IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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| IN THE MATTER OF Trusts Created Under Articles V and VII of the James M. Barker Trust Agreement Dated April 19, 1973, as Amended May 3, 1973, September 25, 1973, March 20, 1974, and April 18, 1974, FBO Hugh and Ralph Barker. | ) ) ) ) ) ) | C.A. No. 20455-VCL |

***MEMORANDUM OPINION AND ORDER***

**Submitted: May 14, 2007**
**Decided: June 13, 2007**

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LAMB, Vice Chancellor.

A trustee petitions for instructions whether under Illinois law a named beneficiary of the trust properly exercised a power of appointment granted to him by the trust instrument in favor of his son, whom he adopted as an adult some twenty-four years after the settlor's death. The petitions also asks for instructions, whether under Delaware law the same adopted son is entitled to take as a member of the class of persons described in a testamentary exercise of a similar power of appointment by his father's brother, who died having never learned of the adoption.

Because Illinois law requires clear and convincing evidence in a written trust instrument of a settlor's intent to exclude an adoptee who would normally be eligible to inherit under the operation of that document, and since the persons attempting to prohibit the adopted son from doing so in this case have presented no competent evidence that this settlor intended such an exclusion here, summary judgment will be entered in favor of the adopted son and his father confirming the legal propriety of the father's exercise of his power of appointment. However, because the text of the uncle's will, as well as the circumstances in which that will was executed, clearly indicate that the uncle did not intend the adopted son to benefit from the exercise of his power of appointment, Delaware law requires the court to enter summary judgment against the adopted son on that issue.

## I.

A. The Parties

The Wilmington Trust Company, acting as trustee,[1] filed this action on July 28, 2003 seeking instructions as to the proper beneficiaries of certain trusts created under an April 1973 trust agreement (the "Agreement") settled by James M. Barker, a former chairman of Allstate Insurance Company (the "Settlor"). The respondents are Hugh Barker, Jerry Burnett-Barker (Hugh's adopted son), the James M. and Margaret R. Barker Foundation (the "Foundation"), and various other members of the Barker family (the "Barker Respondents").[2]

B. The Facts[3]

With the help and counsel of his attorneys at the Chicago law firm of Winston & Strawn, the Settlor executed the Agreement on April 19, 1973 as part of his estate plan. The Agreement specifies that it is to be governed by Illinois law.

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[1] James R. Barker and Wilmington Trust are currently co-trustees of the trusts. James delegated all of his powers to Wilmington Trust, except for his power and discretion to participate in any "investment decisions," as that term is defined in 12 *Del. C.* § 3313(d). Wilmington Trust is the sole trustee with authority to take action on behalf of these trusts with respect to this suit.

[2] At the time of his death, the Settlor had four children: Robert Barker, Ralph Barker, Hugh Barker, and Cecily B. Finley. Ralph and Robert are now deceased. Although Ralph had no children, Robert had four children (James R. Barker, Ann S. Barker, W. Benjamin Barker, and Margaret B. Clark), and Cecily has three (Jeanne C. F. Montgomery, Beatrice M. Finley, and William B. Finley). These grandchildren are the Barker Respondents.

[3] The facts herein are drawn from the record in this matter, and are construed in a light most favorable to the Barker Respondents and the Foundation.

While the Settlor was alive, the Agreement operated to establish an *inter vivos* trust for his benefit. Upon his death on July 3, 1974, however, four trusts were created: one for each of the Settlor's children. Hugh is the current beneficiary of one of those trusts. The Foundation and the Barker Respondents are possible remaindermen under Hugh's trust, as well as under the trust created for the benefit of Hugh's deceased brother, Ralph.

Article V, paragraph 1(b) of the Agreement governs Hugh's trust and provides, in pertinent part, that:

> On the death of [Hugh] after [the Settlor's] death, the trust shall be distributed to or in trust for such one or more of [the Settlor's] descendants (excluding the estate of [Hugh]), and the James M. and Margaret R. Barker Foundation, in such proportions and subject to such trusts, powers and conditions as [Hugh] appoints by Will specifically referencing this power of appointment.

Thus, the Agreement grants Hugh a limited power of appointment whereby he may designate one or more "descendents" of the Settlor and/or the Foundation as the beneficiaries who will receive the corpus of his trust upon his death. Similarly, article VII of the Agreement placed a limited amount of discretion in Ralph's hands to dispose of his trust as he wished. Paragraph 1(b) of article VII states that:

> On the death of [Ralph] after [the Settlor's] death, the trust shall be distributed to or in trust for such one or more of [the Settlor's] descendants (excluding the estate of [Ralph]), the James M. and Margaret R. Barker Foundation, or in trust for [Ralph's] wife, in such proportions and subject to such trusts, powers and conditions as [Ralph] appoints by Will specifically referencing this power of appointment.

In late 1991 or 1992, at a time when Hugh was then 75 years old and Ralph was 69, the pair's other brother, Robert, convinced Hugh and Ralph to make wills wherein they exercised their powers of appointment in favor of the Barker Respondents. Between April and June 1992, both Ralph and Hugh executed wills according to Robert's design, and provisions of Ralph's will evidence that he and Hugh reached some sort of understanding that the Barker Respondents should be the ultimate beneficiaries of their trusts.[4] In 1998, however, Hugh rewrote his will to exercise his power of appointment in favor of Jerry. As will be discussed at length *infra,* Hugh undertook this revision to his estate plans following his adoption of Jerry, an act which was not disclosed to his relatives, and which they did not discover until several years later.

Unaware of both the adoption and the alterations to Hugh's will, Ralph died on October 10, 2000. Paragraph A.3 of Ralph's last will and testament, a document which specifies it is to be governed by Delaware law, provides that:

> [The Trustees] shall divide [Ralph's trust] into equal shares, one share for each child of [the Settlor] who has living descendants. Each share shall be further divided into equal shares, one share for each of the children of such child who is then surviving and one share, by right of representation, for the living descendants of any such children who

[4] Article XI of Ralph's will provides:

> It is my intention that the trusts created by the exercise in this will of my power of appointment be merged, if at all possible, with the similar trusts which my brother HUGH BARKER intends to create at his death by a similar exercise of his power of appointment.

> [are] deceased and shall be administered and distributed for their benefit as provided . . . below as if the children of [the Settlor] had predeceased me, even if any such children [are] then living.

