

2000

Kenneth Alan Banks; Susan Banks Baker; and Bransford Michael Banks v. Means : Brief of Appellee

Utah Supreme Court

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KENNETH ALAN BANKS;
SUSAN BANKS BAKER; and
BRANSFORD MICHAEL BANKS

Plaintiffs/Appellees,

NANCY A. MEANS

Defendant / Appellant

NANCY A. MEANS

Counterclaim-Plaintiff/Appellant

vs.

KENNETH ALAN BANKS;
SUSAN BANKS BAKER; and
BRANSFORD MICHAEL BANKS

Counterclaim Defendants/Appellees

REPLY BRIEF OF APPELLEES

Supreme Court
Case No. 20001071-SC
Priority No. 12

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH ALAN BANKS;
SUSAN BANKS BAKER; and
BRANSFORD MICHAEL BANKS

Plaintiffs/Appellees,

vs.

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Defendant/Appellant

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KENNETH ALAN BANKS;
SUSAN BANKS BAKER; and
BRANSFORD MICHAEL BANKS

Counterclaim Defendants/Appellees

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE FRANK G. NOEL, PRESIDING

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to § 78-2-2(3)(j), Utah Code Ann., 1953, as amended.

STATEMENT OF THE ISSUE

1. Whether the trial court, in granting summary judgment for Appellees, correctly concluded that Appellant failed to raise a material issue of fact sufficient to prevent the trial court from ruling as a matter of law as per the specific trust language that the interests vested in Appellees by virtue of the 1992 Betty A. Banks Family Protection Trust were subject only to divestiture via a revocation of that trust. Conclusions of the trial court with respect to summary judgment are reviewed by the appellate court for correctness. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

2. Whether the trial court could have correctly concluded that, even when considering the facts in the light most favorable to Appellant, the documents allegedly executed in 1999 by Betty Banks were insufficient to either effect the revocation of the 1992 Betty A. Banks Family Protection Trust or amend that trust as a matter of law. An appellate court may affirm a trial court's order granting summary judgment on any ground that was available to the trial court even if it was not specifically relied upon by the court below. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993). This issue was presented to the trial court and is preserved by the record. (R.375-76).

3. Whether the trial court, in denying Appellant's Motion for Summary Judgment, correctly concluded that Appellees had

submitted evidence that, when taken in the light most favorable to them as the nonmoving party, was sufficient to raise an issue of material fact as to whether Ms. Banks was either competent or free from undue influence when she allegedly executed certain documents in 1999. Ordinarily, the denial of a motion for summary judgment is not appealable. Christensen v. Farmers Ins. Exch., 443 P.2d 385 (Utah 1968). However, cross-motions for summary judgment may be viewed as the independent contention by both parties that they are entitled to judgment as a matter of law rather than a concession that no question of fact exists under the theory advanced by the opposing party. Wycalis v. Guardian Title, 780 P.2d 821 (Utah App. 1989), cert. denied, 789 P.2d 33 (Utah 1990). Nonmoving parties are entitled to have all evidence construed in the light most favorable to their position. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979).

4. Whether the trial court correctly determined that the statements made by attorney Joseph Platt were admissible when the information divulged by Mr. Platt was not acquired by him in his capacity as Appellant's attorney and it was divulged by him only in response to specific questions posed Appellant's counsel. A trial court's interpretation of law is reviewed for correctness with some deference being accorded the trial court's application of law to fact. Montes Family v. Carter, 878 P.2d 1168 (Utah App. 1994).

DETERMINATIVE LAW

Cases: Contintental Bank & Trust v. Country Club Mobile Est., 632 P.2d 869 (Utah 1981) (even revocable trusts vest within trust

beneficiaries an enforceable interest in the trust corpus).

Homer v. Smith, 866 P.2d 622 (Utah App. 1993) (when interpreting a contract a court must construe the writing according to its plain and ordinary meaning).

Nielsen v. O'Reilly, 848 P.2d 664 (Utah 1992) (a contract should be read as a whole in an attempt to harmonize and give effect to all of the contract's provisions).

In re Short, 7 S.W.3d (Mo. App. 1999) (well known technical terms should be afforded their technical meanings).

Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979) (nonmoving parties are entitled to have all questions of fact resolved in their favor).

Estate of Jones v. Jones, 759 P.2d 345 (Utah 1988) (the presence of undue influence is a question of fact).

Hilbert v. Benson, 916 P.2d 903 (Wyo. 1996) (the test for competency is whether the settlor had the ability to comprehend the subject of the trust, its nature and probable consequences).

Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483 (Utah 1988) (only complete and facially unambiguous documents may be interpreted as a matter of law).

Gold Standard Inc. v. American Barrick Resource Corp., 801 P.2d 909 (Utah 1990) (the attorney-client privilege must be strictly construed).

Rules of Evidence: Utah R. Evid 507(a).

Rules of Civil Procedure: Utah R. Civ. Pro. 56

Statutes: Utah Code Ann., § 78-24-8(2).

Restatements: Restatement 2d, Trusts §§ 19, 333 (the test for competency is whether the settlor had the ability to comprehend the subject of the trust, its nature and probable consequences).

STATEMENT OF THE CASE

A. Nature of the case.

The dispute in the present case focuses on issues which surround the 1999 modification of the 1992 document entitled "The

Betty A. Banks Family Protection Trust." Appellees are the children and vested beneficiaries of the 1992 Trust. Appellant is the vested beneficiary of the 1999 modification of that trust which purports to divest Appellees of their beneficial interests. As set forth above, this appeal presents four issues for the Court to determine. However, the Court's decision will hinge on the Court's interpretation of the specific language of the 1992 trust document. If the Court finds, as the trial court found, as per the specific language of section 3.2 of the trust document that the children's beneficial interests in the trust corpus were subject to divestiture only through the revocation of the trust, then this Court should affirm the ruling of the trial court below. If, however, the Court finds that the children's interests were subject to divestiture via a modification or amendment to the trust, the Court should remand this case to the trial court to determine whether the 1999 modification of trust was effected while Ms. Banks was competent and free from undue influence.

The remaining issue focuses on the statements made by attorney Joseph Platt in his deposition and in an affidavit offered by Appellees in support of their motion for summary judgment and in opposition to Appellant's cross-motion. Appellant contends that these statements were improperly admitted by virtue of the attorney-client privilege while Appellees contend that even if the statements were privileged they were properly admitted on account of the nature of the underlying case

and the fact that Appellant waived the privilege by eliciting the responses from Mr. Platt during his deposition.

B. Course of proceedings.

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Appellees agree that Appellant has accurately characterized the course of proceedings.

C. Disposition of the trial court.

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Appellees agree that Appellant has accurately characterized the disposition of the trial court.

