any economic benefit from the trust because of the equitable doctrines of waiver, unclean hands, and laches. The motion for partial summary judgment was denied, but a trial limited to waiver and unclean hands was held. In this post-trial memorandum opinion, the Court finds that the doctrine of unclean hands bars the ex-husband from claiming any interest in the trust. He owed his ex-wife and children a duty arising out of his confidential relationship with them to redistribute

any interest in the trust in accordance with his commitment to them. He has breached that duty, and given his inequitable conduct, the Court refuses to acknowledge his claim to any personal economic interest in the trust.

II. BACKGROUND

A. *The Parties*

Petitioner is Susan W. Gore ("Susan").[1] Susan is also a co-trustee of the Pokeberry Trust. Her ex-husband and adopted son, Jan C. Otto ("Jan C."), is a respondent. The remaining respondents may be divided into three groups. The first group consists of Susan's siblings, the other co-trustees of the Pokeberry Trust: Robert Gore, Virginia Giovale, David Gore, and Elizabeth Snyder (collectively, the "Co-Trustees"). The second group is comprised of Susan and Jan C.'s biological children: Jan P. Otto ("Jan P."), Joel C. Otto ("Joel"), and Nathan C. Otto ("Nathan") (collectively, the "Otto Grandchildren"). The third group is made up of the sixteen children of the Co-Trustees: 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,

[1] The Court uses first names for purposes of clarity and convenience. It is neither a matter of lack of respect nor yet another instance of faux familiarity.

Emily Chen Gore, Ryan Chen Gore, Bret A. Snyder, Keith A. Snyder, Sean A. Snyder, and Kelly J. Snyder (collectively, the "Objecting Grandchildren").[2]

B. *The Pokeberry Trust*

In 1972, Wilbert L. and Genevieve W. Gore (individually, "Bill" and "Vieve" and, collectively, the "Grantors") established the Pokeberry Trust (the "Trust"), which they funded with shares of Pokeberry Hill Securities, Inc., a holding company that owned common stock of W.L. Gore & Associates, Inc. ("WLGA").[3] Bill and Vieve created the Trust for the benefit of their grandchildren.[4] The life of the Trust was divided into two stages. During the "initial term," the grandchildren would receive equal distributions of the Trust's income.[5] Upon the death of the last surviving grantor—it turned out to be Vieve—the Trust entered a "secondary stage," at which time it would be divided into shares. Each grandchild then living would receive one share of the Trust,[6] and each of these shares would be treated as a separate trust, or "share trust."[7] The

[2] At times, the Otto Grandchildren and Objecting Grandchildren will be referred to, collectively, as the "Nineteen Grandchildren."
[3] Susan and the Co-Trustees are the children of Bill and Vieve.
[4] Trustee Ex. 35 (the trust agreement for the "Trust for Grandchildren of Wilbert L. and Genevieve W. Gore") (the "Trust Agreement").
[5] The Trust Agreement directs that all payments of trust income are to be made in convenient installments, "but not less frequently than quarter-annually." *Id.*
[6] One share also was to go to the account of each deceased grandchild who then had living issue.
[7] "Share trust" is the specific term used in the Trust Agreement. These individual trusts could be considered sub-trusts.

Trust's principal—i.e., shares of Pokeberry Hill Securities—would then be allocated to the individual share trusts.

Pursuant to the formula set forth in the Trust Agreement (the "Pokeberry Formula"), the size of each grandchild's share trust would be predicated upon how many siblings that grandchild had at the time of the latter of Vieve or Bill's deaths—more siblings resulted in a larger share trust. During the secondary stage, all of the income from each individual share trust would be distributed regularly to its respective grandchild-beneficiary.[8] At that grandchild's death, the balance of the principal and undistributed income would be distributed in accordance with each grandchild's will; if appointment had not been made, or was ineffectual, the individual's share trust's assets would then be distributed in accordance with the terms of the Trust.

Before Jan C's adoption, Susan had only three children, but her siblings each had four children. Thus, under the Pokeberry Formula and before the adoption, the Otto Grandchildren would have expected to receive substantially smaller share trusts in the "secondary stage" than their cousins.[9] This eventuality was of great concern to Susan and the Otto Grandchildren. They considered using adoption as a

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[8] *See supra* note 5.