Therefore, Ralph exercised his power of appointment under the Agreement to divide the assets in his trust for the benefit of his nieces and nephews. Following his death, half of Ralph's trust was divided among Robert's children, with Cecily's children receiving the remaining portion. Since Jerry made no claim against Ralph's estate and Wilmington Trust was unaware of Jerry's adoption, no part of Ralph's trust was set aside for him.

In the first half of 2001, as Ralph's estate was being wound up and as Hugh's disposition of his trust likely pressed to the fore in the family's minds once again, Robert and James (Hugh's nephew) called the office of Douglas Rankin, a Florida lawyer in charge of Hugh's estate planning, several times in an attempt to learn whether the Barker Respondents were still appointed by Hugh's will. On each occasion, Rankin told the inquisitors that such information was confidential, and that Hugh was the only person with the authority to divulge it. Then, in August 2001, Robert, James, and Scott Simonton (a Wilmington Trust representative), traveled, on their own initiative, to Florida to meet with Hugh. These gentleman, along with Hugh, met with Rankin, and once again demanded that Rankin openly discuss Hugh's estate matters. In a private discussion, Hugh told his attorney that he did not wish for Robert, James, or Simonton to know that

he had changed his power of appointment. Thus, Rankin followed his client's wishes and did not convey any of this information.

In August 2003, following the filing of Wilmington Trust's petition in this action, the Barker Respondents and the Foundation finally learned of Jerry's adoption and Hugh's changes to his power of appointment. After exchanging interrogatory responses and document production in this case, James and the Foundation filed suit against Hugh and Jerry in a Florida state court on August 12, 2004. That action sought to nullify the adoption on the grounds that the procedure was a fraud on the Florida court which granted it and that it was obtained without constitutionally-required notice to the Foundation as a contingent beneficiary of Hugh's estate. On November 5, 2004, the Foundation moved to stay this case in favor of the Florida action, arguing that if the Florida court invalidated the adoption, the case in Delaware would be moot because Jerry would have no conceivable basis on which to bring a claim that he is a descendent of the Settlor and is entitled to take from Hugh's trust.

In recognition that the Florida adoption was a linchpin in this case, the court believed that more thorough discovery in this matter would be beneficial, and that the Florida case should proceed apace. Thus, while the court ultimately denied the Foundation's motion to stay, it allowed the Foundation and the Barker Respondents to dramatically alter the original scheduling order in this matter which

had contemplated completion of discovery by October 29, 2004. Over the subsequent eighteen months, the Foundation and the Barker Respondents took the depositions of Jerry and of George Ferguson, Hugh's primary care physician. Although Hugh's deposition was noticed, it ultimately did not go forward because of the physical and mental infirmities from which he chronically suffered by late 2004.[5]

At Jerry's deposition, counsel for the Barker Respondents inquired at length about the relationship between Jerry and his adopted father. Jerry's testimony revealed that, throughout their more than sixty-year relationship, he and Hugh have remained devoted to one another. In June 1945, while stationed in Florida with the military, Hugh married Jerry's mother, Valera, when Jerry was five years old. Jerry lived exclusively with Hugh and Valera during his formative years, moving from Florida to Chicago in 1945, and back to Florida again as Hugh's employment changed. It was only upon Jerry's departure to attend Florida State University that he moved out of Hugh's home. Even then, Jerry returned during the summers and continued to list Hugh's address as his permanent residence until he reached his mid-twenties.

[5] Ferguson testified that, at this point in his life, Hugh would not be able to understand the questioning were he to be deposed. The parties are in agreement that Hugh can no longer provide useful information in this case from his personal recollection.

It is clear from the testimony that Hugh treated Jerry as his own son since the inception of the relationship. Early in his life, Jerry accompanied Hugh and Valera to family dinners and holidays at the Settlor's residence whenever the couple was invited to attend. In the 1980s and 1990s, Jerry held managerial positions in several businesses in which Hugh was involved, handling the finances and serving in other positions of trust. As Hugh and Valera aged, Jerry either cared for the two personally or made other arrangements to ensure their well-being.

Jerry was thoroughly questioned at his deposition regarding the circumstances surrounding his adoption. Jerry testified that when he was approximately six years old, Hugh and Valera asked him if he wanted to change his last name to Barker and discussed the issue of adoption with him. Indeed, the adoption issue surfaced several times around the dinner table when Jerry was quite young. According to Jerry's testimony, at some point after Hugh and Valera had these conversations with young Jerry, they attended a dinner at the Settlor's home where the topic of adoption was discussed by the adults behind closed doors. Following this meeting, the discussions stopped due to Hugh's concern that Jerry's biological father would not freely consent to the adoption. As Jerry got older, the subject of his adoption came up infrequently, but no legal action was ever taken.

Jerry testified that in 1996, Hugh became concerned about the possibility that Jerry would not be able to inherit from his estate simply because no legally-recognized father-son relationship existed between them. Jerry later learned that Hugh discussed the idea of adoption in private meetings with Rankin. Eventually, Hugh convened a meeting with Jerry and Rankin at Rankin's office. Jerry testified that he was never informed by Hugh or Rankin as to the subject of the meeting, and was surprised when Rankin, in a "deadly serious" manner, asked him whether or not he would like to be adopted by Hugh. Influenced by his love and respect for the man who raised and nurtured him, as well as by the prospect of inheriting from Hugh's estate, Jerry agreed.

In 1998, Jerry, Hugh, Valera, and Rankin appeared before a Florida judge to finalize the adoption. Once the legal process wound up, Jerry undertook the necessary steps that accompany a change of surname. He changed his name on all of his credit cards and legal documents. He contacted the Social Security Administration to get a new social security card issued, and informed the Army of his changed status to ensure that his pension benefits would run smoothly. Additionally, Jerry testified that he held himself out to friends and acquaintances as "Jerry Burnett-Barker," even including his new name on the return address stickers on his Christmas cards for 1998. Although these cards were sent to Robert, Cecily,

and Ralph, neither Jerry nor Hugh gave any other indication to their relatives that the adoption had occurred.