D. Statement of the facts.

1. Appellees are the children of the decedent, Betty A. Banks, who passed away on August 24, 1999. (R.15, 156).
2. Appellant is the older sister of the decedent. (R.155).
3. Attorney Joseph Platt is the attorney who prepared testamentary instruments for both the decedent and Appellant in or about April of 1992. (R.388).
4. Third-party Kevin Reeves is the Appellant's confidant and the beneficiary of Appellant's estate. (R.363, citing Deposition of Nancy Means, p. 42.12, and Deposition of Joseph Platt, p. 69.4). For the sake of candor, Appellant contends that Mr. Platt's statement concerning Mr. Reeves' status as the beneficiary of Appellant's estate violated attorney-client privilege. The trial court admitted this statement.
5. In April of 1992, the decedent executed a document known as "The Betty A. Banks Family Protection Trust," hereinafter

referred to as "the 1992 trust." (R.363).

6. Article I of that document states: "This Trust is established for the primary benefit of the Undersigned during the Undersigned's lifetime, for the Undersigned's family thereafter." Article I then proceeds to list the names of the Appellees as the only family of the Undersigned. (R.2-3).

7. Under the terms of the 1992 trust, the decedent, as the settlor and trustee, retained the right to enjoy the use of the trust corpus as she saw fit until the time of her death with her children being named as vested beneficiaries subject to divestiture. (R.363).

8. The 1992 trust also specified that Appellees were to serve as joint successor trustees following the Undersigned's death or incapacity. (R.363).

9 Section 3.2 of the 1992 trust reads:

Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestiture which shall continue until this Trust is revoked or terminated other than by death. As long as this trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity. (R. 363).

10. Section 3.1 of the 1992 trust reads:

Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trust shall deliver to the Undersigned, as the Undersigned may direct in the

instrument of revocation, all of the Trust property.
(R.212).

11. At no point in time subsequent to the execution of the 1992 trust did the decedent have a falling out with the beneficiaries of that trust. (R.363).

12. In fact, notwithstanding that each of Appellees resided outside of the State of Utah, Appellees each made consistent efforts to visit and call the decedent until the time of her death in August of 1999. (R.363). In fact, Appellant has conceded that the decedent maintained warm relations with her children until the time of her passing. Brief of the Appellant, p.6.6.

13. In early 1999, the decedent began experiencing a deterioration of her health that eventually required extended hospitalization. (R.361).

14. At substantially that same time in early 1999, Appellant, together with Kevin Reeves, began to inquire of the decedent exactly how she had devised her estate. (R.361).

15. In response to these inquiries, the decedent gave answers to Appellant and Mr. Reeves that did not accurately reflect her then current estate plans: she informed them that Appellant was the beneficiary of the trust which she executed in 1992.

Deposition of Kevin Reeves, p. 19.18-20.18, (R.369).

16. Not satisfied with the decedent's response to his inquiry, Mr. Reeves took it upon himself to search for the decedent's estate plans so that he might ascertain for himself whether the decedent had in fact, devised her estate to Appellant. (R.364).

17. In February of 1999, at substantially the same time when Appellant and Mr. Reeves began searching for the decedent's estate plans, the decedent, concealing this fact from Appellant and Mr. Reeves, gave the original 1992 trust and will to Appellee Susan Banks for safekeeping together with the instructions that Ms. Banks would need those documents upon the decedent's passing. (R.364).

18. When Mr. Reeves was unable to locate the documents at issue, Mr. Reeves persisted in calling attorney Joseph Platt approximately twenty times with the goal of obtaining a copy of the 1992 estate documents so that he would be able to ascertain for himself whether the decedent had in fact devised her estate to Appellant as she had previously represented. (R.364).

19. Mr. Reeves and Mr. Platt offer significantly different versions of the events which culminated in the 1999 amendment to the 1992 trust. (R.364).

20. According to Mr. Reeves, after he had tried approximately twenty times to reach Mr. Platt by phone, Mr. Platt finally returned Mr. Reeves' phone call. (R.364).

a. During this initial phone conversation, Mr. Reeves gave the telephone to the decedent who then informed Mr. Platt that she wished to obtain a copy of her estate planning documents. (R.364).

b. Thereafter, Mr. Reeves obtained the documents at issue from Mr. Platt. (R.364).

c. Upon obtaining the documents from Mr. Platt, Mr. Reeves

proceeded to read the documents to the decedent, who by this time was hospitalized for her progressing illness. (R.364).

d. After hearing Mr. Reeves' recital in which Appellees rather than Appellant stood to take the decedent's estate upon her passing, the decedent allegedly informed Mr. Reeves that the documents did not reflect either her current or past intentions and that she instead wished for Appellant to receive her entire estate. (R.364).

e. Mr. Reeves, upon hearing the decedent express her wishes as such, persisted in calling Mr. Platt to prevail upon him the necessity of coming to the hospital to visit with the decedent so that she could personally express to Mr. Platt her desire to amend her estate plans. (R.365).

f. After breaking many appointments to meet with the decedent, Mr. Platt finally showed up one day, unannounced, at the decedent's hospital room while Mr. Reeves happened to be present. (R.365).

g. Prior to this meeting, Mr. Reeves claims to have never met Mr. Platt. (R.365).

h. During the meeting at the hospital room, Mr. Platt and the decedent discussed which changes the decedent wished to make to her to her estate plans. (R.365).

I. Mr. Reeves claims to have been present during the entire meeting that day and to have overheard the entire conversation day between Mr. Platt and the decedent, including the instructions which the decedent gave Mr. Platt. (R.365).

j. During the conversation between Mr. Platt and the decedent, Mr. Reeves claims to have witnessed Mr. Platt make notations on a pad of paper which he subsequently had the decedent sign. When Mr. Reeves questioned Mr. Platt about the signed notation, Mr. Platt allegedly answered that the signed notation was sufficient to effect the amendment of the 1992 trust and the no further signature from the decedent would be required. (R.365).

k. Unsatisfied with Mr. Platt's response, Mr. Reeves prevailed upon Mr. Platt to generate more substantial documents for the decedent to sign. (R.365).

l. Thereafter, Mr. Reeves appeared at Mr. Platt's office to retrieve the proposed amendments in printed form, and notwithstanding Mr. Platt's statement that the documents required no additional signature from the decedent, Mr. Reeves took the documents to Ms. Banks for her signature. (R.365).

m. After the decedent signed the documents which Mr. Reeves had delivered to her, Mr. Reeves returned the documents to Mr. Platt who promptly notarized a signature that he had not witnessed. (R.365).

21. Mr. Platt offers the following version the events:

a. In the late summer of 1999, Mr. Platt began receiving telephone messages from an individual who represented himself to be Kevin Reeves and that he spoke for the decedent who wished to make amendments to her then existing estate plans. Mr. Platt denies speaking to the decedent by telephone on that day. (R.

