

2000

Larry B. Rentmeister v. June R. DeSilvia, James
Howard Rentmeister, Donald Neil Rentmeister,
Trustees of the Estate of Della Zillah C.
Rentmeister : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Larry B. Rentmeister v. June R. DeSilvia, James Howard Rentmeister, Donald Neil Rentmeister, Trustees of the Estate of Della Zillah C. Rentmeister*, No. 14366.00 (Utah Supreme Court, 2000).

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LARRY B. RENTMEISTER,

Plaintiff and
Respondent,

vs.

JUNE R. DeSILVA, JAMES
HOWARD RENTMEISTER, and
DONALD NEIL RENTMEISTER,
TRUSTEES OF THE ESTATE OF
DELLA ZILLAH C. RENTMEISTER,

Defendants and
Appellants.

Case No. 14366

RESPONDENT'S BRIEF

Appeal from the Judgment of the
District Court of Weber County,
Honorable Calvin Gould, Judge

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LARRY B. RENTMEISTER,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	
JUNE R. DeSILVA, JAMES	/	Case No. 14366
HOWARD RENTMEISTER, and	/	
DONALD NEIL RENTMEISTER,	/	
TRUSTEES OF THE ESTATE OF	/	
DELLA ZILLAH C. RENTMEISTER,	/	
Defendants and	/	
Appellants.	/	

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action brought by Respondent, who was the Plaintiff in the Lower Court, against the Appellants, who are Co-Trustees and beneficiaries of the residuary estate, wherein the Respondent seeks to compel the distribution of the estate in accordance with the terms of an inter vivos trust agreement. The Counterclaim of the Co-Trustees, who are also beneficiaries under the terms of the inter vivos trust agreement, seek to exclude the Respondent from participating in the distribution

of the residuary estate of the deceased Settlor, and to limit the distribution to the Respondent of only the specific bequest set forth in the inter vivos trust agreement and seeking a reformation of paragraph F of Article III of the Trust Agreement so as to prevent Respondent from participating in a one-fourth equal distribution of the residual trust estate in accordance with the provisions set forth in said paragraph. The basis set forth for the reformation of the Trust Agreement is alleged to be a scrivener's error on the part of the attorney who drafted the trust instrument.

DISPOSITION IN LOWER COURT

The Lower Court granted Judgment in favor of Respondent and against Appellants, holding that an inter vivos trust cannot be altered after the death of Settlor by a claim of scrivener's error, where the dispositive terms of the trust are sought to be altered without proof of fraud or undue influence.

RELIEF SOUGHT ON APPEAL

Respondent seeks upholding of the Judgment of the Lower Court and the denial of any right of reform of the trust instrument and that the terms of the trust instrument be carried forth in the manner clearly and unequivocally set forth therein.

STATEMENT OF FACTS

The testimony set forth in the Lower Court revealed that the Decedent, Della Zillah C. Rentmeister, (R-39), who will hereinafter be referred to herein as the Settlor, employed the services of Attorney William J. Critchlow, III, who will hereinafter be referred to herein as Settlor's Attorney, for the purposes of estate planning and that the Settlor's Attorney did draft an inter vivos trust in September, 1968, (R-39), and that the Settlor had four children, namely James Howard Rentmeister, Donald Neil Rentmeister, June R. DeSilva, who are also the Defendants and Appellants in the instant matter before this Court, and Ned Everest Rentmeister, who was deceased at the time of the making of the inter vivos trust and is and was survived at all times herein by the Respondent, Larry B. Rentmeister, who was also the grandson of the Settlor and the only child surviving of the Decedent, Ned Everest Rentmeister. (R-39)

A Family Trust Agreement was drafted on October 3, 1968, and subscribed to by the Settlor and by the three Trustees, June R. DeSilva, James Howard Rentmeister, and Donald Neil Rentmeister, the Appellants herein (R-53).

The Settlor reserved to herself the right to amend or revoke the Trust or to change the beneficiaries thereof, or

to withdraw the whole or any part of the trust estate by filing a notice of revocation, modification, change, or withdrawal with the Trustees (R-48).