[9] Jan C. Ex. ("J.C. Ex.") 7 ("Otto Grandchildren's Am. Answer") ¶ 9 ("Solely because the Petitioner, Susan W. Gore, had only three children while each of her two brothers and two sisters (the Respondent Co-Trustees) had four children, application of the Pokeberry Formula will result in separate share trusts for each of the [Objecting Grandchildren] having a value 4.4 times greater than the separate share trusts for each of the [Otto Grandchildren].").

means of adding a sibling, and thus reconfiguring the Pokeberry Formula;[10] yet that option was seen as one of last resort.[11] Susan and the Otto Grandchildren instead preferred a cooperative remedy involving Vieve and/or the Objecting Grandchildren.[12] Vieve, however, was unwilling to amend the Trust Agreement.[13] The Objecting Grandchildren, too, refused to commit to an even distribution,[14] which could possibly have been achieved through unanimous agreement. [15]

C. *Jan C.'s Adoption*

While Susan and the Otto Grandchildren probed a possible agreement with Vieve or the Objecting Grandchildren, they also began to consider Jan C. as an

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[10] Trustee Ex. 7 (Aug. 11, 2002 Mem. from Susan to Nathan and Joel) (asking whether "there is any good reason not" to pursue an adoption).

[11] *Id.* (writing that she would like an "agreement to equal division of [the Trust] among the 19 cousins . . . [t]he best way to achieve that is not through adoption, if such a solution exists. If adoption is necessary to achieve that goal, the ground rules of adoption should be agreed upon."). At a June 21, 2002 meeting, the Otto Grandchildren—specifically Jan P.—informed the Objecting Grandchildren that adoption was being considered as a means of reallocating the Trust's assets. According to Nathan, the Objecting Grandchildren did not react well to the idea, as they "felt that it was not reasonable for [the Otto Grandchildren] to even consider adoption." Tr. (Nathan) 238.

[12] *See* Trustee Ex. 8 (Nov. 7, 2002 Mem. from Nathan to Jan P., Joel, and most of the Objecting Grandchildren) at 16 (presenting two methods to redistribute the Pokeberry share trusts during the secondary stage: "[u]nanimous agreement among the cousins to change the trust document," and "[a]doption with all trust benefits returning to the 'blood' cousins for an even-19 distribution," but stating that "*we would strongly prefer unanimity to adoption*") (emphasis in original). Jan C. concurred with this preference. Trustee Ex. 20 (May 15, 2003 Letter from Jan C. to Susan) ("[T]he best solution to the unequal allocation, in my opinion, would be to amend the trust document . . . .").

[13] Trustee Ex. 9 (Apr. 28, 2003 Mem. from Nathan to Susan, Jan C., Jan P., and Joel) ("Recently, Susan and I asked Vieve to change the trust, and got a firm 'no.'").

[14] Tr. ("Nathan") 252 (explaining that the Objecting Grandchildren were not receptive to an agreement).

[15] *See* Trustee Ex. 8 ("I have received a legal opinion which says that unanimous agreement among the beneficiaries is sufficient to secure an even distribution of the Pokeberry Trust. The mechanism is the execution of a private contract among all of the cousins or their guardians ensuring even distribution.").

adoption candidate.[16] Nathan spearheaded these discussions: he explained the adoption plan to Jan C.[17] and raised the issue of what would be done with Jan C.'s share of the Trust's income and principal. Regarding the income, Nathan wrote that he would "personally . . . like to simply see you enjoy the income," but that "it seems most fair to distribute the income among the [Nineteen Grandchildren] . . . ." As for the principal, Nathan proposed that Jan C. distribute it by will to the Nineteen Grandchildren. He made these suggestions on Susan's behalf, as she believed that any economic benefit deriving from Jan C.'s potential share of the Trust belonged to the Nineteen Grandchildren; Nathan, however, suggested that the Otto Grandchildren, himself included, could "arrange for a

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[16] This was around April 2003. Jan C. first became aware of the possibility that Susan and the Otto Grandchildren were contemplating adoption as a means of equalizing the Pokeberry Formula sometime in 2002. Tr. (Jan C.) 23. At that time, Susan's granddaughter, Jenna, was being considered as an adoption candidate. While Susan and the Otto Grandchildren were discussing the adoption strategy with Jan C., he joked "you might as well adopt me." The joke launched more serious discussions almost immediately thereafter. Nathan sent Jan C. an email on April 9, 2003 in which he wrote that "the idea of having Susan adopt you is about as equally absurd, amusing and awkward as the Pokeberry distribution formula itself," but that, given the circumstances, "your humorous proposal is being taken seriously." Trustee Ex. 10.

[17] *Id.* Nathan explained the adoption strategy to his father as follows:

> From a legal point of view, the adoption is very straightforward. Susan would file a petition to adopt you, then wait 60 days (might vary by state), then the two of you go in front of a judge to confirm the adoption, done. Susan would have no new legal power over your life, but you would then be a beneficiary of Pokeberry. Adoptees, even adult ones, really do count as much as natural-born children.
>
> Then Susan would send a letter to the Trustee (Vieve) informing her that she has adopted, and that the new adoptee is a beneficiary of Pokeberry, with your address to begin receiving checks . . .
>
> Would this set off an adoption war? I don't think so, probably, but it could. It would certainly piss off Vieve, [Robert Gore], perhaps the cousins, etc.