365-66).

b. Because Mr. Platt did not know whether Mr. Reeves did in fact speak for the decedent, Mr. Platt did not immediately begin preparing a new set of trust documents, or any amendment thereto, which reflected the requested changes or amendments. (R.366).

c. At some point in time subsequent to their initial conversation, Mr. Platt states that Mr. Reeves showed up at his office unannounced and that Mr. Reeves stated that he would not leave until he received a satisfactory resolution to the matter. (R. 366).

d. At that time, Mr. Platt prepared a handwritten note stating that the decedent wished to make changes in her estate plans with respect to the existing beneficiaries. Mr. Platt gave this note to Mr. Reeves with the instruction that Mr. Reeves should deliver the note to the decedent, have the decedent sign the note and then return the note to his office as evidence of the decedent's desire to actually change her trust. (R.366).

e. Mr. Reeves subsequently returned with the signed note purporting to bear the decedent's signature. (R.366).

f. After receiving the signed note from Mr. Reeves, Mr. Platt prepared two separate pages of proposed changes to the trust and delivered them to the decedent at the hospital for her review as an intermediate step before preparing a restatement of the entire trust. (R.366).

g. Mr. Platt did not present these pages to the decedent

with the intention that she should sign or initial them, and at no time did the decedent initial or sign these pages in Mr. Platt's presence. Moreover, Mr. Platt does not believe that he himself ever notarized the document or authorized another in his stead to notarize the document notwithstanding the stamp bearing his name. Lending credence to Mr. Platt's belief that he never notarized the document is the fact that the amendment to the 1992 trust occurred in August of 1999, but Mr. Platt's supposed affirmation of the decedent's signature bears the date of the 1992 trust rather than the date when he supposedly witnessed the decedent's signature. (R.237, 366).

h. At no time, notwithstanding Appellant's representation to the contrary, did Mr. Platt ever prepare an entire trust document for the decedent to sign; rather, Mr. Platt simply prepared separate pages of proposed amendments which would be incorporated into a formal restatement of trust that he intended to prepare at a later time. The two pages that Mr. Platt prepared incorporated proposed changes to section 4.3 (distribution) and to section 6.6 (trustee). Deposition of Joseph Platt, p.50.16-22., (R.642).

I. Mr. Platt never prepared a formal instrument revoking the 1992 trust. (R.642).

j. The 1999 amendment to the 1992 trust, although purporting to divest Appellees of their vested beneficial interests, retains the exact language of the 1992 trust with respect to Article I:

1.1 Purpose of the Trust. This Trust is established for the primary benefit of the Undersigned during the Undersigned's lifetime, for the Undersigned's family thereafter. At the signing of this Trust, the Undersigned is not married.

1.2 The family of the Undersigned consists of:

KENNETH ALAN BANKS, January 12, 1938
SUSAN BANKS BAKER, March 20, 1940
BRANSFORD MICHAEL BANKS, April 20, 1945

(R.227).

k. At the time Mr. Platt delivered the proposed amendments to the decedent in the hospital, he was concerned about her competency and whether she was free from undue influence. (R. 366).

l. Mr. Platt has called Mr. Reeves version of the events "a complete fabrication." (R.367).

22. The decedent died fifteen days after Mr. Platt visited her in the hospital. (R.156).

23. During the course of the ensuing litigation, on or about January 6 and 7, 2000, Appellees' counsel had occasion to depose Appellant. During that deposition, Appellees sought to pursue a line of questioning relating to Appellant's own estate provisions. Appellant objected and subsequently obtained a protective order limiting that line of questioning to the plans which Appellant had made prior to the decedent's passing. (R.84).

24. On or about March 9, 2000, the parties deposed attorney Joseph Platt. During the course that deposition, Appellant's counsel inquired of Mr. Platt whether he had had any conversations with Appellant recently. Mr. Platt responded:

No. I had one conversation with her several months ago. I called her and asked her how she felt about all of this. She is my client, also. And I wanted to make sure that she was okay with what was happening. I wanted to make sure she didn't feel like Kevin was unduly influencing her. I confirmed in my own mind whether she understood that if Betty died Betty's estate was now going to go to Nancy. Nancy is going to die and Kevin is going to end up with that. I just wanted to make sure she understood that. (R.424).

25. Appellant's counsel did not object to this answer and in fact continued with a line of questioning that was designed to elicit the responses to which Appellant now objects:

Q: How do you know that occurred?

A: Who do I--

Q: How do you know that Mr. Reeves would end up with the estate?

A: Because Nancy told me.

SUMMARY OF THE ARGUMENT

The trial court correctly granted Appellees' motion for summary judgment in this matter; notwithstanding questions of fact that prevented the trial court from granting Appellant's motion, the trial court correctly concluded that even when construing the questions of fact in the light most favorable to Appellant, these questions of fact were immaterial to Appellees' argument and Appellees were entitled to a judgment as a matter of law.

The 1992 trust, even though revocable and subject to amendment, vested within Appellees a beneficial interest in the decedent's estate. This interest was not contingent. Pursuant to the explicit terms of the trust document, the vested beneficial interest that Appellees enjoyed was subject to

divestiture only through a revocation of that trust.

The term revocation is not synonymous with either the term modification or with the term amendment. These terms are technical terms under the law and should be afforded their technical meanings.

Once a settlor creates a trust, even though that trust may be revocable and subject to amendment, a settlor and trustee are bound by the specific language of that trust and may not exercise authority over the trust in a manner that is inconsistent with the trust's explicit language.

In the present case, section 3.2 of the trust specifically states that the interests of Appellees were vested interests subject to divestiture only via a revocation of the trust. Even if the 1999 amendment to the 1992 trust was made while the decedent was competent and free from undue influence, the 1999 amendment was not a revocation of that trust. Therefore, the 1999 amendment was insufficient to divest Appellees of their beneficial interests and Appellees are entitled to their beneficial interests.

However, even if the Court finds that the Appellees' beneficial interest was subject to divestiture via an amendment or modification, this Court should remand this matter to the trial court; not only is the denial of summary judgment not a final order which can be appealed, there remain questions of fact, as set forth above, surrounding the 1999 amendment that prevent judgment from being entered in Appellant's favor as a

matter of law. As the non-moving party with respect to Appellant's motion, Appellees are entitled to have each question of fact resolved in their favor, and it does not necessarily follow that simply because both parties may have moved the trial court for summary judgment that both parties concede that no questions of fact exist under the theory of the case propounded by the opposing party.

Finally, the trial court did not err in allowing the statements made by attorney Joseph Platt to be admitted in this matter. The statements made by Mr. Platt were unrelated to Mr. Platt's previous representation of the Appellant, the Appellant was not the personal representative of the decedent who could claim the privilege under Rule 504[©] of the Utah Rules of Evidence on the decedent's behalf, and the Appellant waived any privilege she may have otherwise claimed when her attorney's own question elicited the response to which Appellant now objects.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

Because the disposition of a case by summary judgment denies the losing party the benefit of a trial on the merits, the appellate court must review the evidence presented in the light which is most favorable to that party and then affirm only when it appears that no genuine dispute of material fact exists, or where, even according to the facts as contended by the losing party, the moving party is entitled to a judgment as a matter of law. Themy v. Seagull Enters. Inc., 595 P.2d 526 (Utah 1979).

However, an appellate court may affirm a trial court's order granting summary judgment on any ground that was available to the trial court even if it was not specifically relied upon by the trial court. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993). In the present case, a material dispute exists as to the validity of the 1999 amendment to the decedent's 1992 trust. However, even when the Court resolves this dispute of fact in Appellant's favor, Appellees are still entitled to summary judgment because the 1999 amendment is insufficient to divest them of the beneficial interest that vested in them by operation of the 1992 trust as a matter of law.