Apparently in an attempt to flesh out a case for undue influence or lack of testamentary capacity, counsel for the Barker Respondents questioned both Jerry and Ferguson at length about Hugh's mental condition from 1996 to the present.[6] Jerry testified that he began to notice that Hugh's memory and cognitive functions were slipping at some point in the mid-1990s. Between January 1995 and January 1998, Hugh wrote a number of checks to employees of his business, but could not recall the specific purposes for which they were issued. Furthermore, Hugh forgot to give Rankin certain tax documentation necessary to file his tax returns for 1995 to 1997, and apparently had some difficulty depositing income into his personal bank accounts in early 1998. However, Hugh retained his driving privileges until 2000, and continued paying all his own personal bills and writing his own checks,

[6] Oddly, neither the Foundation nor the Barker Respondents ever sought to take the deposition of Rankin or David Rawlings, the physician who, upon Rankin's referral, conducted a battery of neuropsychological tests on Hugh from April 21-23, 1998. This litigation strategy is made all the more peculiar given that the evidence adduced from Ferguson and Jerry, as well as the documents in the record, fail to raise a genuinely-disputed material issue of fact as to Hugh's competence during the 1996 to 1998 time frame which is relevant here. Indeed, the decision not to take evidence from Rawlings or Rankin strikes the court as even more myopic given the relatively few people who can still provide informed testimony in this matter. Valera suffered a massive brain stem stroke in 1999 and is incompetent to testify. As mentioned previously, Hugh cannot be deposed, and Robert is deceased. Perhaps due to her lack of pertinent knowledge or her mental infirmity, the Foundation and the Barker Respondents also chose not to depose Cecily.

with Jerry providing a bit of oversight to ensure that his father attended to important matters, until 2005.

The record indicates that around the time the adoption was to occur, Rankin insisted Hugh get tested by Rawlings. The documents produced from those tests found Hugh to be functioning in "the average range of psychometric intelligence." Rawlings determined that while Hugh exhibited adequate verbal abstract thinking and visual and verbal attention, he did demonstrate a minimal level of cognitive dysfunction "suggestive of a mild dementia." In sum, however, Rawlings concluded that Hugh was "intellectually intact" and could make "informed decisions about his medical course of treatment."[7]

[7] The Foundation and the Barker Respondents, in an attempt to create a material issue of fact as to Hugh's testamentary capacity, place heavy reliance on Ferguson's deposition testimony that he believed it more likely than not that Hugh would not have understood, *without the aid of his attorney*, the legal jargon in the power of appointment executed in 1998. The legal jargon which normally infiltrates wills and trust agreements is indisputably difficult to understand for the average layperson; what is important is that the testator or settlor understands how the legal terminology disposes of his property. *See, e.g.*, *In re Ver Vaecke's Estate*, 194 N.W. 135, 137 (Mi. 1923) ("When a man goes to an attorney, and, without aid or suggestion, directs the provisions of his will . . . it is a waste of time to discuss the question as to whether he was mentally competent to dispose of his property as he did."). The manner in which this deposition question was asked and answered provides no pertinent evidence as to whether or not Hugh possessed testamentary capacity in 1998. The record is bereft of any competent evidence that, when viewed in a light most favorable to the Barker Respondents and the Foundation, would provide a factual foundation to meet the high hurdles of showing undue influence over Hugh or a lack of testamentary capacity on his part. *See, e.g.*, *Matter of Estate of Osborn*, 599 N.E.2d 1329, 1335 (Ill. App. 1992) (explaining the burden a challenging party faces on a claim of undue influence); *Citizens Nat. Bank of Paris v. Pearson*, 384 N.E.2d 548, 551 (Ill. App. 1978) (explaining the burden a challenging party faces on a claim of lack of testamentary capacity).

Critically, Ferguson's deposition testimony illustrates that Hugh's mental and physical condition did not precipitously deteriorate until the last several years. As Hugh's primary care doctor since 1996, Ferguson noted that the three serious conditions from which Hugh was suffering–aortic stenosis, hypothyroidism, and Alzheimer's-type senile dementia–had diagnostic onsets later than 1998.

In addition, although Hugh has recently experienced extreme difficulty with abstract thought and with processing complex historical information, both Ferguson and Jerry dispelled any notion that Hugh was the subject of undue influence. Ferguson characterized him as a "non-compliant and cantankerous" old man who would not have been easy to cajole or manipulate. Jerry claimed that his father is "very stubborn" and not easily influenced by the persuasive powers of others "when he gets his mind onto something."

Faced with the unavailability of evidence showing any undue influence over Hugh or that would undermine the legal presumption of his testamentary capacity, the Foundation began focusing its efforts on the Florida litigation to have Jerry's adoption nullified. Although the suit there initially survived a motion to dismiss, the Florida legislature subsequently enacted a statute which directly affected the merits of that case. The new statute, which is remedial in nature, provides that only individuals with a "direct, financial, and immediate" interest that will be lost

as a result of a pending adoption are entitled to notice of the proceeding.[8] Following enactment of the statute, the Florida court granted summary judgment in favor of Hugh and Jerry. James and the Foundation then appealed the trial court's ruling to Florida's Second District Court of Appeal, and their application is currently under consideration.

Faced with the still-pending summary judgment motion filed by Hugh and Jerry in this court on October 29, 2004, the Barker Respondents filed a supplemental brief in opposition on August 21, 2006.[9] The Foundation, as well as Hugh and Jerry, filed responsive briefs on September 14, 2006. More than three years after filing their responses to the petition, yet just two days prior to the date set for oral argument on the present motion, the Foundation and the Barker Respondents filed a motion to amend their responses, seeking to add affirmative defenses against Hugh and Jerry of unclean hands, laches, waiver, and equitable

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[8] The full statute provides:

> (a) Except for the specific persons expressly entitled to be given notice of an adoption in accordance with this chapter, the interest that entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate and a person with this indirect interest lacks standing to set aside a judgment of adoption.
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> (b) This subsection is remedial and shall apply to all adoptions, including those in which a judgment of adoption has already been entered.

*Fla. Stat.* § 63.182(2) (2006).

[9] During the extended discovery period, the court issued a memorandum opinion which upheld Wilmington Trust's decision to increase distributions to Hugh from his trust for legal fees incurred in this action. *See generally In re Barker Trust Agreement*, 2005 WL 396334 (Del. Ch. Feb. 7, 2005).

estoppel.[10] At the December 20, 2006 hearing, the court encouraged the parties to submit their dispute to mediation, and they voluntarily agreed to do so shortly thereafter. The mediation proved unsuccessful, and the case was resubmitted to the court on May 14, 2007.