Id.

comfortable income for [Jan C.] as well," assuming he went along with the adoption and assuming the Trust "gave significant income."[18]

Jan C. responded to Nathan's email soon thereafter. He expressed his willingness to be part of the adoption plan; [19] Jan C. also suggested that Susan and Nathan draft a codicil to Jan C.'s will to "direct[ ] the principal as you see fit,"[20] while he agreed to "defer to [Nathan's] judgment" regarding the Trust's income. Susan sent an email to Jan C. and the Otto Grandchildren approximately one week later to "clear up communication" concerning the adoption.[21] She told Jan C. that, if he agreed to the adoption, the "financial benefit to [him] would be nice but not substantial, as we would have to frame our agreement so that inheritance of [principal] and any huge dividends [unlikely possibility] would go to the cousins and their heirs." Susan, however, also wrote that she would "like to see [Jan C.] in a comfortable retirement," and she suggested that both she and her children would help him in that regard.[22] Jan C. assured Susan that his only interest in participating in the adoption was to correct a Trust distribution plan that he

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[18] *Id.*

[19] Trustee Ex. 11 (Apr. 9, 2003 Email from Jan C. to Nathan). At this early stage, Jan C. seemingly believed that the adoption was part of a strategy to force an agreement with Vieve and/or the Co-Trustees and Objecting Grandchildren. *Id.* ("[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.").

[20] *Id.*

[21] Trustee Ex. 12. Susan's email was sent on April 19, 2003.

[22] *Id.* ("There will be persuasive advantage in 'we're helping with Dad's retirement' should we want to present the idea to the Gore family, but wanting to be helpful is the genuine article even if we might milk it a little.").

believed treated his children unfairly.[23] He reiterated that he did "not expect any financial benefit from Pokeberry, should the adoption actually occur."[24] It was generally understood, however, that he would be compensated for any out-of-pocket expenses incurred as the result of his involvement.[25]

Finally, in early May 2003, Susan asked Jan C. to explain why he was willing to become her adoptee in relation to the Pokeberry Trust. He responded on May 15, 2003, with two written memoranda: in the first memorandum, Jan C. gave his own detailed analysis of the Trust Agreement—he concluded that the Pokeberry Formula suffered from "serious flaws."[26] In the second memorandum, Jan C. explained that he was "convinced that the allocation procedure is unnecessarily and arbitrarily discriminatory."[27] He was therefore willing to go along with the adoption to alter the Pokeberry Formula to achieve a more equitable distribution for his children. Jan C. held himself out as the "best choice," among all potential adoptees primarily because he had "the best interest of all involved parties at heart."[28] He further represented that "any income distributed to my 1/20th share during my lifetime would in turn be redistributed equally among the

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[23] Trustee Ex. 15 (Apr. 21, 2003 Email from Jan C. to Susan).
[24] *Id.*
[25] Trustee Exs. 15, 32 (Del. 25, 2004 Jan C. Journal Entry (quoting Dec. 25, 2004 Email from Joel)).
[26] Trustee Ex. 17.
[27] Trustee Ex. 20.
[28] Jan C. believed he was in a better position relative to the other potential adoptees to dampen any feelings of animosity or rancor that might exist among the Co-Trustees and the Objecting Grandchildren following the adoption. Tr. (Jan C.) 64-65.

remaining 19 beneficiaries, after deducting any taxes and expenses incurred."[29] Because the adoption, to be effective, would have to be completed before the Trust's secondary term, and thus Vieve's death, Jan C. urged that the adoption be "completed as soon as possible."[30]

At Susan's request, an attorney subsequently prepared a pre-adoption agreement to be executed by both Susan and Jan C.[31] Under the pre-adoption agreement, Jan C. would have agreed to modify his will to allow for the Pokeberry Trust's principal to pass on his death in accordance with a written instruction from Susan; he also would have agreed to enter into a post-nuptial agreement with his wife, Joann M. Otto, in which she would waive any right to claim against Jan C.'s interest in the Trust both during their marriage and in the event of dissolution of marriage or Jan C.'s death. Additionally, the pre-adoption agreement would have Jan C. agree to distribute all income received from the Pokeberry Trust to the Nineteen Grandchildren, after using as much as the income as reasonable or

[29] *Id.* Jan C. also wrote that the 1/20th share of Pokeberry units that he would be able to direct upon his death would also be distributed equally among the Nineteen Grandchildren.
[30] Trustee Ex. 17. According to Jan C., his suggestion that the adoption be consummated sooner rather than later was simply a reprise of Susan and Nathan's concerns that the adoption "go forward as soon as possible." Tr. (Jan C.) 70.
[31] *See* Trustee Ex. 22.