A. EVEN IF VALID, THE 1999 AMENDMENT DOES NOT DIVEST APPELLEES OF THE INTERESTS THAT THEY ACQUIRED VIA OPERATION OF THE 1992 TRUST.

By its own terms, the 1992 trust was both revocable and subject to amendment. The primary purpose of this trust was to provide for the decedent who simultaneously occupied the positions of settlor, trustee and beneficiary. Indeed, by the terms of the trust, the decedent was the sole active beneficiary. However, the 1992 trust also vested in Appellees a beneficial interest that was subject to divestiture only by a revocation of that trust. That revocation never occurred. Appellees are therefore entitled to their beneficial interest set forth in the 1992 trust notwithstanding the validity of the 1999 amendment and this Court should affirm the trial court's order.

Even revocable trusts vest within the trust beneficiaries an enforceable interest in the trust corpus. Continental Bank v.

Country Club Mobile Est., 632 P.2d 869 (Utah 1981); Matter of Estate and Trust of Pilafas, 836 P.2d 420 (Ariz. App. 1996).

"These interests cannot be taken from the beneficiaries except in accordance with a provision of the trust instrument, or by their own acts, or by a decree of a court." Pilafas, *supra*, at 423, *citing*, George G. Bogart and George T. Bogart, *Trusts and Trustees* § 998 (2d. ed. Rev. 1983). Accordingly, the explicit terms of the trust limit the power of both the settlor and the trustee over the trust and this limitation remains even when the settlor has appointed himself trustee for his own benefit.

Continental Bank, *supra*, 872; Pilafas, *supra*, 423; Kline v. Utah Dept. of Health, 776 P.2d 57, 61 (Utah App. 1989); see also, Estate of Brenner, 547 P.2d 938, 942 (Colo. App. 1976).

Therefore, absent fraud or mistake, neither of which has been alleged surrounding the creation of the 1992 trust, a settlor has the power to modify or revoke a trust only if and to the specific extent that such a power was explicitly reserved by the terms of the trust itself. Kline, *supra*, 61; Bogert and Bogert, *Trusts and Trustees*, § 1001 (where a settlor reserves a power to revoke the trust in a particular manner, he can revoke it only in that manner).

In the present case, it is not disputed that had the decedent reserved the power to terminate Appellees' interest in the trust via an amendment to the trust rather than by a revocation of the trust, she clearly could have done so. However, she did not reserve this power. Rather, she reserved

only the power to terminate Appellees interest in the 1992 trust by a revocation of the trust. And once the decedent divested herself of the legal title to the trust corpus, the formalities and terms of the trust document limited her authority to control the trust corpus thereafter. These formalities cannot be abridged notwithstanding the powers of reservation which the settlor could have made but did not make. Continental Bank, *supra*, illustrates this point.

In Continental Bank, a settlor owned property subject to a six year option to buy held by a third party. Thereafter, the settlor conveyed this property to a trustee to be held in trust for various members of his family. The settlor retained the right to revoke and amend the trust but granted the trustee broad authority to manage the trust. The authority granted to the trustee included the right to grant options. Subsequent to divesting himself of legal title, the settlor extended the third party's option to buy. Shortly after the settlor's death, and after the expiration of the original option to buy, the third party sought to exercise the second option leading the trustee to initiate a quiet title action. In holding that the settlor's extension of the option to buy was without legal effect, the Court advocated a formalistic analysis rather than the intent based approach advocated by the dissent: "once the settlor has created the trust he is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument." Id., at 872 (citations

omitted). Thus, the Court noted that even though the settlor could have properly achieved the desired result by adhering to the trust formalities--i.e., revoking the trust and then granting the extension--the settlor's failure to so adhere rendered his extension void.

A formalistic analysis yields the same result in the present case: even if valid, the decedent's failure to adhere to the trust formalities renders the 1999 amendment ineffective to divest Appellees of their beneficial interests.

Sections 3.1 and 3.2 of the trust control this analysis.

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when the change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the trust property.

3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this trust is revoked or terminated other by death. As long as this trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee in their fiduciary capacity.

Section 3.1, governs the rights which the decedent retained over the trust subsequent to divesting herself of legal title.

Section 3.2 outlines the rights which Appellees received by virtue of the decedent's conveyance in trust. In tandem, the two provisions provide the formalistic framework that govern the Court's analysis.

Under section 3.1, the decedent, in her capacity as settlor, reserved the right to amend, modify or revoke the trust. Section 3.1 specifies, however, that such amendment, modification or revocation would be effective only when such change was delivered to the then acting trustee. Until that time, the terms of the 1992 unamended trust govern. Section 3.2 of the trust then states that the rights which the Appellees received were presently vested rights, and although these rights were subject to divestiture, these rights were to continue until the trust was revoked or terminated other than by death. Thus, even though the decedent, in her capacity as settlor, retained the right to divest Appellees of their beneficial interests, her power to effect such divestiture was limited by the trust's expressed terms; and the trust specified that she could only accomplish this end via a revocation of the trust.

Two brief asides are worth noting here. First, the decedent retained the power to amend the trust. Thus, it is conceivable that had she delivered in writing to the acting trustee an amendment to the trust that permitted a divestiture of the Appellees through amendment or modification, rather than revocation, she could have done so. However, there has been no evidence presented to show that the decedent ever attempted such amendment. Second, the decedent, in her capacity as settlor, granted to the trustee the authority to use both the trust income and the trust principal for the decedent's benefit as the sole active beneficiary. Obviously, to the extent that the trustee's

duties required her to invade the trust principal, the trustee possessed a limited power to effect at least a partial revocation of the trust. Again, however, this issue is not before the Court inasmuch as it is clear that the 1999 amendment was an action made by the decedent in her capacity as settlor.

Leaving behind those two asides, it is clear that the two single sheets which the decedent purportedly initialed were not a revocation of the trust; rather they were merely an attempted modification. The terms amendment, modification and revocation are not synonymous but are instead well-known technical terms. Under the law, words with a well-known technical meaning should be construed according to their technical meaning unless a contrary meaning appears in the granting instrument. In re Short, 7 S.W.3d (Mo. App. 1999). Black's Law Dictionary defines the terms as follows:

Amend. To improve. To change for the better by removing defects or faults. To change, correct, revise.

Amendment. To change or modify for the better. To alter by modification, deletion, or addition.

Modification. A change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject matter intact.

Modify. To alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease.

Revocation. The withdrawal or recall of some power, authority, or thing granted, or a destroying or making void of some will, deed, or offer that had been valid until revoked.

Revoke. To annul or make void by recalling or taking back.

To cancel, rescind, repeal, or reverse, as to revoke a license or will. Black's Law Dictionary, (6th ed. 1990).

Thus, while amendment and modification contemplate continuity of the subject matter subsequent to a change, the term revocation indicates a destruction of the subject matter altogether.

No contrary meanings to these definitions are present within the trust. In fact, the technical distinction is evident in the explicit trust language. Section 3.1 states: "On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property." In other words, upon the revocation of the trust, the trust would cease to subsist and the trustee was to restore to the settlor all of the property which she held in trust, thereby extinguishing the relationship between the parties. No similar instruction accompanies the reservation of power to modify or amend the trust. The implication is obvious; if the settlor chose to amend or modify the trust the trust would continue to exist.