**II.**

Hugh's and Jerry's fundamental basis for their summary judgment motion is that, under both Illinois and Delaware law, Jerry is a "descendant" as that term is used in both the Agreement and in Ralph's will. According to Hugh and Jerry, at the time the Settlor signed the Agreement, Illinois law provided that adopted children were considered descendants of their adoptive parents for purposes of inheriting from lineal and collateral relatives. They also contend that, pursuant to Illinois law, a decedent's intent to exclude after-adopted children must be shown by clear and convincing evidence. Since the Settlor knew of the close relationship between Jerry and Hugh at the time the Agreement was executed and because the Settlor failed to include any exclusionary language in the document, Hugh and Jerry contend that the court must apply these legislative presumptions here and

[10] Pursuant to Court of Chancery Rule 15(a), this court will allow a party to amend its pleading "when justice so requires." Although the court did not rule on the motions to amend in December, those motions are hereby granted. Any prejudice to Hugh and Jerry is minimal, as the Foundation raised the equitable doctrines of laches and unclean hands in its initial response to the summary judgment motion in November 2004. Thus, Hugh and Jerry have been on notice of the relevance of such affirmative defenses for some time. Indeed, their recently-filed supplemental memorandum specifically addresses each affirmative defense included in the amendments.

conclude that Hugh has rightfully exercised his power of appointment under the Agreement by leaving the corpus of his trust to Jerry.

With respect to Delaware law and Ralph's will, Hugh and Jerry note that adult adoptees under Delaware law are allowed to inherit through their adoptive parents unless the instrument which allows the adoptee to take evidences an exclusionary intent. Since Jerry was adopted before Ralph died and since Ralph did not specifically exclude Jerry from the class of descendants in his will, Hugh and Jerry argue that Ralph's trust should be reapportioned and reallocated to reflect the fact that Jerry is a member of the class entitled to take pursuant to Ralph's exercise of his power of appointment.

In opposition, the Barker Respondents and the Foundation contend that extrinsic evidence and the other provisions of the Agreement display a clear intent on the part of the Settlor to prevent Jerry from being able to take from the trust of either brother. They also argue that because Jerry's adoption was effectuated solely for the purpose of augmenting his inheritance, Illinois law and Delaware law do not recognize the adoption's validity. Thus, according to the Barker Respondents and the Foundation, the court must deny Hugh's and Jerry's motion for summary judgment because Jerry is not a "descendant" as that term is legally understood in the context of either the Agreement or Ralph's will.

The Barker Respondents and the Foundation also advance a number of equitable affirmative defenses in favor of their position. They say Hugh and Jerry have unclean hands due to their alleged effort to conceal the adoption from their relatives. Moreover, the Barker Respondents and the Foundation argue that Jerry's ability to take from Ralph's trust, if the court finds that Jerry has a right to do so, is barred by the doctrine of laches. Additionally, they contend that Jerry has either waived his right to be included in the class created by Ralph's will or is equitably estopped from asserting such a right.

## III.

Pursuant to Court of Chancery Rule 56(c), a Delaware court will enter summary judgment in favor of a moving party when there is "no genuine issue as to any material fact," and the party is entitled to judgment as a matter of law.[11] To determine whether this standard is met, the court must look to the evidence of record embodied by depositions, answers to interrogatories, admissions, and affidavits.[12] Although the court will consider the facts in a light most favorable to the nonmoving party,[13] "the judge must view the evidence presented through the prism of the substantive evidentiary burden."[14]

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[11] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[12] Court of Chancery Rule 56(e); *Levy v. HLI Operating Co., Inc.*, ___ A.2d ___, 2007 WL 1500032, at *6 (Del. Ch. May 16, 2007).
[13] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[14] *Konitzer v. Carpenter*, 1993 WL 562194, at *2 (Del. Super. Dec. 29, 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)); *see also Cerberus Int'l, Ltd. v. Apollo Mgmt.,*

If the record evidence supports a favorable conclusion for the nonmoving party, the court cannot weigh the evidence, but instead must deny the moving party's motion for summary judgment.[15] However, "where the opponent of summary judgment has the burden of proof at trial, he must show specific facts demonstrating a plausible ground for his claim, and cannot rely merely upon allegations in the pleadings or conclusory assertions in the affidavits."[16] Indeed, if it is to prevent judgment from being entered against it, the adverse party must "set forth specific facts showing that there is a genuine issue for trial."[17] Finally, "[w]hen a party moves for summary judgment under . . . Rule 56 and the court concludes that the moving party is not entitled to summary judgment, and the state of the record is such that the nonmoving party is clearly entitled to such relief, [the court] may grant final judgment in favor of the nonmoving party."[18]

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*L.P.*, 794 A.2d 1141, 1147-48 (Del. 2002) (holding that the substantive proof required at trial should be the substantive standard of proof at the summary judgment stage).

[15] *Izquierdo v. Sills*, 2004 WL 2290811, at *2 (Del. Ch. June 29, 2004).

[16] *In re Tri-Star Pictures, Inc. Litig.*, 1992 WL 37304, at *4 (Del. Ch. Feb. 21, 1992), *aff'd in part and rev'd in part on other grounds*, 634 A.2d 319 (Del. 1993).

[17] Court of Chancery Rule 56(e).

[18] *Weiss v. Weiss*, 2007 WL 522290, at *2 (Del. Ch. Feb. 15, 2007) (citing *Goss v. Coffee Run Condo. Council*, 2003 WL 21085388, at *6 (Del. Ch. Apr. 30, 2003)).

## IV.[19]

A. Under Illinois Law, Jerry Is A "Descendent" Of The Settlor For Purposes Of The Agreement

Delaware courts commonly enforce choice of law provisions contained in contracts such as trust agreements.[20] Since the Agreement specifically provides that Illinois law governs its interpretation, the court must analyze Illinois law regarding adult adoptions to determine whether Jerry qualifies as a descendent of the Settlor.

The fundamental goal of an Illinois court when interpreting a trust instrument is to ascertain the intent of the settlor at the time of execution.[21] If the language of the instrument is unclear or ambiguous, an Illinois court may then "consider the surrounding circumstances at the time of the execution to determine the settlor's intent."[22] The court must view the language of the instrument as a

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[19] Obviously, this opinion is predicated on the legal validity of the Florida adoption. Indeed, if the Florida appellate court was to overturn the trial court's decision in the proceedings challenging the adoption, the primary foundation of the court's decision would disappear. If, therefore, the Florida decision is reversed, the court would expect to entertain a motion for relief from judgment pursuant to Court of Chancery Rule 60(b).

[20] *See Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989) (upholding a choice of law provision in a trust instrument and noting the general rule that a contractually-mandated choice of law will be recognized if the jurisdiction selected bears a material relationship to the transaction).

[21] *First Nat. Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 426 N.E.2d 1198, 1201 (Ill. 1981).