necessary to pay any expenses incurred as a result of receiving or distributing such income.[32] This pre-adoption agreement, however, was never executed.[33]

Nonetheless, on July 7, 2003, Susan adopted Jan C. in a Wyoming state court proceeding.[34] Susan and the Otto Grandchildren immediately thereafter considered Jan C. a lawful beneficiary of the Trust. In a July 15, 2003, memorandum from Nathan to Susan, Jan C. and the other Otto Grandchildren, Nathan listed Jan P., Joel, himself, and Jan C. as the four income beneficiaries of the Pokeberry Trust in his branch of the Gore family.[35]

After the adoption, Jan C. began to consider keeping the Trust benefits for himself.[36] By September 2003, Jan C. had decided that if the Objecting

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[32] *Id.*

[33] Whether Jan C., Susan, and the Otto Grandchildren entered into an enforceable agreement, despite not having executed a formal pre-adoption contract, has not been framed for the Court to decide in this memorandum opinion and will therefore not now be addressed.

[34] Jt. Pretrial Stip. & Order at 2; *see also* J.C. Ex. 38 (Final Decree of Adoption of Adult Person Pursuant to Wyoming Statute § 1-22-113). The adoption decree reads in part:

> 1. The adoption of Jan C. Otto by Susan W. Gore hereby is allowed, approved, and confirmed.
> 2. Hereafter, Jan C. Otto should be the same in all respects as if the natural offspring and issue of Petitioner.
> 3. Jan C. Otto shall be entitled to all the rights of the other issue of Susan W. Gore, the same as if Jan C. Otto was the natural offspring of Jan C. Otto, and Susan W. Gore shall also be entitled to all rights incident to that relationship.

[35] Trustee Ex. 27.

[36] *See* Trustee Ex. 26 (July 15, 2003 Jan C. Journal Entry) (reasoning that if he were to retain his entire income share, then the share flowing to each of the Nineteen Grandchildren would decrease from 1/19, or 5.26% of the Trust's income, to 1/20, or 5%, which would mean that each of the Nineteen Grandchildren would still "receive 95% of what they were formerly receiving"). As of this time, and according to Jan C., the "current plan [was] to return the present income derived from dividends to the other 19 beneficiaries, after deducting for taxes and expense of distribution." *See* Trustee Ex. 28 (July 16, 2003 Jan C. Journal Entry). Jan C., however, also considered distributing only a portion of his share of the Trust's income to the Objecting

Grandchildren contested the adoption, he would use the income to "fight to enforce [it]";[37] he also had decided that, in the event of a challenge to the adoption, he would distribute none of the income to the Objecting Grandchildren, and instead would "dispose of the income as I see fit."[38] Jan C.'s "decision" was motivated in part by a desire to have those things he could not otherwise afford.[39] Indeed, he conceded that greed had influenced his thinking "for a period of time" after July

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Grandchildren (and perhaps all Nineteen Grandchildren), while keeping the remainder for himself. The Otto Grandchildren believed that if they could diversify their individual trusts, they could enhance their income in the secondary phase. In this event, Jan C. thought it would be appropriate for him to return to the Objecting Grandchildren only the amount of income they would have received had his share trust remained invested in only WLGA stock. *See id.* (asking whether he should "continue to distribute this income, in its entirety, to the other 19 beneficiaries, even though the other sixteen, outside the Ottos, are receiving [a lesser amount] per year on their individual trusts"). Only two days later, Jan C. seemed more certain that he would take a portion of the income, assuming the Trust became diversified and began yielding a greater return than what it would have provided without diversification. *See* Trustee Ex. 29 (July 18, 2003 Jan C. Journal Entry) ("What I will do then, is take the income from the diversified trust and redistribute it to the other nineteen Gore G3 cousins (including my sons). But I will distribute no more than each beneficiary receives from a non-diversified, all-WLGA trust."). Jan C., however, was skeptical that he and the Otto Grandchildren would be able to diversify their respective share trusts. *See* Trustee Ex. 24 (Dec. 24, 2003 Jan C. Journal Entry) (calling the diversification plan a "big 'if' in my mind").

[37] As of September 2003, neither Vieve, the Co-Trustees, nor any of the Objecting Grandchildren knew of Jan C.'s adoption. This change of status was not disclosed to the rest of the Gore family until after Vieve's death in January 2005. Opening Post-Trial Br. of Co-Trustees & Obj. Grandchildren at 6; *see also* Tr. (Nathan) 298. Jan C. ostensibly assumed at this time that the other Gores would fight the adoption's validity.