Viewed in this context, it is clear that the 1999 amendment which purports to divest Appellees of their beneficial interests, was not the type of event that contemplated the termination of the trust in its entirety. Rather, it was merely a change incidental to the trust itself. And under the trust's own terms, because Appellees' vested interest in the trust corpus were to continue as long as the trust subsisted, it was insufficient to divest Appellees of their interests.

B. APPELLANT'S ARGUMENTS IGNORE THE TRUST'S UNAMBIGUOUS MEANING.

In her brief, Appellant sets forth five separate arguments as to the trial court's misinterpretation of the 1992 trust. Without exception these arguments ignore the trust's plain and unambiguous meaning.

First, Appellant argues that section 3.1 of the trust is the controlling section "as to modifications of the Trust including the creation and removal of contingent beneficial interests" because section 3.2 merely recites a formality to ensure that the trust is not illusory under the law. Brief of the Appellant, p. 15. In support of this proposition, Appellant recalls historical cases which have held that revocable trusts were not illusory because they created in the beneficiary a presently vested interest which was to coincide with the trust itself. Under the Appellant's argument, because section 3.2 merely restates the law, the Court should look to section 3.1 as the controlling section. Appellant cites In re Estate of Groesbeck, 935 P.2d 1255 (Utah 1997) to bolster this point. In that case, the Court determined that the decedent's revocable trust was not illusory because vested interests were created at the trust's inception. The Court determined that simply because these interests were subject to divestiture did not make the trust illusory.

In the present case, however, neither party contends that the 1992 trust is illusory. Groesbeck is therefore inapplicable to the proposition which Appellant has set forth: that the Court should ignore the plain language of section 3.2 in favor of

section 3.1.

It is axiomatic that when interpreting a contract a court must construe the writing according to its plain and ordinary meaning. Homer v. Smith, 866 P.2d 622, 629 (Utah App. 1993). Moreover, the contract should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions. Nielsen v. O'Reilly, 848 P.2d 664 (Utah 1992). Appellant's position ignores this maxim. Instead, Appellant's argument unnecessarily privileges section 3.1 over section 3.2 while Appellees interpretation harmonizes and gives equal weight to both: the decedent retained the right to amend and modify the trust, but if the decedent wished to divest the beneficiaries of their vested rights, she was required to revoke the trust. Moreover, only Appellees position may be read in harmony with Article I of the trust which states that the purpose of the trust, after providing for the decedent during her lifetime, was to provide for Appellees.

Appellant's first argument belies her second in which she posits that section 3.2 actually means that the interests of the beneficiaries were subject to divestiture via amendment and revocation. In submitting that claim, Appellant attempts to parse the language of section 3.2 by dividing modifying phrases to arrive at what is apparently a contradictory conclusion with the position that she advances. Without attempting to recreate Appellant's somewhat confusing method, the correct interpretation of section 3.2 is as follows: Section 3.2, by its plain language,

defines the rights which the beneficiaries received by the creation of the trust. The term of art which described this right is a presently vested beneficial interest which was subject to being divested. Section 3.2 then specifies that this right was to continue for as long as the trust remained in effect. Thus, as long as the trust existed, the Appellees interest in the trust existed as well.

Appellant's confusion apparently stems from the phrase "subject to divestment" which she mistakenly separates from the phrase "presently vested interests" rather than reading them together as a whole to describe the interest that Appellees received. The Groesbeck case, *supra*, from which Appellant herself quotes illustrates this error. Appellant has previously noted the similarities between the language in the Groesbeck trust and the 1992 trust executed by the decedent. Brief of the Appellant, p. 14. In fact, section 3.2 is nearly identical to Article VI C of the Groesbeck trust. Article VI C of the Groesbeck trust states: "The interests of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death." Thus, the only difference with respect to the two sections is that the 1992 trust gives a more detailed description to what the Groesbeck trust simply calls a "present interest." Appellant is therefore incorrect when she separates the phrase "subject to divestment" from the phrase "presently vested interests" to derive the significance that she propounds in her brief.

Appellant's third argument is merely the conclusory statement that the trial court's interpretation of section 3.2 stripped section 3.1 of its meaning with respect to partial revocations. Appellant offers no support for this proposition, however. Therefore, Appellees respectfully request this Court, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, to disregard this portion of Appellant's brief. See also, Burns v. Summerhays, 927 P.2d 197 (Utah App. 1997) (where appellant failed to provide adequate legal analysis and legal authority in support of his claims, his assertions did not permit appellate review). To the extent, however, that Appellant's third argument merely restates arguments presented elsewhere, Appellees respectfully refer the Court to those areas of this brief.

Appellant's fourth argument, to a certain degree, develops the argument which Appellant failed to support in her third: the decedent retained the right to effect partial as well as total revocations of the trust. If evidence exists, and Appellant claims it does, that indicates the decedent effected a partial revocation of the trust then that partial revocation is sufficient to divest Appellees of their vested interests. This argument fails as a matter of law.

Appellees do not dispute that the decedent retained the right to partially revoke the trust. Instead, Appellees dispute that a partial revocation, even if so effected, would have the legal consequence that Appellant asserts. As set forth above, the decedent had at her disposal two methods of effecting a

partial revocation: First, as the settlor, and in compliance with the instructions set forth in section 3.1, the decedent clearly could have withdrawn certain property from the trust corpus. Once the settlor withdrew this property from the trust, neither the trustee nor the beneficiaries would have any legal relationship or claim to this property. Second, as the trustee, and in compliance with section 2.1 of the trust, the decedent could have determined that the property was required to meet the decedent's needs in her capacity as the active beneficiary of the trust. Again, once this property was removed from the trust, neither the trustee nor the beneficiaries would have standing to claim an interest in that property. In both cases, however, notwithstanding the partial revocation, the underlying trust would continue to subsist and the relationships defined by that trust would continue with respect to the property left undisturbed. See, Matter of Estate of West, 948 P.2d 351, 354 (Utah 1997).

Notwithstanding the language that Appellant uses to phrase her argument, Appellant is not claiming that either the settlor or the trustee removed property from the trust. Therefore, Plaintiff's fourth argument, at its essence, is unrelated to the issue of whether a partial revocation could effect Appellees' divestiture. Instead, Appellant is arguing that the Court need not be troubled with trust formalities and that the decedent's alleged amendment should be sufficient to divest Appellees notwithstanding the plain language of section 3.2 because the

decedent also retained the right to revoke the trust.

In support of this position, Appellant cites authorities which are largely inapplicable to the facts before the Court: *Scott on Trusts*, § 331.1 (3d ed. 1967) and *In re Schautz*, 151 A.2d 457 (Penn. 1959). These authorities stand for the proposition that where a settlor reserved the power to revoke the trust, the settlor's power to also amend the trust would be inferred even if the settlor failed to explicitly reserve such power. Thus, a settlor could properly amend the trust without first revoking the trust. In the present case, however, the decedent clearly reserved the power to modify the trust and distinguished this power from the power to revoke the trust. Moreover, unlike the situations set forth in the authorities cited by Appellant, the decedent specifically stated that the interests which Appellees enjoyed were to co-exist with the trust during the trust's subsistence. Thus, even were the Court generally inclined to interpret Appellant's authorities as removing the formalistic barrier which required revocation before amendment, that interpretation would have no bearing on the present case; to give effect to this trust's plain language, the Court can only find that Appellees' interest were subject to divestment only via a revocation of the trust.