The Trust Agreement further provided under Article III, paragraph E, as follows:

After the payment of debts and expenses and the withdrawal of all personal affects as hereinabove provided, Larry B. Rentmeister shall have the right to withdraw from the trust estate the sum of \$5,000.00. In the event that he shall fail to make such withdrawal, or should die before making such withdrawal, said sum shall be distributed by Trustees to his surviving descendants and dependents for the purpose of providing such descendants and dependents with care, support, maintenance, medical care, and education. (R-50)

Under the same Article III in paragraph F thereof, the Trust Agreement further provided as follows:

After the payment of debts and expenses and the withdrawals as hereinabove provided, Trustees shall divide the balance of the trust estate into equal shares, one for each of Grantor's children then living, and one for each of Grantor's children then deceased, leaving living descendants. (R-50)

Under Article III, paragraph F, subparagraph 4a, the Trust Agreement provided as follows:

Upon the death of a child of Grantor or lawful descendant of a deceased child of Grantor for whom a trust is then held, such trust, to the extent not appointed as hereinabove provided, shall be apportioned in partial shares among his or her living lawful descendants upon the principle of representation, which partial shares shall be held, administered, and distributed as separate trusts ***. (R-51)

On November 8, 1971, an amendment to the Family Trust Agreement was made by the Settlor, wherein the Trust Agreement of October 3, 1968, was amended only as to paragraph E of Article III, and substituted therein was the following:

E. LARRY B. RENTMEISTER. After the payment of debts and expenses and withdrawal of all personal affects as hereinabove provided, Larry B. Rentmeister shall have the right to withdraw from the trust estate the sum of \$7,000.00. In the event he shall fail to make such withdrawal, or should he die before making such withdrawal, said sum shall be distributed by Trustees to his surviving descendants and dependents for the purpose of providing such descendants and dependents with care, support, maintenance, medical care, and education.

The foregoing Amendment was subscribed to by the Settlor on November 8, 1971, and also by the three Appellants, who were also the Trustees of the Estate. (R-55) No other amendment or change of the original Agreement has been presented in evidence before the Court.

At time of trial in the Lower Court, the only witness brought forth was Settlor's Counsel, and prior to any material testimony being given by said witness, Counsel for the Respondent made objection to any testimony of the witness. (R-79) Counsel for Respondent asked for an acknowledgement by the Court and Counsel for Appellants, that there be a continuing objection to any testimony by Settlor's Attorney, which was stated by

the Court and agreed to by Counsel for the Appellant. (R-80)

Counsel for the Appellants further stipulated:

Rather than disrupt the proceedings, your Honor, we would agree that he (Counsel for Respondent) objects to any testimony from Mr. Critchlow, and let it go at that. I don't think there is a problem on that. I will tell the Supreme Court that.
(R-80)

A reiteration of such objection was again made by Counsel for the Respondent and acknowledged by Counsel for Appellants.
(R-81)

The Settlor's Attorney testified, that he personally dictated the original Trust Agreement and the subsequent Amendment to the Trust Agreement. (R-88)

The Settlor became demised on November 2, 1973, at the age of 78 (R-88), leaving an estate in the amount of \$113,629.87 (R-89).

The Settlor's Attorney further testified that he had been advised by the Settlor, that her son, Ned, was killed in 1944, and that the Settlor was the beneficiary of her son's G.I. insurance in the sum of \$10,000.00. (R-92) The Respondent herein being the only living child of the Settlor's deceased son, Ned, and a grandson of the Settlor (R-92,R-46).

The Settlor's Attorney further testified that it was not uncommon in his practice of drafting testamentary instruments

for a parent to leave to a deceased child's children the share the deceased child would have received (R-94).

Further testimony of Settlor's Counsel was to the affect, that at the time of the signing of the original Trust Agreement on October 3, 1968, (R-54), the Settlor and the three Appellants were present in the offices of Counsel for the Settlor (R-95), and that the Settlor read the Trust Agreement, that Settlor's Counsel presumed that the three Trustees, the Appellants herein, also read the Trust Agreement (R-96) and that the Counsel for the Settlor did not read the Trust Agreement (R-96).