[22] *See, e.g., Ford v. Newman*, 396 N.E.2d 539, 540 (Ill. 1979) (noting that if the court can ascertain the intent of the settlor from the document, then resort to extrinsic evidence is likely unnecessary).

whole, rather than certain provisions in isolation, when construing a trust agreement.[23]

Illinois law, both now and at the time the Agreement was signed, expressly permits the adoption of adult persons[24] and recognizes "foreign" adoptions such as the one here between Jerry and Hugh consummated in Florida.[25] Ordinarily, Illinois law draws no distinction between adopted adults and adopted minors for purposes of the nature of the legal relationship created between the adoptee and the adopting parent.[26] Both are eligible to inherit from either lineal or collateral relatives.[27]

As a general rule of Illinois law, an adopted child may inherit under an instrument unless the drafter's "contrary intent is demonstrated by the terms of the instrument by clear and convincing evidence."[28] Furthermore, additional evidence

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[23] *Peck v. Froehlich*, 853 N.E.2d 927, 932 (Ill. App. 2006).

[24] 750 *Ill. Comp. Stat.* 50/1(F) provides that "a person is available for adoption when the person is . . . (d) an adult who meets the conditions set forth in Section 3 of this Act." Section 3 states:

> A male or female child, or an adult, may be adopted provided that the other conditions set forth in this Act are met, and further provided, with respect to an adult, that such adult has resided in the home of the persons intending to adopt him at any time for more than 2 years preceding the commencement of the adoption proceeding . . . .

750 *Ill. Comp. Stat.* 50/3 (2007). Since Jerry resided in Hugh's home for the vast majority of his childhood, the two year requirement is indisputably met in this case.

[25] *See McNamara v. McNamara*, 135 N.E. 410, 413-14 (Ill. 1922) (noting that principles of comity and of full faith and credit should require courts of one state to recognize the legal validity of an adoption properly consummated in a sister state).

[26] *See In re Estate of Brittin*, 664 N.E.2d 687, 690 (Ill. App. 1996) (noting that "the adoptee, regardless of his age upon adoption, attains the status of a natural child of the adopting parents").

[27] *Id.*

[28] 755 *Ill. Comp. Stat.* 5/2-4(e) (2007). *See also First Nat'l Bank of Chicago v. King*, 635 N.E.2d 755, 758-59 (Ill. App. 1994) (noting that the clear and convincing evidence standard was

must exist on the face of the instrument "that the [drafter] actually considered the contingency of adoption."[29]

Fundamentally, the Barker Respondents and the Foundation lack both a legal and an evidentiary basis for their position that Jerry is not a descendent under the Agreement. From a legal standpoint, Illinois courts have consistently held that the term "descendent" is broad in the inheritance context, and its mere use does not by itself evidence a testator's intent to exclude adopted persons.[30] Moreover, the settlor is presumed to have known the law with respect to property rights of adopted children and to have created his estate plan in view of the existing statutes and how those statutes would apply to his particular factual situation.[31] Here, the Settlor retained a sophisticated Chicago law firm to draft the Agreement, and the evidence shows he clearly knew of Jerry's existence and that Hugh was raising Jerry. If the Settlor wished to exclude Jerry as a descendent, he and his counsel

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appropriate to apply, and that the legislature had recently reinforced this statutory presumption because "'[t]wo recent Appellate Court decisions [had] called this widely accepted presumption into question'").

[29] *First Nat'l Bank of Chicago v. King*, 651 N.E.2d 127, 131 (Ill. 1995) (involving interpretation of an instrument created prior to 1955).

[30] *See, e.g.*, *id.* (holding that the use of the words "lawful descendants" and "per stirpes" in a will executed in 1936 did not constitute clear and convincing evidence of a testator's intent to exclude adopted children); *Wielert v. Larson*, 404 N.E.2d 1111, 1113-14 (Ill. App. 1980) (noting that the meaning of the term "descendent" is broad under Illinois law).

[31] *Weilert*, 404 N.E.2d at 1114 ("Further, we must keep in mind that the testator is presumed to have known the law with respect to the property rights of adopted children and to have made her will in view of the existing statute.").

easily could have done so by excluding anyone not biologically related to the Settlor in the location that is legally relevant–in the text of the Agreement.

In a futile effort to create ambiguity on the face of the Agreement, the Barker Respondents and the Foundation argue that certain provisions of the Agreement, viewed in context, illustrate the Settlor's purported intent to exclude Jerry. Cecily and Robert had children at the time the Agreement was executed, and the trustees of their trusts were directed to pay those monies for the benefit of Cecily and Robert, as well as their descendants, while the two were living. In contrast, the trustee of Hugh's and Ralph's trusts are directed by the Agreement only to pay monies to Hugh and Ralph as individuals. The Barker Respondents and the Foundation say that if the Settlor wished to treat Jerry as his descendant, he would have written Hugh's trust to look like Robert's and Cecily's trusts. Additionally, the Barker Respondents and the Foundation note that Ralph's trust was specifically written to provide for Ralph's wife, whereas the Settlor made no provision for Valera. This distinction, so the argument goes, evidences the Settlor's purported intention that Jerry was never to benefit from Hugh's trust.

The point the Barker Respondents and the Foundation make regarding Valera actually supports the position of Hugh and Jerry. Valera's exclusion illustrates that the Settlor contemplated the treatment of Hugh's nuclear family when drafting the Agreement, and made the decision not to specifically exclude

Jerry from the eligible class of beneficiaries under Hugh's trust. More axiomatically, however, the Barker Respondents' and the Foundation's textual arguments turn the statutory presumption contained in 755 *Ill. Comp. Stat.* 5/2-4(e) on its head. Under Illinois law, the intent of the drafter to exclude an adoptee under an instrument must be objectively clear, not inventively conjured up by selecting ancillary provisions of the document and then speculating as to that intent through the artifice of negative implication. These end-around tactics are rendered even weaker by the fact that the Barker Respondents and the Foundation would face a substantial evidentiary burden at trial on the point of the Settlor's intent to exclude.[32] At the summary judgment stage, even viewing the facts in a light most favorable to the nonmoving party as is required of this court, the Barker Respondents and the Foundation have failed to show that a genuine issue of material fact exists as to whether the Settlor intended to exclude Jerry from the eligible class of beneficiaries under the Agreement.