An aside relevant to this point: Appellant has previously set forth that trust provisions such as section 3.2 find their genesis in law discussing the legal effect of revocable inter vivos trusts. The implication of this statement is that section

3.2 is merely a formal necessity that prevents the trust from being illusory rather than a statement that reflects the settlor's intent. The connotation is that section 3.2's literal reading should be subordinated to other sections, particularly section 3.1. However, neither the implication nor the connotation accurately reflects the law concerning trusts; section 3.2 was simply not needed to prevent the trust from being illusory under the law.

In Sundquist v. Sundquist, 639 P.2d 181, 183 (Utah 1981), the Court, in giving effect to an undocumented trust, specifically stated: "The settlor need not sign a formal trust instrument or employ any particular form of words." Rather, a settlor need only have a present intent to create a presently enforceable trust, have property set aside, and then specify the essential terms of a trust in such manner that a court could enforce the duties which comprise the sine qua non of the trust. Id. at 184. In the present case, the application of this finding defeats both Appellant's implication and its accompanying connotation: even were 3.2 absent from the trust, the trust would still have been enforceable under the law. Section 3.2 was simply not required merely as a formal necessity to prevent the trust from being illusory. In fact it was not required at all. Therefore, its inclusion cannot merely be dismissed as a formality rather than a statement of intent. Thus, section 3.2 should be afforded status equal to other provisions in the trust and read so as to give full effect to its plain language. Homer

v. Smith, supra; Nielsen v. O'Reilly, supra. When section 3.2 is interpreted in this manner, the only interpretation which gives equal weight to this provision is the reading which finds that the rights of the Appellees were subject to divestment only through a revocation of the trust.

Appellant's fifth argument is also unpersuasive. Under this theory, section 3.2 of the trust refers not to Appellees but only to the decedent inasmuch as she was the only active beneficiary of the trust. Although Appellant cites Matter of Estate of West, supra, in support of this proposition, this argument may be disposed of simply by referencing the trust document itself. Under the terms of the 1992 trust, the term beneficiaries clearly refers to all persons who could claim a beneficial interest under the trust: in this case the decedent and the Appellees. First, the term beneficiaries is the plural of the term beneficiary. If the Court construes this plural noun according to its plain meaning, the Court must conclude that section 3.2 applies to more than one beneficiary. Aside from the Appellees and the decedent, no other persons are mentioned in the trust. Therefore, the Court must conclude that the settlor intended section 3.2 to govern the interests of both the decedent and the Appellees.

Second, the settlor, when referring only to the decedent's beneficial interest elsewhere in the trust, does not refer to the decedent as the beneficiary. Rather, she is referred to as the Undersigned, a term which is also used to occasionally, and confusingly, designate the settlor. For example, in section 2.1,

the trustee is authorized to make payments for the benefit and maintenance of the Undersigned. Section 2.1 does not use the term beneficiary at any time, but obviously, a trustee holds legal title to property to be used only for the benefit of the beneficiary as opposed to the settlor, who has divested himself of both legal and beneficial title. Thus, when section 3.2 authorizes payment by the trustee to the Undersigned, the Undersigned is clearly a beneficiary of the trust.

Finally, Matter of Estate of West simply does not stand for the proposition which Appellant asserts. The West case stands for the proposition that a sole surviving trustee who is also the trust's sole active beneficiary may exercise by himself all of the powers which he could have exercised jointly with a co-trustee, and that he could do so without breaching an owed fiduciary duty to beneficiaries who were subject to divestiture. Nowhere in the West opinion does the Court state that beneficiaries subject to divestiture are not beneficiaries. Rather, it states that these beneficiaries could not assert a claim for breach of fiduciary duty since their rights had not ripened at that point. Thus, Appellant's fifth argument must fail as a matter of law and the Court should find that section 3.2 applies to Appellees as well as the decedent.

Appellant's sixth argument is a policy argument which is simply not well reasoned. Appellant contends that under the trial court's ruling, a settlor of a revocable trust subject to amendment could only divest beneficiaries via a revocation of the

trust in its entirety. In fact, the trial court's ruling carries no such implication. Rather, the trial court's ruling has no implication beyond the present case other than to ensure that full weight and effect are given to a trust's explicit terms. This is already the law in Utah. The only beneficiaries who could not be divested of their interests via an amendment to the trust, would be those beneficiaries whose interests under the trust's plain language were to continue until the trust was revoked. The Court should therefore affirm the trial court's order granting summary judgment.

C. THE COURT MAY FIND AS A MATTER OF LAW THAT THE 1999 AMENDMENT FAILS AS AN AMENDMENT TO THE 1992 TRUST.

Although not relied on specifically by the trial court below, this Court may find that the 1999 amendment to the 1992 trust fails as a matter of law and affirm the trial court's order granting summary judgment to Appellees. An appellate court may affirm a trial court's order granting summary judgment on any ground that was available to the trial court even if it was not specifically relied upon by the court below. Higgins v. Salt Lake County, *supra*. This issue was presented to the trial court on pages 18 and 19 of the Appellees' Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment and is preserved by the record on pages 375 and 376.

In 1996, the Washington Court of Appeals handed down a decision in a case remarkably similar to the case before the Court today: In re Tosh, 920 P.2d 1230 (Wash.App. Div. 1 1996).

If this Court were to adopt the standard promulgated by the Washington court, this Court could determine as a matter of law that even if the decedent actually intended to amend the 1992 trust by inserting two pages of proposed amendments into the existing 1992 trust, that such amendment was invalid and therefore insufficient to vest in Appellant any enforceable interest in the 1992 trust corpus.

In the Tosh case, a settlor created an original revocable trust in which he gave his companion a life estate in a duplex with the remainder split between his two daughters. Thereafter, he consulted an attorney for the express purpose of amending his trust to leave the duplex to his companion outright. In preparing the amendment, the attorney simply substituted one page of the trust for another without preparing a new trust agreement that incorporated the proposed amendment. Upon the settlor's death, the daughters contested the validity of the amended trust.

In handing down its decision, the Washington court first commented that the record undoubtedly reflected the settlor's intent and belief as to the validity of the amended trust. Nevertheless, the court determined that a trustor who merely substituted an amended page into an already existing trust had not met the formal procedural requirements for amending the trust and the court therefore invalidated the amendment. As the court stated: "Clear evidence of both intent and belief cannot substitute for actually, or substantially, doing what is required." Id. at 1233.