ARGUMENT

POINT I

INTER VIVOS TRUST CANNOT BE REFORMED ON ALLEGATION OF SCRIVENER'S ERROR WHEN ITS CONTENT AND INTENT ARE CLEAR AND UNEQUIVOCAL.

The Complaint of the Respondent, who was the Plaintiff in the Lower Court, brought an action against the Trustees of the trust estate of the Settlor, to compel the Trustees to make distribution of the one-fourth equal share in the remainder of the estate in accordance with the provisions of the Family Trust Agreement following the demise of the Settlor, which occurred on November 2, 1973. (R-14,R-33)

The defense of the Appellants, who were the Defendants

in the Lower Court, sets forth that through inadvertence and mistake of the Settlor's Attorney in the preparation of the Trust Agreement, that the appropriate exclusionary language excluding the Respondent from participating in the residue of said estate was not included in the distribution paragraph F of the Trust Agreement (R-16,R-45), and requested that the Court should reform the Trust Agreement to comply with the Settlor's intent as alleged by the testimony of Settlor's Attorney.

The Court in its Memorandum Decision gave Judgment to the Respondent and against the Appellants, holding that the Trustor executed the trust as an inter vivos act on October 3, 1968, and made an Amendment thereon on November 8, 1971, and the Settlor being now deceased, the first effort to reform the instrument occurred April 10, 1974, by means of the Answer and Counterclaim filed by the Appellants, in response to the Complaint seeking enforcement of the trust by the Respondent. (R-59)

The Court found that the Co-Trustees are children of the deceased, Settlor, and that the Respondent is the only child of the deceased child of the Settlor, and stated that the issue presented to the Court was whether the dispositive provisions on the death of an inter vivos Settlor can be reformed after death of the Settlor upon the claim of a scrivener's

error, and held that the rules to be applied in a determination of the reformation of an inter vivos trust, such as that before the Lower Court, are the rules which must be applied pertaining to Wills. (R-59)

The Appellants cited on page 8 of their Brief, the case of In Re Harmon's Trust, 164 N.Y.S.2d 468, wherein the Supreme Court of New York held:

If in fact there was a scrivener's error in transcribing Settlor's intention at the time of creating the Trust, it is correctible by the Court in an action to reform the instrument ** in all the cases where reformation was granted by the Court, Petitioner presented direct and convincing evidence of the necessary fact of Settlor's original intentions and instructions and of the mistake in the instrument as drawn.

This cited case involved an irrevocable trust, which empowered the Trustee, who was the Settlor's only son, to make only such investments as were permitted by the laws of the State of New York for the investment of trust funds. Approximately six months later, the then still living Settlor executed a second document amending the first document and permitting the Trustee to invest and re-invest the proceeds which he deemed in his discretion to be in the best interest of the Trust. The Amended Trust Agreement was executed by the Settlor and by all of the adults involved in the first trust, but there were then in being six grandchildren of Settlor who, because

of infancy, were incapable of giving consent. The grandchildren, who had a contingent interest as remaindermen in the trust, and having a vested interest in accordance with the Statutes of the State of New York, and not having executed the document, had a right to subsequently object to the altering of the irrevocable trust by the drafting of a second trust, which had changed the conditions and terms of investment by the Trustee. Following the demise of the Trustee, it was determined that there had been losses occasioned by the unauthorized transactions as were allowed by the second Trust Agreement, and a Petition was filed by the Executors of the deceased Trustee alleging scrivener's error in the first Trust Agreement and seeking to reform the original indenture to state and conform to the second Trust Agreement.