[38] Trustee Ex. 23. It is unclear whether Jan C. still intends to distribute some or all of the income to the Otto Grandchildren. He wrote that the "19 beneficiaries (with the exception of my sons) can go pound sand . . .," which suggests that he would not undermine his own children. On the other hand, he expressly recognized that each of the Otto Grandchildren would receive a 1/20 share of the Pokeberry Trust, which he believed would provide them with some level of material comfort. *Id.*

[39] *Id.* Jan C. wrote that he would put the income toward some of his "deferred dreams." These dreams included purchasing a vacation retreat in New Mexico, finishing building his "next Harley FLHT custom," travel, contributing more to his household expenses, and perhaps purchasing a new truck.

2003.[40] He did not share these views, however, and through most of 2004, Susan and the Otto Grandchildren continued to assume that Jan C. would redistribute the Trust income that he might receive.[41]

By December of 2004, Jan C. had decided to keep any income from the Trust for himself. This decision grew from a dispute between Jan C. and Jan P. Jan C. had been working on a ranch owned by the Otto Grandchildren;[42] for this, he was paid a wage.[43] Jan P., however, fired Jan C. from the ranch after two unrelated events: 1) a dispute over the price at which Jan C. sold two horses; and 2) an altercation between Jan C. and Jan P.'s daughter, who also worked on the ranch.[44] Jan P. and Jan C. agreed upon a severance of which Jan C. received only the first portion. According to Jan C., Jan P.'s decision to pay him only the first

[40] Tr. (Jan C.) 109-10; *see also* Trustee Ex. 29 ("The other fact, quite honestly, is cupidity on my part. I hate to see the work of my sons (and my work, as well) go strictly to the other sixteen Gore cousins, without some of it sticking to my fingers.").
[41] Tr. (Nathan) 248. During this time period the Otto Grandchildren intimated to Jan C. that, dependent upon resolution of certain issues regarding diversification of the Trust's assets, they would provide him with income so he could live comfortably. Trustee Ex. 30. Some income was in fact being provided. Tr. (Nathan) 275-76. Jan C., however, did not perceive a "verbal commitment to 'provide Dad with an income' [to be] very strong," especially in the context of what the Otto Grandchildren stood to gain from his adoption. Trustee Ex. 30. Jan C. thought it made more sense to use his share trust to provide for his own income, with a verbal promise to give some of it to his children. *Id.*
[42] Nathan testified that Jan C. had begun working on the ranch sometime in 2004. Tr. (Nathan) 296-97.
[43] Tr. (Jan C.) 125.
[44] *Id.* at 125-26.

part of his severance convinced him to retain the income from the Trust.[45] He informed Nathan of his decision shortly thereafter.[46]

III. CONTENTIONS

The parties have framed the issues narrowly. Solely for the purposes of the March 2010 trial, they did "not dispute that Jan C. Otto's adoption by Susan Gore is valid and that as a result of the adoption he is a beneficiary of the [Trust]."[47] The questions presented are whether Jan C., by his pre-adoption commitments, waived his beneficial interest in the Trust or whether he is precluded from taking a personal economic benefit because of unclean hands. The Co-Trustees and Objecting Grandchildren therefore assume, for purposes of this memorandum opinion only, that but for waiver or unclean hands, Jan C. would be entitled to a beneficial interest in the Trust.

Beginning with waiver, the Co-Trustees and Objecting Grandchildren contend that Jan C. waived his right to any financial interest in the Pokeberry Trust

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[45] *See* Trustee Ex. 31 (Dec. 30, 2004 Jan C. Journal Entry) ("It absolutely is not acceptable to have him play games with money I earned, and he at least implicitly agreed to by writing the first installment, and then have him decide he will not honor that agreement.") Jan C. wrote that his son's decision not to pay him any additional severance "did more to change my attitude than any other event possibly could have done." *Id.* (deciding that he would "throw down the gauntlet over the adoption").

[46] Tr. (Nathan) 247. Although this memorandum opinion has focused mostly on how Jan C. intended to deal with income from the Trust, he also contemplated in his journal entries, at varying times, distributing principal from the Trust to individuals other than the Nineteen Grandchildren. *See* Trustee Ex. 29 ("As to the distribution of the corpus, if I understand the trust correctly, I can actually designate where the corpus goes. If that is true, I will make another modification to the original plan.").

[47] Jt. Pretrial Stip. & Order at 2.

by representing to Susan and the Otto Grandchildren that he sought no personal economic benefit from the adoption, and, more specifically, by promising that he would redistribute the Trust's income and principal to the Nineteen Grandchildren.

