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Re: In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore dated April 14, 1972
C.A. No. 1165-VCN
Dates Submitted: November 19, 2010 and December 30, 2010

Dear Counsel:

I write to address two pending motions: (1) Motion of Respondents Jan P. Otto, Joel C. Otto, and Nathan C. Otto for Summary Judgment to Enforce Earlier Declaration of the Pokeberry Trust; (2) Motion of Respondents Jan P. Otto, Joel C. Otto, and Nathan C. Otto to Preclude the Proposed Expert Testimony of Robert H. Sitkoff and Leonard S. Togman. I am satisfied that my efforts to resolve these motions would not be aided by oral argument.

I. MOTION FOR SUMMARY JUDGMENT

The Otto Grandchildren seek summary judgment determining that a trust instrument signed by Mr. and Mrs. Gore (the "Settlors") and dated May 8, 1972 (the "May Instrument"), governs the Pokeberry Trust, instead of a trust instrument dated October 16, 1972 (the "October Instrument"). Summary judgment under Court of Chancery Rule 56 may be granted only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Here, the material facts are not seriously disputed; instead, the debate is over the inferences that may properly

be drawn from those facts.[1] Because the Court cannot conclude that one set of inferences is the only set that can reasonably be drawn from the facts, it may not grant summary judgment. Delineating the differences in any detail here accomplishes little. Suffice it to note that the May Instrument was prepared by counsel and appears to have been duly executed by the Settlors. By its terms, it was irrevocable. On the other hand, it is, at least arguably, at odds with what is known about the Settlors' intent and carries potentially significant adverse tax consequences—something that the Settlors clearly wanted to avoid. Little mention, if any, of the May Instrument was ever made, and all parties seem to have gone forward for years in reliance upon the October Instrument—indeed, well into this proceeding—and without any awareness of the May Instrument. Ultimately, the question before the Court comes down to one of the Settlors' intent.[2] Not only is the Settlors' intent difficult to ascertain from a summary judgment platform, but also, in this matter, there are facts—themselves undisputed—that tend to support competing theories.

Accordingly, the motion for summary judgment will be denied.

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[1] *See, e.g.*, *Krahmer v. Christie's Inc.*, 911 A.2d 399, 405 (Del. Ch. 2006) ("When the intent of a party is at issue, summary judgment is ordinarily inappropriate."); *see also Ward v. Gen. Motors Corp.*, 431 A.2d 1277, 1281 (Del. Super. 1981).

[2] *See, e.g.*, *Chavin v. PNC Bank, Delaware*, 816 A.2d 781, 783 (Del. 2003); *Walsh v. St. Joseph's Home for the Aged*, 303 A.2d 691, 695 (Del. Ch. 1973) ("It is fundamental that the purported settlor of a trust must have properly manifested an intention to create a trust.").

II. MOTION TO PRECLUDE TESTIMONY

The Otto Grandchildren challenge the proposed expert testimony of Professor Sitkoff and Mr. Togman. Specifically, they contend that the proposed expert testimony would impermissibly intrude upon the province of the Court. They properly note that expert testimony, under D.R.E. 702, must be shown by its proponent as tending to assist the Court in understanding the evidence or in determining a fact. Expert opinion that, in essence, tells the Court what it must do should be excluded; similarly, expert opinion on Delaware law is to be avoided.[3]

I have reviewed the reports of Professor Sitkoff and Mr. Togman and, while at times they may drift toward ultimate conclusions, they do not reach that destination. I am satisfied that their opinions, if accepted, with respect to, for example, the context, circumstances, and drafting techniques animating estate planning almost forty years ago and how the two instruments would achieve (or fail to achieve) the Settlors' estate and tax planning objectives would assist the Court in gaining a better understanding of the Settlors' intent.

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[3] *United Rentals, Inc. v. RAM Holdings, Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007) (excluding expert testimony that "impermissibly encroache[d] on the province of this Court" and observing that "[t]his Court . . . has made it unmistakably clear that it is improper for witnesses to opine on legal issues governed by Delaware law").

Accordingly, the motion to preclude the proposed expert testimony will be denied.

* * *

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. The Motion of Respondents Jan P. Otto, Joel C. Otto, and Nathan C. Otto for Summary Judgment to Enforce Earlier Declaration of the Pokeberry Trust be, and the same hereby is, denied; and

2. The Motion of Respondents Jan P. Otto, Joel C. Otto, and Nathan C. Otto to Preclude the Proposed Expert Testimony of Robert H. Sitkoff and Leonard S. Togman be, and the same hereby is, denied.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K