The Court actually held, that inasmuch as both the Trustee and Settlor were demised and there was no direct evidence brought out of the intent of the Settlor, and a reformation was attempted to be made by relying on circumstantial evidence, the Court held:

Whatever the real facts, it is clear that both Settlor and her son were educated persons and must have read and understood this lengthy and express limitation clause deliberately inserted in the indenture, particularly in the case of a son who as the "scrivener" would necessarily have been conscious of the very words he was using

to express that intention. This is not a situation of a mere omission, concerning which there may be doubt as to whether through inadvertence instructions have not been followed, but of a clearly expressed and complete clause.***

The Court denied the Petition for revision based upon alleged scrivener's error.

The facts in the instant matter before the Court are to the effect, that the Counsel for the Settlor is a competent attorney who is skilled in the drafting of testamentary and trust instruments and that the clear and unequivocal words as set forth by him, which he has alleged as having personally dictated (R-88), with the testimony by Settlor's Counsel, that he presumes that the client read the Trust Agreement prior to subscribing thereto (R-96), and further presumed that the three Trustees also read the trust instrument prior to signing, and the very nature of the dispositive part of the Trust Agreement as set forth in Article III, Paragraph F, does not subject itself to an error of omission, but only possibly of co-mission, which reads partially as follows:

**Trustees shall divide the balance of the trust estate into equal shares, one for each of Grantor's children then living, and one for each of Grantor's children then deceased leaving living descendants
***.

This provision is of such clarity as cannot have been read without its clear and unequivocal meaning being understood

even by a layman. (R-50)

In spite of the clear-cut language of this dispositive provision above, the testimony of the scrivener stated as follows:

I apparently left out an exclusion for the deceased children, the son of Mrs. Rentmeister; either I dictated it and my secretary left it out in the transcription, or I failed to dictate it.
(R-88)

Counsel for Settlor, who was the scrivener, further testified that while the paragraph was clear, that it talks about a deceased child, and "that it could mean a deceased child subsequent to the execution of this document". (R-97)

The attention of the Court is then called to paragraph 4a of the original Trust Agreement, wherein it provides as follows:

DISTRIBUTION TO DESCENDANTS. On the death of a child of Grantor or lawful descendant of the deceased child of Grantor for whom a trust is then held, such trust, to the extent not appointed as hereinabove provided, shall be apportioned in partial shares among his or her living lawful descendants upon the principle of representation,
***. (R-51)

If it was the belief and intent, that paragraph F applied only to the deceased children of living beneficiaries, then it would appear that paragraph 4a, which provided for distribution to the descendants, is purely redundant.

The Appellant has cited Paulson v. Kunz, 253 P.2d 621, as authority for the reformation of the Trust Agreement before

this Court, which Respondent submits to the Court, this case is substantially less than on all fours with the instant matter before the Court, in that the Paulson case was the reformation of a contract with all of the parties living and able to present their own testimony and not as in the instant matter, wherein the Settlor is demised and the scrivener is attempting to change the entire dispositive provisions of a Trust Agreement by what he orally states is the intent of the Settlor.

Even in the Paulson case, this Court stated:

Without discussing the propriety of or authority for such procedure, it is difficult to perceive how one can arrive at the conclusion, that there is clear and convincing evidence for the extraordinary relief by way of reformation, considering the law's policy to lend dignity to written instruments and sanctity to the Parol Evidence Rule. The fact that one is ignorant of the contents of the paper he signs necessarily does not relieve him from contractual liability and should not do so here.

The Court in the Paulson case did not allow the reformation of the contract and the similarity between the Paulson case and the instant matter is that the scrivener alleged, that after dictating the trust, that he did not bother to read it (R-96). A more unexplainable part of the contention of the Appellants is the fact, that upon the amendment of the original Trust Agreement, which occurred more than three years

subsequent to the making of the first Trust Agreement, that the scrivener did not again read the instrument prior to making an amendment and revision of the original Trust Agreement, when the specific bequest to the Respondent was changed from \$5,000.00 in the first Trust Agreement to \$7,000.00 in the Amended Trust Agreement. (R-55) It is testified to that as a matter of fact, the scrivener did not know of the error allegedly made in the two instruments of trust until Counsel for Respondent made demand for distribution in accordance with the terms of the Trust of one-fourth of the estate, which demand occurred in 1974. (R-89)

The Appellants cite the case of Webb v. Webb, 209 P.2d 201, on page 5 of Appellants' Brief, in support of the right of revision of an inter vivos trust following the demise of the Settlor, when as a matter of fact the question decided by the Court was whether or not a deed in form absolute was intended as a mortgage to secure advancements or as an outright transfer of title for a consideration of \$500.00.