In the present case, the facts are similar. However, in this case the two pages of purported amendments were not inserted into the original documents, but into an unexecuted photocopy of the 1992 will and trust that Mr. Reeves received at some point in time subsequent to the preparation of the purported amendments. To be candid, questions of fact abound with respect to the circumstances surrounding the 1999 amendment, with both Mr. Reeves and Mr. Platt giving remarkably different accounts of the events. However, regardless of how these questions of fact are resolved, it is not disputed that Mr. Platt only prepared two pages of proposed amendments which were subsequently inserted into a blank copy of the 1992 trust. Given the decision in Tosh, which is entirely in harmony with the Court's decision in Continental Bank, this Court can clearly find that the alleged 1999 amendment did not meet the procedural requirements needed to validly effect an amendment to the 1992 trust in accordance with the provisions set forth in section 3.1 regarding amendment, modification and revocation. Therefore, since Appellant's entire claim hinges on the validity of the 1999 amendment, the Court can properly affirm the trial court's order granting Appellees summary judgment.

II. THE TRIAL COURT CORRECTLY FOUND THAT QUESTIONS OF FACT PREVENTED SUMMARY JUDGMENT FROM BEING ENTERED FOR APPELLANT.

Cross-motions for summary judgment are most properly viewed as the independent contention by both parties that they are entitled to summary judgment as a matter of law rather than a concession that no question of fact exists under the theory

advanced by the opposing party. Wycalis v. Guardian Title, 780 P.2d 821 (Utah App. 1989), cert. denied, 789 P.2d 33 (Utah 1990). Ordinarily, the denial of a motion for summary judgment is not appealable. Christensen v. Farmers Ins. Exch., 443 P.2d 385 (Utah 1968). However, if the Court determines that Appellant can properly appeal the trial court's finding that questions of fact existed with respect to Appellant's theory of the case, then Appellees become the nonmoving party. As the nonmoving party, Appellees are entitled to have all evidence construed by this Court in the light most favorable to their position, Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979), with some deference being accorded to the trial court's application of law to fact. Montes Family v. Carter, 878 P.2d 1168 (Utah App. 1994). With respect to Appellant's motion, the reasonable inferences drawn from the facts at bar demonstrate that material issues exist which may only be resolved by a trier of fact.

A. THE PRESENCE OF UNDUE INFLUENCE IS A QUESTION OF FACT.

Whether an undue influence contributed to the purported amendment of the 1992 trust is a question of fact that may only be resolved by analyzing the relationships between the decedent, the Appellant and Mr. Reeves to determine whether a confidential relationship existed which may have unduly affected the decedent's decision to amend her trust. "A confidential relationship arises when one party, after having gained the trust and confidence of another, exercises extraordinary influence over the other party. If a confidential relationship exists between

two parties to a transaction, and if the superior party (in whom the trust has been reposed) benefits from the transaction, a presumption of undue influence is raised." Estate of Jones v. Jones, 759 P.2d 345, 347 (Utah 1988) (citations omitted). The existence of a confidential relationship is a question of fact. Id.

In the matter at bar, Appellees' case does not suffer from the failure of proof contemplated by Rule 56(c) of the Utah Rules of Civil Procedure. To the contrary, Appellees have not only demonstrated that genuine issues of fact exist, Appellees have raised issues upon which a trier of fact could reasonably find in their favor. This presentation of fact precludes entry of summary judgment in Appellant's favor.

Specifically, Appellees have called into question the circumstances preceding the decedent's amendment of trust. As set forth in the Statement of Fact, *supra*, and as amply demonstrated below, Appellees have cast doubt on Appellant's version of these facts, which Mr. Platt has called "a complete fabrication." (R.370). For example, Appellee has shown that but for the interference of Kevin Reeves in the decedent's personal affairs, the 1992 trust would have remained unaltered. Statement of Fact ¶¶ 14-21. Additionally, by Kevin Reeves' own testimony, he had developed a relationship of trust and confidence with the decedent. Deposition of Kevin Reeves, p. 18.12-19, p. 20.11-18. Appellant concedes this fact. Moreover, as the Appellant's beneficiary, Mr. Reeves stood to gain from any amendment of trust

which benefitted Appellant. When these facts are construed in the light most favorable to Appellees' position, it is clear that a presumption of undue influence has been raised which would invalidate the 1999 amendment, particularly in light of Mr. Platt's pronouncement.

Moreover, Appellees have presented evidence that can be construed as evidence that the decedent in fact attempted to resist Mr. Reeves' undue influence. In early 1999, Mr. Reeves began inquiring as to the state of the decedent's personal affairs. (R.361). In response to these inquiries, the decedent gave answers which can be construed as being intentionally misleading in order to keep her affairs private: she told Mr. Reeves, untruthfully, that the Appellant was her beneficiary. (R.369). At substantially the same time that she was misrepresenting her affairs to Mr. Reeves, the decedent gave her daughter the original copy of the 1992 trust and the accompanying will along with the instruction that the daughter would need those documents upon the decedent's passing. (R.364). This fact can be construed as the effort by the decedent to keep her affairs secret from the Appellant and Mr. Reeves, and to guarantee that her true intent with respect to her estate would remain uncompromised.

This reasonable inference gains credence in light of the Appellant's own testimony: Appellant testified that the decedent had always told her that she was the decedent's beneficiary. (R.369). If this testimony is true, then the decedent must have

known that any discovery of her trust would expose the fact that she had always misrepresented the true state of her affairs. It also creates the reasonable inference that the decedent must have known that were the documents discovered, she would be compelled to alter the documents, especially in light of the testimony that the decedent had a history of conceding to the Appellant.

(R.370). In fact, this is precisely what happened. After keeping her affairs private for seven years, and notwithstanding the decedent's own efforts to conceal her true plans, Mr. Reeves obtained a copy of the decedent's trust and the decedent was compelled to make the modifications.

B. QUESTIONS OF FACT EXIST AS TO WHETHER MS. BANKS WAS COMPETENT TO EXECUTE A TRUST.

Appellees are entitled to have all reasonable inferences surrounding questions of fact regarding the decedent's competency drawn in their favor. The standard for determining requisite competency with respect to the execution of a trust is a higher standard than mere testamentary capacity and is, in fact, the identical standard required as to all contracts. Estate of Loupe, 878 P.2d 1168 (Utah App. 1994). Thus, the test for competency is not whether the settlor was generally of a sound mind but whether the settlor had the power to comprehend the subject of the trust, its nature and its probable consequences. Walker v. U.S. General, Inc., 916 P.2d 903 (Utah 1996); Hilbert v. Benson, 917 P.2d 1152 (Wyo. 1996) (citing Restatement 2d, Trusts §§ 19, 333). In the instant case, in light of this standard, sufficient questions of fact exist to allow Appellees'

case to survive summary judgment.

The decedent's competency affects two areas of this case: first, whether she was competent as the trust's settlor to effect a valid amendment of the trust, and second, whether she was competent as the trustee to receive the amendment. In the trial court, Appellees presented evidence which tended to show that the decedent's competency was in fact diminished with respect to both roles. First, Appellees presented evidence that during her final weeks, the decedent became forgetful and repetitive in her conversations with her children. (R.372). In fact, Mr. Reeves testified that the decedent told him that she had lost her trust documents when she had, in fact, given them to her daughter. (R.372). Second, Mr. Reeves has stated that Ms. Banks did not understand the trust language when he read it to her and that he had to explain it in very simple terms. (R.372). Third, both Mr. Reeves and Appellant have testified that the decedent stated that she believed that Appellant was the original beneficiary of her trust. (R.372).