The Co-Trustees and Objecting Grandchildren also assert that Jan C. has come before the Court with unclean hands, a claim which, they maintain, may arise when one breaches a fiduciary duty. They argue that Jan C. owed Susan and the Otto Grandchildren fiduciary duties by virtue of a supposed confidential relationship that existed among and between them. The Co-Trustees and Objecting Grandchildren contend that Jan C. breached his fiduciary duties to Susan and the Otto Grandchildren by attempting to take the Trust's benefits for himself, instead of distributing them as he had promised. It is argued that Jan C. abused his confidential relationship with Susan and the Otto Grandchildren and that his inequitable conduct should preclude him from claiming any economic benefit from the Trust.

IV. ANALYSIS

The facts are generally not in dispute. Jan C. promised Susan and the Otto Grandchildren that he would take no personal economic benefit from the Trust as the result of his adoption. He did so while professing great concern for his children's well-being. After his adoption, Jan C. decided to profit from his new-found status as a grandchild that would entitle him to the Trust's benefits. The

facts plainly show inequitable—deplorable may be a more accurate description—conduct by Jan C. His actions bar him from claiming a personal economic interest in the Trust.

The Court first turns to the doctrine of unclean hands.[48]

It is a fundamental maxim of equity that "he who comes into equity must come with clean hands."[49] The unclean hands doctrine "permits a court of equity to close its doors to applicants for equitable relief who have acted in violation of any fundamental concept of equity in connection with the matter in controversy."[50] "In effect, the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[51] The Court has considerable discretion in exercising its equitable power under the unclean hands doctrine; it "is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of [its] discretion."[52]

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[48] Jan C. seems to argue that the Court may not address unclean hands without first resolving the waiver issue. Jan C.'s pre-adoption commitments worked a technical waiver does not determine whether his conduct was so inequitable as to preclude him from claiming an interest in the Trust.
[49] *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *11 (Del. Ch. Aug. 18, 2005) (citing *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947)).
[50] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Del. Ct. of Chancery* § 11.06[a] at 11-70 (2009).
[51] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).
[52] *In re Barker Trust Agmt.*, 2007 WL 1800645, at *11 (Del. Ch. June 13, 2007) (quoting *Nakahara*, 718 A.2d at 522-23).

Jan C. contends that the Co-Trustees and Objecting Grandchildren's use of unclean hands is unavailing in this context. He argues that the unclean hands doctrine exists exclusively as an equitable defense to block one from seeking affirmative relief, which he claims not to have done. Our Supreme Court has made clear, however, that "[t]he application of the maxim is not a matter primarily of defense. It is not applied to favor a party litigant; rather, it is a rule of public policy."[53] The unclean hands doctrine is deployed principally to protect courts of equity from misuse by those who have acted unconscionably.[54] It need not apply only in a defensive posture, but may be used to save the Court from using its powers to benefit an undeserving party. And in any event, although Jan C. may not have initiated this lawsuit—Susan filed the Petition for Construction[55]—he is nevertheless before the Court to secure what he contends is his right to a beneficial interest in the Trust.[56] The unclean hands doctrine may be applied in this context to preclude Jan C. from staking his claim.

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[53] *Bodley*, 59 A.2d at 492-93; s*ee also In re Barker Trust Agmt.*, 2007 WL 1800645 (deciding a claim for unclean hands raised affirmatively against one seeking recognition as beneficiary of a trust).

[54] *Patel v. Dimple, Inc.*, 2007 WL 2353155, at *12 (Del. Ch. Aug. 16, 2007); *Neumeister v. Herzog*, 2007 WL 2162556, at *7 (Del. Ch. 2007).

[55] Susan specifically asked for an "order from this Court for construction of the Trust Agreement to determine whether Jan is a grandchild of Bill and Vieve and therefore a beneficiary of the Pokeberry Trust." Pet. for Construction ¶ 19.

[56] Answer of Jan C. Otto, Request for Relief (a) (requesting that the Court enter an order "Construing the Trust Agreement to determine that Jan C. Otto is a grandchild under the terms of the Pokeberry Trust"). It is clear that the Co-Trustees will not recognize any claim of Jan C. without judicial intervention. Thus, as a practical matter, Jan C. cannot obtain what he wants out of the Trust or these proceedings without some sort of affirmative relief.