This was not an action to change the terms of an inter vivos trust agreement or of a Will, but simply pertained as to the upholding or disclaimer of the absolute form of a written deed for which consideration has been paid.

This Honorable Court held In Re Beal's Estate, 214 P.2d

525:

The rule of construction, that the intent of the Testator must be carried out, does not authorize Courts to make a new Will to conform to what they think the Testator intended, but the intent of the Testator must be ascertained from the Will as it stands.

Appellants cite Sine v. Harper, 222 P.2d 571, which was heard by this Honorable Court as to the reformation of a deed, and seeks to use the language of this Court as authority for the testimony of the Attorney for the Settlor, who was also the scrivener, changing the intent and purpose of the plain words of the inter vivos trust to what the scrivener alleges to be the intent of the Settlor.

The action in the Sine case was for the reformation of a deed on the grounds of mutual mistake and the statements made by purchasers through their agent was held to be admissible for purposes of showing beliefs of the purchasers or to establish the extent of the agent's authority.

It is pointed out to this Court, that the Court restated its position as held in George v. Fritsch Loan & Trust Company, 69 Ut. 460, 256 P. 400, 403, wherein the Court stated:

The law is well settled in this and in other jurisdictions, that a written contract will be reformed to express the agreement of the parties when the proof of the mistake is clear, definite, and convincing,

and where the party seeking the reformation is not guilty of negligence in the execution of the contract nor laches in making timely application for its reformation.**

It is suggested to this Court that in the instant matter before it, there is no clear and convincing evidence as to the intent of the Settlor, other than the clear language of the Trust Agreement itself, and that the scrivener, as well as the Co-Trustees, beneficiaries and Appellants, are free from negligence in the final wording of the inter vivos trust, in that the testimony of the Settlor's Counsel, who is also the scrivener, was to the effect that the Settlor's Counsel testified he personally dictated the original Trust Agreement and the Amendment to the Trust Agreement (R-88); that Counsel for the Settlor did not read the Trust Agreement prior to the subscription thereto (R-96); and the testimony further that the Settlor's Counsel believed that the three Co-Trustees, beneficiaries and Appellants, also read the Trust Agreement prior to the subscription thereto by the Settlor.

The laches would be evidenced by the fact, that the original Trust Agreement was subscribed to on October 3, 1968, by the Settlor and the three Co-Trustees, and that an Amendment was made to the Trust Agreement on November 8, 1971, (R-51, R-55), and that no action was taken by the Co-Trustees or the

Settlor's Counsel for a revision of the Trust Agreement until
an Answer and Counterclaim was filed by the Co-Trustees on
April 10, 1974. (R-4)

In the Estate of John W. Baum, 4 Ut.2d 375, 294 P.2d
711, this Court held:

Elementary in the law of Wills, is that the intention of the Testator must govern. To arrive at that intention, the Courts must consider the Will in its entirety and not merely the particular clauses which are in dispute. This Court has recognized that a Testator has a right to dispose of his property as he sees fit, and he may disinherit close relatives if he desires, no particular form of disinheritance being necessary to accomplish that objective. All that need appear is that Testator intentionally excluded the particular heir.

This Court further held in the cited case, that extrinsic evidence cannot be resorted to to dispute the Testator's recitals where the intention of the Testator is manifested.

If this Court deems that it is proper and possible to reconstruct the intent of a Settlor, where there is a variation of such intention as alleged by the Settlor's Counsel in testimony more than seven years following the drafting of the original Trust Agreement, and where the language of the dispositive terms of the trust are clear and unequivocal, then it is submitted to the Court, that there are some interesting aspects of the intent of the Settlor as were recited by the scrivener justifying

the special bequest to the Respondent, as well as allowing Respondent equal participation in the residuary estate.