Indeed, the circumstantial evidence to which the Barker Respondents and the Foundation call attention is little more than legally-insignificant speculation. Even assuming it were proper for the court to look outside the four corners of the Agreement, there is no direct evidence that the Settlor ever told Hugh or anyone else that Jerry should never be adopted and should never take under the

[32] *See* note 14 *supra*.

Agreement. No evidence has been presented as to what actually transpired at the closed-door meeting in the Settlor's home sometime in the late 1940s. The delay in consummating the adoption proceeding is attributable to Hugh's reluctance to adopt Jerry without the consent of Jerry's biological father, and the Barker Respondents and the Foundation offer no factual basis to refute Jerry's deposition testimony on this point.

It does bear mentioning, however, that the Barker Respondents' and the Foundation's attempt to contort the facts of this case into the holding of the Illinois Appellate Court in *Cross v. Cross* is misplaced.[33] In *Cross*, a son was granted a power of appointment under his mother's trust agreement in favor of "such one or more of [the mother's] descendants and their respective spouses . . . as [the son] may appoint by his will making specific reference to this power of appointment."[34] Shortly following his mother's death, the 49 year-old son adopted his 36 year-old, co-habiting male companion in a Texas proceeding, and proceeded to exercise his power of appointment in favor of the adoptee.[35]

Although the *Cross* court held that the adoptee was not a "descendent" of the mother under the trust, it did so without citing any specific facts in the record evidencing the mother's intent to exclude an adult adoptee from the class of

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[33] 532 N.E.2d 486 (Ill. App. 1988), *appeal denied*, 541 N.E.2d 1105 (Ill. 1989).
[34] *Id.* at 488.
[35] *Id.*

potential beneficiaries. Thus, the *Cross* court appears to have misapplied the statutory presumption contained in 755 *Ill. Comp. Stat.* 5/2-4(e).[36] Despite *Cross*, this court is obliged to abide by the self-evident charge of that statute to presume the Settlor's intent to benefit adopted persons. The weak circumstantial inferences which the Foundation and the Barker Respondents say constitute factually-robust evidence of the Settlor's intent to exclude Jerry completely fail to overcome that legislatively directed presumption.[37]

The facts in *Cross* are also readily distinguishable from the circumstances present here. The unconventional relationship in *Cross* that may have influenced that court's analysis is not comparable to the father-son bond shared by Hugh and Jerry for over 50 years.[38] Additionally, the factual record in *Cross* also supported

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[36] *Id.* at 488-89.

[37] 755 *Ill. Comp. Stat.* 5/2-4(a) has been amended in a significant way since the ruling in *Cross*. Although the amendment, which became effective January 1, 1998, is not remedial, the fact that the Illinois legislature enacted the legislation has some bearing on the precedential value which the court places on *Cross*. The statute currently provides:

> An adopted child is a descendant of the adopting parent for purposes of inheritance from the adopting parent and from lineal and collateral kindred of the adopting parent and for the purpose of determining the property rights of any person under any instrument, *unless the adopted child is adopted after attaining the age of 18 years and the child never resided with the adopting parent before attaining the age of 18 years*, in which case the adopted child is a child of the adopting parent but is not a descendant of the adopting parent for the purposes of inheriting from the lineal or collateral kindred of the adopting parent.

Section 2-4(a) was first enacted in 1955 without the italicized language, which constitutes the amendment passed by the legislature in 1997. Clearly, the legislature intended for adopted adults to have the same inheritance rights as biological children, provided that the adopted child shared a domicile with, and received day-to-day care from, the adopting parent.

[38] *Cross*, 532 N.E.2d at 488.

an inference that the adoption was done to defeat the testatrix's intention,[39] while the Barker Respondents and the Foundation have uncovered no evidence of any misconduct by Jerry or Hugh. Moreover, the timing of Jerry's adoption–coming as it did long after the Settlor's death–is hardly suggestive of any preconceived plan to frustrate the Settlor's intentions. For these reasons, the *Cross* decision is not persuasive precedent, and summary judgment in favor of Jerry and Hugh on the issue of Jerry being a descendant of the Settlor under Illinois law is appropriate.

B. Pursuant To Delaware Law, Jerry Is Not A "Descendent" For Purposes Of Ralph's Will[40]

Delaware law controls the construction and validity of the provisions of Ralph's will due to the operation of the choice of law provision located therein.[41] Adult adoptions are sanctioned by Delaware statute,[42] and foreign adoptions are entitled to full faith and credit within this State.[43] Thus, an adopted child has the

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[39] *See id.* (noting that the adoption was consummated less than a month after the mother's death and that the power of appointment was exercised just over a week later). *See also id.* at 489 ("Moreover, defendant's own deposition testimony refers to a conversation defendant and [the son] had with [the son's] attorney after [the mother's] death. The attorney 'jokingly' suggested they think of adoption. '[W]e thought it was a joke at first and then found out it could be done that way.'").

[40] Although the Barker Respondents and the Foundation did not move for summary judgment on this issue, the state of the record reveals no disputed issues of material fact as to Ralph's intentions in his will. Because Hugh and Jerry did move for summary judgment on this point, it is procedurally proper for the court to enter judgment against them. *See* note 18 *infra*.

[41] 6 *Del. C.* § 2708 (2007). Ralph's will provides that "each trust created under Article V of this will shall be regarded as a Delaware trust for administrative purposes and, to the extent legally possible, shall also be regarded as a Delaware trust for matters of validity and construction."

[42] *See generally* 13 *Del. C.* §§ 951-956 (2007).

[43] 13 *Del. C.* § 927(a) (2007).

same legal relationship with his or her adopted parent as if he or she had been born to that individual,[44] and is treated as a biological child for purposes of inheritance both from the adopting parent and the collateral or lineal relatives of the adopting parent.[45] In effect, the relevant statutory provisions create a rebuttable presumption that adopted children are to be treated the same as biological children under a will or a trust agreement provided there is no evidence of a contrary intent to exclude adopted persons.[46]

The Delaware Supreme Court has held that no requirement exists that an actual parent-child relationship exist for an adult adoption to be valid.[47] Moreover, an adult adoption motivated by the parties' desire to create inheritance rights is legitimate in the eyes of Delaware law.[48] In *Chichester v. Wilmington Trust Co.*, however, Justice McNeilly poignantly noted that:

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[44] 13 *Del. C.* § 954 (2007). *See also* 13 *Del. C.* § 919(a) (2007) ("[T]he adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he or she had been born to the adopting parent or parents.").