The question then becomes whether Jan C.'s conduct bars him from claiming an interest in the Trust. The conduct alleged to be the grounds for unclean hands must be so "offensive to the integrity of the court" that the claims should be denied, "regardless of their merit."[57] The doctrine is often applied to deny relief to parties found to have acted fraudulently.[58] It may, however, also apply to bar a party from obtaining relief where he has breached a fiduciary duty.[59] Such fiduciary duties may arise where "one party places a special trust in another and relies on that trust or where a special duty exists for one party to protect the interests of another."[60] This special trust is often found in the family context, where one justifiably places her trust in a close relative.[61]

A South Carolina case cited by the Co-Trustees and Objecting Grandchildren, *Chapman v. Citizens & Southern National Bank of South Carolina*, is instructive.[62] In *Chapman*, a testator executed a will giving his wife a life estate in his home and other property, with a power of appointment at her death. The will provided that if she did not exercise that power, those assets would pass to the

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[57] *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991).
[58] Wolfe & Pittenger, *supra*, § 11.06[a] at 11-73.
[59] *Craig v. Graphic Arts Studio, Inc.*, 166 A.2d 444, 447 (Del. Ch. 1960).
[60] *Goodrich v. E.F. Hutton Group, Inc.*, 1991 WL 101367, at *1 (Del. Ch. Mar. 14, 1993).
[61] *See Wagner v. Hendry*, 2000 WL 238009, at *7 (Del. Ch. Feb. 23, 2000) (placing constructive trust over funds entrusted to one "regarded as family," and reasonably relied upon who had kept the funds for himself in an unconscientious manner); *Carey v. Carey*, 1982 WL 117003, at *3 (Del. Ch. Aug. 11, 1982) (finding that inequitable conduct could be found where "Plaintiffs reposed their trust in their Mother as well as their brother based apparently on the confidential and familial relationships between them").
[62] 395 S.E.2d 446 (S.C. Ct. App. 1990).

testator's children from a previous marriage. The wife promised her husband that she would not exercise the power of appointment, and instead would allow the property to pass to her husband's children upon her death. She, however, changed her mind soon after the husband's death and willed the property to her own children, also from a prior marriage.

The decision in *Chapman* turned on the existence of a "confidential relationship." The *Chapman* court defined confidential relationship as one in which "the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed."[63] In addition, the party in whom the trust is reposed must "possess the power to abuse the trust of the confiding party to [that party's] detriment . . . ."[64] The Court in *Chapman* found that, upon the husband's death, the wife "of course" had "absolute dominance" over the trust that he had placed in her.[65] By breaking her promise, the Court concluded that the wife abused their confidential relationship and violated a fiduciary duty owed to her husband. It imposed a constructive trust over the property for the benefit of the husband's children.[66]

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[63] *Id.* (citation omitted).
[64] *Id.* at 476.
[65] *Id.* at 477.
[66] The Co-Trustees and Objecting Grandchildren have not sought imposition of a constructive trust, although they view it as an "eventual remedy." Opening Post-Trial Br. of the Co-Trustees

Just as the wife in *Chapman* promised her husband that she would follow his instructions, Jan C. promised Susan and the Otto Grandchildren that, upon becoming a beneficiary of the Trust by Susan's adoption, he would redistribute its income and direct the principal in accordance with their wishes. The Otto Grandchildren trusted that Jan C., their father, would honor his promise.[67] Thinking that she and her ex-husband's interests were aligned regarding their children, and upon receiving assurances from Jan C. regarding his intent and motivations as to the Trust,[68] Susan went forward with Jan C.'s adoption.[69] Given his familial position, representations, and assurances, any trust reposed in Jan C.—by both Susan and the Otto Grandchildren—was justifiable. Moreover, Jan C. had

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& Objecting Grandchildren at 34. As of now, they merely seek a declaration that Jan C. is barred from taking an interest in the Trust.

[67] Tr. (Nathan) 295 ("I supported [the adoption of] Jan C. Otto because—well, because the characteristics of the adoptee required that they be trustworthy and honest, and I didn't have any reason to doubt my father on those counts."); *Id.* at 240 ("I trusted him my whole life."); J.C. Ex. 48 (Dec. 25, 2004 Jan C. Journal Entry (quoting Dec. 25, 2004 Email from Joel)) ("More than anyone, I supported the adoption and assured Susan that you were trustworthy. By trustworthy, I mean that your actions with regard with Pokeberry would be solely aimed toward even distribution among your sons and their cousins.").

[68] *See* text accompanying notes 23-24, 28, *supra*; *see also* Trustee Ex. 21 (May 31, 2003 Email from Susan to Jan C.) ("I want to express my appreciation and respect for your responses to the Pokeberry distribution question . . . Your memo to me summarizing your reason for volunteering . . . is unassailable.").