The scrivener testified that at the time of the making of the original Trust Agreement of October 3, 1968, (R-53), that the Settlor stated to the scrivener, that her son, Ned, had been killed somewhere in 1944 or thereabouts, and that as a result of the demise of her son, Ned, that the Settlor received \$10,000.00 in insurance as the G.I. beneficiary of the son (R-92). The Respondent, Larry R. Rentmeister, is the only child and heir of the Settlor's son, Ned, and, of course, was living at the time that the Settlor received her son's \$10,000.00 G.I. insurance.

It was further testified to by the Settlor's Counsel, that at the time of the drafting of the 1968 inter vivos trust, the Settlor did not advise the scrivener of the amount that she wanted to leave to her grandson, the Respondent herein (R-83), and that the scrivener further testified:

My notes reflect a dollar sign and blank. Later she called me and through her own son sent a note to me telling the total amount to be left to the grandson (R-83).

The scrivener further testified that on the telephone, the Settlor stated that she wanted the blank amount of the specific bequest to be in the sum of \$5,000.00.

The scrivener further testified that about 1971, the Settlor telephoned and stated that she wanted to increase the specific bequest for her grandson and have it changed from \$5,000.00 to \$7,000.00. (R-88)

The lack of decisiveness of the Settlor at the time of the drafting of the inter vivos trust, as has been hereinabove set forth, together with the setting first of an amount of \$5,000.00 and then an amount of \$7,000.00 as a specific bequest for the Respondent, coupled with the admitted fact that the Settlor received G.I. insurance in the amount of \$10,000.00 or more from her son, Ned, who is the father of the Respondent herein, all is indicative of an intent, if inferences are to be made, of what the intent of the Settlor was at the time of the drafting of the inter vivos trust, and can just as readily be seen as the desire of a 78-year old mother and grandmother (R-33), to do justice to her deceased son's only child by returning to him the monies received as a result of the death of her son and the G.I. insurance in the amount of \$10,000.00, or more, having declared the Settlor as a beneficiary, instead of the grandson, who was the only living child of her son, Ned.

It is submitted to the Court, that if there was any indecisiveness on the part of the Settlor as to what to leave

to her grandson, it was only how much of the insurance proceeds received by Settlor from her son should be returned to Respondent and not as to whether or not her deceased son's only living son, the Respondent, should share equally in the residuary estate with her other three children.

The Appellants have cited Hurst v. Kravis, 333 P.2d 314, as authority that a trust may be reformed because of a mistake and clerical error, but it is submitted to the Court, that this citation is not in point in the instant matter before the Court, in that reformation was being sought on behalf of all of the direct beneficiaries of the trust in accordance with the Statute of the State of Oklahoma, wherein contingent beneficiaries were also a party brought in as a class, also in accordance with Oklahoma Statutes for the purpose of clarifying the investment terms of the trust which in its existing form did not make possible the carrying out of the intent of the Settlor.

Appellants cite the case of Ford v. Ford, 492 S.W.2d 376, as a citation in support of the position of the Appellants, that an irrevocable trust may be modified where the Attorney for the Settlor made a mistake in drafting of the trust. It was clearly shown in this case, that the intent was to make the trust irrevocable for a period of ten years in order that

special tax benefits would benefit the Settlers, and in constructing it, the Attorney set forth that the property was conveyed "absolutely and irrevocably for a term in excess of ten years, as hereinafter designated".

The error made was that Section 2 of the trust instrument provided that the trust would become effective from the 1st day of January, 1967, and continuing until January 4, 1976, on which date the beneficiary would be 21 years of age, but the fact was that the beneficiary became 21 years of age nine years and four days after the date of the creation of the trust and was, therefore, in conflict with not only the intent and the purpose of obtaining tax benefits by establishing the proper time period in the trust, and the Court allowed a change of trust based upon error in order that the intent of the Settlor and the purpose of the trust would be carried out and the conflict of the period of the trust removed.