[45] Delaware law provides:

> Upon the issuance of a decree of adoption, the adopted child shall acquire the right to inherit from its adoptive parent or parents and from the collateral or lineal relatives of such adoptive parent or parents, and the adoptive parent or parents and the collateral or lineal relatives of the adoptive parent or parents shall at the same time acquire the right to inherit from the adoptive child.

13 *Del. C.* § 920(b) (2007).

[46] *See, e.g.*, *Chichester v. Wilmington Trust Co.*, 377 A.2d 11, 13-14 (Del. 1977) (holding that the relevant statutory provisions of Delaware law allow adult adoptees to take as issue of their adoptive parents provided no evidence of a contrary intent exists in the given instrument); *Schlaeppi v. Delaware Trust Co.*, 525 A.2d 562, 564 (Del. Ch. 1986) (holding that the presumption may be overcome by a clear intent to exclude).

[47] *See In re Swanson*, 623 A.2d 1095, 1096-99 (Del. 1993) (holding that a 66 year-old man could adopt his 51 year-old companion).

[48] *Id.* at 1097-98.

> The finality of adoption does not preclude inquiry into its purpose in the context of determining a class of beneficiaries, and the intent or purpose of the testator or trustor *can always be examined* to determine if he intended to benefit adopted individuals.[49]

The court's discussion in *Chichester*, then, supports the seminal rule of construction in Delaware trusts and wills cases: that the intent of the settlor or the 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.'"[50] Pursuant to the teachings of Delaware statutes and pertinent case law, if Ralph's will is facially ambiguous and evidences some intent to limit the proceeds of his trust to his biological nieces and nephews, and if the circumstances surrounding the will's execution provide a concrete basis to conclude that he wished to so limit the eligible beneficiaries, Jerry cannot be classified as a descendent for purposes of Ralph's will.

Contrary to the situation the court faced in construing the Agreement, Ralph's will, considering the set of factual assumptions Ralph was operating under when he executed it, reveals ambiguity regarding his intent to limit the class of beneficiaries created by the exercise of his power of appointment. Although his

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[49] 377 A.2d at 14-15 (emphasis added).
[50] *Annan*, 559 A.2d at 1292 (quoting *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983)).

power of appointment was exercised broadly in favor of his father's children's living descendants, article XI of Ralph's will also states:

> It is my intention that the trusts created by the exercise in this will of my power of appointment be merged, if at all possible, *with the similar trusts which my brother HUGH BARKER intends to create at his death by a similar exercise of his power of appointment.*[51]

On the face of Ralph's will, then, it appears that while he wished for all of nieces and nephews to be the object of his bounty, he believed that group to consist only of the Barker Respondents–the same group benefitted by Hugh's 1992 will. Given the opaque language of Ralph's will, and as the *Chichester* and *Annan* decisions instruct, this court should look to competent circumstantial evidence to determine the intended beneficiaries of Ralph's estate.[52]

The uncontroverted extrinsic evidence presented shows that Ralph only intended that his seven biological nieces and nephews take from his trust. First, before Jerry was adopted, Hugh originally exercised his power of appointment in favor of Robert's and Cecily's children. Hugh and Jerry do not dispute that an oral understanding existed between Ralph and Hugh that these children would receive the proceeds of both trusts upon their deaths. While no written agreement was ever in place to memorialize this understanding (and thus Hugh was clearly within his

[51] Emphasis added.
[52] 377 A.2d 14-15.

legal rights to alter his estate plan at any time),[53] Ralph died believing that only his seven blood-related nieces and nephews would inherit from his trust. Thus, while the adoption in this case comes nowhere close to being "patently frivolous" with respect to Jerry's ability to inherit from Hugh's trust,[54] it certainly does violence to Ralph's testamentary intentions. To that point, the fact that Hugh was aware of the parallel nature of Ralph's estate plan, yet never once mentioned Jerry's adoption in the two years preceding Ralph's death, creates a powerful inference that Hugh suspected Ralph only wished for Robert's and Cecily's children to become his beneficiaries.

Second, Jerry's deposition testimony reveals that, throughout Ralph's life, Jerry never had close ties with his adopted uncle and did not expect Ralph to appoint any part of his trust to him. Accordingly, after Ralph's death in 2000, Jerry made no claim against Ralph's estate. Clearly, Jerry's lifelong relationship with his adopted father materially differs from Jerry's casual relationship with Ralph,[55] and provides strong circumstantial evidence of Ralph's intent to benefit

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[53] *See* 6 *Del. C.* § 2715 (2007) (statute of frauds requiring that an agreement by a decedent to make a will or devise a legacy must be in writing and signed by the decedent in order to charge the decedent's personal representatives or heirs). Because Hugh is still alive and because the Barker Respondents have not taken from his trust, the partial performance exception discussed in *Wagner v. Ware*, 1985 WL 44704 (Del. Ch. Feb. 7, 1985), is inapplicable to enforce any promise against Hugh to exercise his power of appointment in a certain way. Regardless, neither the Barker Respondents nor the Foundation has ever raised such an argument in this litigation.

[54] *See Swanson*, 623 A.2d at 1099 (stating that "no court should countenance an adoption to effect a fraudulent, illegal or patently frivolous purpose").

[55] Jerry testified that he had not seen Ralph in the thirty years preceding Ralph's death.

only those nieces and nephews he was aware of at his death. On these bases, then, the court must hold that Ralph never intended Jerry to be a descendant for purposes of his will, and summary judgment in favor of the Barker Respondents and the Foundation is appropriate since the record plainly illustrates Ralph's intention to limit the beneficiaries of his trust to those nieces and nephews which he knew existed at the time of his death in 2000.