[69] Tr. (Susan) 141 ("The [adoptee] would have to be able to work with the family. They would have to be a trustworthy person. They would have to be able to understand that their role was not to participate in any financial gain, but simply to settle an estate . . . ."). Susan, of course, considered a written pre-adoption agreement with Jan C. *See* text accompanying note 30, *supra*. Although her counsel's advice against an agreement was a major reason why there is no written contract, Tr. (Susan) 151, it is clear that Susan believed that Jan C. would honor his commitments. *Id.* at 153 (explaining that she felt "betrayed, disappointed, angry," upon learning that Jan C. had decided to keep a personal financial interest in the Trust).

the power to abuse this trust: after the adoption, and upon his becoming a beneficiary of the estate, he could disavow his commitments and attempt to retain the Trust's benefits for himself.[70] This is of course the very path he has chosen.

The trust that existed between Jan C. and Susan and between Jan C. and the Otto Grandchildren, which Jan C. had the power to abuse, created a confidential relationship under which Jan C. was obligated to meet his pre-adoption commitments.[71] His decision to keep the benefits from the Trust for himself—a decision motivated in part by greed and anger—constitutes a violation of this confidential relationship. That breach of the confidential relationship constitutes unclean hands. Jan C.'s grossly inequitable conduct will not be countenanced by the Court.[72]

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[70] *See* J.C. Ex. 32 (Dec. 25, 2004 Jan C. Journal Entry (quoting Dec. 25, 2004 Email from Joel)) ("When discussing the adoption, the question came up of whether you would be trustworthy, since you would have total freedom of action with regard to Pokeberry, and since having a written agreement was not possible."); J.C. Ex. 22 (Feb. 6, 2005 Mem. drafted by Susan) ("The ideal is that Jan make and keep a commitment to the intentions of the trust, accept support that his sons want to give him, and enjoy good relationships with Ottos and Gores. A 'trust' is just that, trusting. Short of that, it is important to accept one another's choices in order to have clarity and resolution. Jan Charles may be choosing to be untrustworthy in order to further personal agendas that are more important to him than you are. If that is true it's important to respect him enough to accept that and deal accordingly.").

[71] Both Susan and the Otto Grandchildren support the Co-Trustees and Objecting Grandchildren's position. Susan identified both the waiver and unclean hands issues in her response to the Otto Grandchildren's Motion for Rule to Show Cause. She too seeks a declaration barring Jan C. "from asserting any financial or beneficial interest in the Pokeberry Trust." Susan's Resp. to Mot. for R. to Show Cause ¶ 15. Counsel for the Otto Grandchildren has represented that he has no objection to the Court making it clear "that [Jan C.] never gets the benefit of any income and he doesn't have any right to dispose of [the principal]." Tr. of Hr'g held on Otto Grandchildren's Mot. for R. to Show Cause (Dec. 14, 2009) at 61.

[72] As a final matter, Jan C. asserts that his conduct cannot preclude him from claiming a personal economic interest in the Trust; he contends that one may only give up rights to a Trust through

V. CONCLUSION

For the foregoing reasons, 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 Trust.[73] Counsel are requested to confer and to submit an implementing form of order for a declaratory judgment to that effect.[74]

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compliance with statute or under the terms of the trust instrument itself. He argues that Delaware's disclaimer statute, 12 *Del. C.* § 601 *et seq.*, prohibits one from disclaiming an interest in a Trust when the disclaimer does not meet a particular form that he contends is required by the statute. The disclaimer statute, however, provides a safe harbor, and not a mandate. It is expressly supplemented by the "principles of law and equity." 12 *Del. C.* § 606. In any event, the issue is not whether Jan C. disclaimed an interest in the Trust, but instead whether he is barred from asserting such interest in light of his inequitable conduct.

Jan C. has also raised the Trust Agreement's spendthrift provision as another restriction on his ability to assign or redistribute his economic interest in the Trust, and thus another impediment to application of the unclean hands doctrine. The Court will not allow the spendthrift provision, which exists to protect the Trusts' beneficiaries, to permit an individual in Jan C.'s position to harm those beneficiaries through his inequitable misconduct. Again, the issue is not whether Jan C. properly assigned his interest in the Trust, but instead whether he may claim such interest as a beneficiary. Jan C. achieved the status of a grandchild only because of his conduct to induce Susan to adopt him. Although he may have achieved the status of a grandchild, he did so without any expectation of economic benefit from the Trust. Thus, while Jan C. may not have disclaimed or conveyed away any interest in the Trust, he never had an interest to convey, nor did he have a cognizable expectation of receiving any economic benefit. This is not simply a matter of vesting; it is a function of the truly unusual events that have brought us to this juncture.

[73] With this determination, the Court need not resolve the question of whether Jan C. waived any rights he may have in the Trust. The Court also has not considered whether Jan C.'s claims are barred by the doctrine of estoppel or whether the whole effort to adopt Jan C. would implicate the unclean hands doctrine.

[74] The understanding 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. *See* text accompanying notes 25, 32, *supra*. 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.