The Appellants cite the case of Leitner v. Goldwater, 48 N.Y.2d 614, (App.Br.p.9). In some manner, this is supposed to be affirmative of the position of the Appellants and the attention of the Court is called to the cited part therein where it states in the case and has been recited by Appellants, that:

The Court further observed that the failure of the Settlers to read the modification which they

signed, because they were busy men who imposed great confidence in their lawyer, would not of itself vitiate the right to reformation.

It should be noted by the Court, that the Counsel for the Settlor has testified that the Settlor did read the Trust Agreement, as well as the three co-beneficiaries and trustees, but it was the Attorney who did not read the Trust Agreement after having dictated it personally, (R-54,-95,-96), and it is, therefore, submitted that this citation is somewhat the opposite as to the present factual situation before the Court.

Appellants cite the case of Vogel v. City Bank Fireman's Trust Company, 272 N.Y.2d 643, as authority by the Supreme Court of New York County, that a trust deed can be reformed based upon an error and mistake of the attorney who prepared the document in failing to include a revocation clause.

Respondent has no argument with the finding of the Court, but cites glaring distinction in the instant matter before the Court and in the Vogel facts.

In the Vogel case, supra, the Settlor was the father of a daughter and created a trust intended to provide for the daughter and her issue for only so long as such financial protection was necessary, and asked his attorney to so draft a trust instrument.

The attorney drafted the trust agreement as an irrevocable trust and subsequently it became unnecessary for the financial

protection of the daughter and her issue to have the trust inasmuch as from another source, a large trust was created for the daughter and her children.

An action was brought for modification of the Trust Agreement and was brought by the still living Settlor, together with his wife, and the adult and minor beneficiaries of the trust, all stating to the Court the purpose of the trust and testifying as to what the intent was for the drafting of same, and that it should have been drawn as a revocable trust. The Court with all parties interested in the Trust Agreement being in agreement, other than the Bank Trustee, the Court held:

If it appears that the power to revoke should have been expressed in the instrument, a Court of equity will now regard as done whatever the parties really intended, and which in good conscience should have been done, and thus, the relief will be adapted to the exigencies of the case.

It is further submitted to the Court, that the additional case citations by the Appellants, all of which involve the modification of a deed, which are set forth as citations by Appellants on pages 9, 10, and 11 of Plaintiff's Brief, (Sheedy v. Stine, 101 N.Y.2d 773; Delap v. Leonard, 178 N.Y.2d 102; Mills v. Shulba, 213 P.2d 408; and Sunnybrook Children's Home, Inc. v. Dahlem, 265 So.2d 921;) are totally distinguishable from the attempted modification of an inter vivos trust seven

years following the creation of the trust and following the demise of the Settlor, by evidence that is not clear and convincing.

Appellants cite the case of First National Bank & Trust Company of Oklahoma City of Oklahoma v. Foster, 346 F.2d 49, U.S.C.A. 10th Circ. (1965), on page 8 of Appellants' Brief, upholding that the intention of the Settlor should control if not in conflict with established principles of law and an action requiring the Co-Trustees to accept an amendment or supplement to the Trust Agreement they were administering.

It should be noted that in this cited case, the Settlor, who was the Plaintiff in the cited case, reserved the right to provide by a supplemental writing the manner of distribution of the corpus of the irrevocable trust upon the demise of the Settlor and the challenge made by the trustees and beneficiaries of the trust was to the right of the Settlor to make more than one change in the beneficiaries and in the manner of distribution of the corpus of the trust. The right of the Settlor was upheld by the decision in this case and has no relevancy to the instant matter before the Court.

The Appellants cite Artmar, Inc. v. United States Fire and Casualty Company, 148 N.W.2d 641, Sup.Ct. of Wisc., as authority in the instant matter before the Court, even though the case deals with the negligence of an insurance agent, the

Court allowed a modification of the insurance contract and alleged that in insurance cases, that less is required to make out a cause of action for reformation than ordinary contract disputes.