If the decedent made this statement, and if, as Mr. Reeves testified, the decedent didn't understand the trust language when he read it to her, two reasonable inferences arise. First, if the decedent could not understand the original trust there is no reason to assume that she understood the amended trust. Second, if she didn't understand the trust and was unaware of the identity of the beneficiary, she would be incapable of discharging her duties as the trustee. If she were incapable,

then she would be unable to accept delivery of the amendment under section 3.1. In any event, these facts give rise to inferences which can only be settled by a trier of fact.

C. ONLY COMPLETE AND UNAMBIGUOUS CONTRACTS MAY BE INTERPRETED AS A MATTER OF LAW.

Only when contract terms are complete, clear and unambiguous can they be interpreted as a matter of law. If the terms of a contract are in conflict, the party's intent may only be derived by resort to extrinsic evidence. Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483 (Utah 1986). The instant case presents neither a complete nor facially unambiguous document. Therefore, contrary to assertions advanced by Appellant, the 1999 amendment may not be interpreted as a matter of law.

Unlike the 1992 trust, the 1999 amendment is incomplete and facially ambiguous. First, as set forth above, the 1999 amendment is nothing but two pages of proposed changes which were inserted into a blank copy of the 1992 trust. Second, axiomatic rules of construction, set forth above in Homer v. Smith and Neilsen v. O'Reilly, reveal the amendment's ambiguity: Article I, which states that the purpose of the trust was to benefit Appellees, cannot be reconciled with section 4.3 of the amended trust which states that Appellant was the beneficiary. Absent resort to extrinsic evidence, it is impossible to harmonize the two provisions and at the same time afford the provisions the meaning of their plain language. Therefore, this document may not be interpreted as a matter of law.

III. THE TRIAL COURT CORRECTLY ADMITTED THE STATEMENTS MADE BY ATTORNEY JOSEPH PLATT.

Whether the trial court correctly determined that the attorney-client privilege did not apply to the deposed statements of Mr. Platt is a mixed question of law and fact. The legal conclusions of the trial court are reviewed for correctness while some deference will be accorded the trial court's application of law to fact. Montes Family v. Carter, *supra*.

Citing to Rule 504 of the Utah Rules of Evidence, Appellant argues that the deposed statements given by attorney Joseph Platt which concerned Mr. Reeves' beneficial status were improperly admitted by the trial court because they did not fall within any of the five listed exceptions to the attorney-client privilege. Appellant's analysis, however, has little bearing on the facts before the court; attorney Platt did not divulge any information that he acquired during his representation of Appellant, and even if the privilege did apply, Appellant waived the privilege by failing to protect it.

A. THE INFORMATION DIVULGED BY MR. PLATT WAS NOT DISCOVERED INCIDENTAL TO AN ATTORNEY-CLIENT RELATIONSHIP.

Utah Code Ann., § 78-24-8(2) states at relevant part: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment." In the instant case, because Appellant has not established that Mr. Platt divulged any information that he acquired during the course of his professional of her,

Appellant cannot assert this privilege.

This Court has commented previously on the attorney-client privilege and noted that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures--necessary to obtain informed legal advice--which might not have been made absent the privilege." Gold Standard, Inc. v. American Barrick Resource Corp., 801 P.2d 909, 912 (Utah 1990) (citations omitted). Thus, "the privilege should be strictly construed with its object." Id. Although the Court stated that each case must be considered individually to determine whether the privilege applies, the Court did find two specific instances in which the privilege would be upheld: "1) for the purpose of forming an opinion as to the legality of a contemplated legal action, or 2) for legal analysis and advice as to the particular prospective litigation." Id. at 913.

Neither of these two instances reflects the facts before the Court and applied to the present case, this standard favors the admission of Mr. Platt's statements. Appellant was not seeking Mr. Platt's legal advice when she informed him that Mr. Reeves was the beneficiary of her trust. Nor was she seeking advice about potential litigation. There is no evidence to suggest that Mr. Platt prepared the trust which gave Mr. Reeves that beneficial status. And there is no evidence to suggest that Mr. Platt's representation of the Appellant extended beyond preparing

a trust for Appellant in 1992 which had by that time been revoked by Appellant. Thus, this Court should affirm the trial court's order with respect to Mr. Platt's statement.

B. APPELLANT WAIVED THE PRIVILEGE WHEN HER OWN ATTORNEY'S QUESTIONS ELICITED THE RESPONSE.

Noticeably absent from Appellant's brief is any reference to the fact that the responses given by Mr. Platt to which Appellant now objects were in response to a series of questions posed by her own attorney. Even if the privilege had otherwise applied, its divulgence under these facts constitutes a waiver of the privilege under Rule 507(a) of the Utah Rules of Evidence.

Rule 507(a) states:

A person upon whom these rules confer a privilege against the disclosure of the confidential matter or communication waives the privilege if the person...voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure.

The Advisory Committee Note, subparagraph (a) then states: "Since the purpose of evidentiary privileges is the protection of some societal interest or confidential relationship, the privilege should end when the purpose is no longer served because the holder has allowed some disclosure or made disclosure."

In the instant case, Appellant allowed the disclosure to which she now objects. Her own attorney phrased three consecutive questions which were designed to elicit the responses. Significantly, it should be noted that because Mr. Bullock did in fact ask three questions, that Rule 507(b)(2) should not apply. This simply is not a case where Mr. Platt made

the disclosure before Appellant could assert the privilege. Rather, Mr. Platt answered a question posed to him by Appellant's counsel. Upon Mr. Platt's answer, Appellant's counsel, rather than asserting any privilege, then asked two consecutive questions designed to clarify Mr. Platt's response. Thus, under Rule 507(a), even if the privilege had otherwise applied Appellant waived the right to assert this privilege. Thus, the trial court's order should be affirmed.

CONCLUSION

For the reasons cited above, Appellees respectfully request this Court to affirm the trial court's order granting them summary judgment; the terms of the 1992 trust are clear and unambiguous. By interpreting that trust as the trial court did, the trial court gave full weight and effect to each of the trust's explicit terms. Alternatively, this Court can conclude that the 1999 amendment fails as a matter of law.

However, even if this Court determines that the trial court erred in interpreting the 1992 trust, this Court should refrain from granting Appellant's motion for summary judgment; not only is the 1999 amendment an incomplete and ambiguous document, questions of fact abound as to whether the decedent executed the 1999 amendment while she remained free from undue influence or while she was mentally competent either to make or receive such amendment.

Finally, this Court should affirm the trial court's order admitting statements made by Mr. Platt; the information divulged

by Mr. Platt was not acquired incidental to an attorney-client relationship and was only divulged pursuant to questions asked by Appellant's own counsel.


RESPECTFULLY SUBMITTED this 8th day of June, 2001.



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CERTIFICATE OF SERVICE

The foregoing Reply Brief of Appellees was mailed to J. Jay Bullock, Clinton J. Bullock and Karen Bullock at Bullock Law Firm, 353 East 300 South, Salt Lake City, UT 84111 on this 8 day of June, 2001.


SECRETARY