C. The Barker Respondents' And The Foundation's Affirmative Defenses Fail As A Matter Of Law[56]

1. Unclean Hands

The affirmative defense of unclean hands embodies the basic and long upheld principle followed by the Court of Chancery that "he who comes into equity must come with clean hands."[57] Because equitable relief necessarily contemplates "[r]ighteous conduct and fair dealing by the litigants,"[58] any party who engages in "reprehensible conduct in relation to the matter in controversy"[59] will have the doors of this court shut against him due to his failure to abide by

[56] In light of the court's holding that Jerry is not a descendent as that term is used in paragraph A.3 of Ralph's will, it is unnecessary to address the Foundation's and the Barker Respondents' affirmative defenses of waiver and laches because those arguments do not pertain to Jerry's ability to take under Hugh's trust.
[57] *Bodley v. Jones*, 59 A.2d 463, 469 (Del. Ch. 1947). *See also Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 791 (Del. Ch. 1998).
[58] *Bodley*, 59 A.2d at 469.
[59] *In re Enstar Corp.*, 593 A.2d 543, 552-53 (Del. Ch. 1991), *rev'd on other grounds*, 604 A.2d 404 (Del. 1992).

precepts of "conscience or good faith."[60] This court has broad leeway in exercising its equitable judgment under this maxim, and is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."[61] If a party raises the doctrine of unclean hands as a defense, it must adduce some credible evidence to support its defense to survive a motion for summary judgment since a rebuttable presumption exists that all persons act honestly and properly in seeking judicial relief.[62]

The Barker Respondents and the Foundation say that Jerry's concoction of a scheme to cause his adoption to occur when Hugh was susceptible to manipulation, or, alternatively, Hugh's lack of testamentary capacity in 1998, should bar Jerry from taking under Hugh's trust. Even if this attempt to obfuscate the substantive standards of evidence for testamentary capacity and undue influence by way of an unclean hands defense made legal sense, it fails for lack of support in the record. Incontrovertibly, Jerry first learned of Hugh's plan to adopt him at Rankin's office in 1996, and Hugh's mind was made up well before discussing his plans with

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[60] *Bodley*, 59 A.2d at 469.
[61] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522-23 (Del. Ch. 1998) (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 204, 246 (1933)).
[62] *Niehenke v. Right O Way Transp., Inc.*, 1996 WL 74724, at *2 (Del. Ch. Feb. 13, 1996). *See also KE Property Mgmt., Inc. v. 275 Madison Mgmt. Corp.*, 1993 WL 2859000, at *7-8 (Del. Ch. July 27, 1993) (discussing summary judgment standard with regard to equitable defenses and finding, in that particular case, that the defendant failed to carry its burden with respect to unclean hands).

Jerry.[63] Rawlings's neuropsychological evaluation, coupled with Ferguson's and Jerry's testimony, conclusively establishes that Hugh's cognitive functions were nowhere near the threshold necessary to show a lack of testamentary capacity.[64] Because they provide only speculation, rather than substantiation, regarding the alleged circumstances which would bar Jerry's ability to take from Hugh's trust on a theory of unclean hands, the Barker Respondents' and the Foundation's arguments on this point fail as a matter of law.

2. Equitable Estoppel[65]

Equitable estoppel arises when "a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment."[66] To mount a defense of equitable estoppel, a party must show by clear and convincing evidence that it (1) lacked knowledge and the means of

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[63] The Barker Respondents and the Foundation point to a note in Rankin's file which, they claim, shows that Rankin and Jerry forced Hugh to undertake both the adoption and change in his power of appointment. On a motion for summary judgment, though, mere speculation is no substitute for factual evidence. *See* notes 16 and 17 *supra*. The note says that Rankin's file should reflect "that Hugh called [Rankin] separate and apart from Jerry and told [Rankin] what he wanted to do . . . [Hugh] wants to adopt Jerry and exercise his power in favor of him . . . [n]obody realized before now that this could be done." This appears to be nothing more than the effort of a conscientious attorney to document the sequence of events giving rise to the adoption in order to provide a record for what he rightly suspected might be contentious litigation at some point in the future.

[64] That standard simply asks whether or not the testator knew the extent of his estate, knew that he was executing a testamentary document, and knew to whom the benefit of his disposition would accrue. *See, e.g.*, *In re Boyd*, 2003 WL 21003272, at *4 (Del. Ch. Apr. 24, 2003); *De Marco v. McGill*, 83 N.E.2d 313, 320 (Ill. 1949).

[65] Insofar as the Barker Respondents argue that equitable estoppel precludes Jerry from taking under Ralph's trust, that argument is moot. *See* note 56 *supra*.

[66] *Wilson v. American Ins. Co.*, 209 A.2d 902, 903-04 (Del. 1965).

knowledge of the truth of the facts in question, (2) relied on the conduct of the other party, and (3) suffered a prejudicial change of position as a result of such reliance.[67] Because of its substantive evidentiary burden, a party claiming estoppel may not rest upon an inference that is only one of several potential inferences.[68] Furthermore, a person's reliance on the other party's actions must be reasonable, and that individual must not have misled himself through his own negligence.[69]

Assuming *arguendo* that the Barker Respondents may properly assert a right of the petitioner here (for Wilmington Trust has never done so), they contend that, because Hugh delayed adopting Jerry for many decades, Hugh must have promised the Settlor at the closed-door meeting that took place somewhere between 1946 and 1949 that Jerry would never be adopted. This argument fails for several reasons. First, the Barker Respondents offer no plausible explanation as to how the Settlor relied *to his detriment* on this alleged promise. Second, any promise Hugh may have made is but one inference among several plausible theories as to why the adoption did not occur until it did. Hugh may not have believed time was of the essence from 1946 to 1996. As Jerry testified, Hugh did not wish to consummate

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[67] *Id.* at 904. *See also Employers' Liability Assurance Corp. v. Madric*, 183 A.2d 182, 188 (Del. 1962) (noting the clear and convincing evidentiary burden a party claiming equitable estoppel must overcome).
[68] *Madric*, 183 A.2d at 188.
[69] *See, e.g., American Family Mortgage Corp. v. Acierno*, 640 A.2d 655 (table), 1994 WL 144591, at *5 (Del. 1994) ("One cannot bury one's head and hope that equitable estoppel will prevent the assertion of another's right.").

the adoption while Jerry's natural father was still alive. As the Barker Respondents even admit in their briefing, such rife speculation falls far short of satisfying the clear and convincing standard required to grant relief under an equitable estoppel theory.[70] Finally, the Settlor could easily have protected against Hugh's appointment of his trust to Jerry (assuming that was his wish) simply by including explicit, restrictive language in the Agreement itself. The Settlor did not do so, even with sophisticated counsel at his side.

**V.**

For the foregoing reasons, the petitioner is hereby instructed that Jerry Burnett-Barker and his children are properly classified as "descendents" under article V of the Agreement. However, because Jerry Burnett-Barker is not within the class of beneficiaries contemplated by paragraph A.3 of Ralph Barker's will, Jerry is foreclosed from taking from the trust created in article VII of the Agreement. IT IS SO ORDERED.

[70] *See* Barker Respondents' Supplemental Br. at 31 ("There may never be sufficient clear and convincing evidence to establish [equitable estoppel] as it is not likely that any direct evidence will be revealed on this issue.").