In The Matter of the Estate of Eben E. Robinson, Deceased, 280 P.2d 676, Sup.Ct. of Wash., (Mar., 1955), an attempt by the Executor of the estate to establish by extrinsic evidence the Testator's intent, and particularly permitting the Attorney who drew the Will to testify over legatee's objection on the matter of the Testator's intent.

The Court held that such testimony was in error, the Court stating:

Appellant contends that the Court erred in permitting the Attorney who drew the Will and a bank representative, to testify, over Appellant's objection, concerning the intent of the Testator with reference to the bequest in question. With this contention, we agree for the reason that the intent of the Testator in this respect was ascertainable from the document itself, without the necessity of extrinsic evidence.

The Court further stated as the law of the State of Washington, that the intent of the Testator must be determined without going outside the four corners of the Will if it is possible.

In the case of In Re Poppleton's Estate, 34 Ut. 285, 97 P. 138, this Court held that the intention of the Testator

is to be ascertained from the language used by the Testator in the Will, and if the meaning is clear from the words that are used, that no resort to any construction is necessary nor permissible, but:

Where, however, meaning of a word or phrase employed by the Testator is not clear, and may be given either one of two or more meanings when read in the light of the whole instrument, the Courts may not only, but are required to look to the conditions and circumstances surrounding the Testator at the time the Will was made and in the light of these determine his true intention.

This Court set the basic standard of determination of the intent of a testamentary instrument in the case of In Re Beal's Estate, 214 P.2d 525, when it held that the rule of construction that the intent of the Testator must be carried out does not authorize the Courts to make a new Will to conform to what they think the Testator intended, but the intent of the Testator must be ascertained from the Will as it stands.

This Court's opinion in the Beal case, supra, is similar to the holding of the District Court of Appeal for California in the case of In Re Avila's Estate, 192 P.2d 64, wherein the Court held that the testimony of an attorney who drew the Will as to what the Testatrix had said to him before the Will was drafted was inadmissible where the language in the Will presented no ambiguity calling for any judicial interpretation. The

Court further stated:

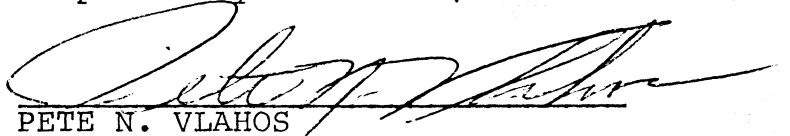
The purpose of construction as applied to Wills is unquestionably to arrive, if possible, at the intention of the Testator; but the intention to be sought for is not that which existed in the mind of the Testator, but that which is expressed in the language of the Will. It is not the business of the Court to say, in examining the terms of the Will, what the Testator intended, but what is the meaning to be given to the language which he used. Where the terms of the Will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the Testator ascertained thereby.

CONCLUSION

It is submitted to this Honorable Court, that the inter vivos trust before this Court is clear and unequivocal as to its meaning and import and that there is no latent or patent ambiguity in the instrument before the Court, and that the scrivener having drafted a trust instrument, which he dictated himself, and which was read by the Settlor and by the three Trustees and beneficiaries, without dissent or complaint during the lifetime of the Settlor, should not now be allowed to testify in a manner contrary to the terms of the trust as to the disposition of the trust estate, and that if in fact there was negligence in the drafting of the inter vivos trust agreement on the part of Counsel for the Settlor, that the remedy for the Co-Trustees

and beneficiaries lies with the negligent party and not in
a modification of the inter vivos trust agreement.

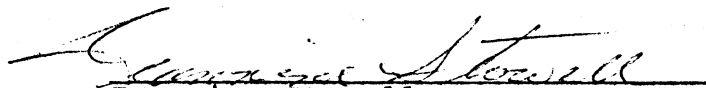
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Pete N. Vlahos", is written over a horizontal line.

PETE N. VLAHOS
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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellants, Richard H. Thornley, Esq., 2610 Washington Boulevard, Ogden, Utah 84401, on this 25 day of March, 1976.


Jeannine Stowell, Secretary

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