

2008

Lefevre v. Stout : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Lefevre v. Stout*, No. 20080234 (Utah Court of Appeals, 2008).

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF:

HAROLD ALMA LEFEVRE and
EDITH K. LEFEVRE

HAL LEFEVRE, JULIA RICHMOND,
JEFFREY LEFEVRE, KELLY LEFEVRE,
DANIEL LEFEVRE, BRYCE LEFEVRE,
AND CYNTHIA C. L. GILES,

Petitioners/Appellees/Cross-
Appellants,

v.

LELAND STOUT,

Respondent/Appellant/Cross-
Appellee.

**BRIEF OF APPELLEES/
CROSS-APPELLANTS**

Case No. 20080234
District Court Case No. 933400210

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Gary D. Stott

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JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-4-103(2)(j) (2009).

STATEMENT OF THE ISSUES

Issue #1: Did the trial court correctly award Petitioners' title to the Property in question via a constructive trust?

Standard of review: Some discretion. In highly fact dependant questions, such as this, the trial court is given some discretion in applying the law to a given set of facts. *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994). “[I]n equity cases such as this is, this court may review the facts. However, it has long been established and reiterated by this court in numerous cases that due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto.” *Pagano v. Walker*, 539 P.2d 452, 454 (Utah 1975). “We apply this standard of review in cases involving trusts which arise by operation of law” *In re Estate of Hock*, 655 P.2d 1111, 1114 (Utah 1982).

Preservation for appeal: R. at 1053-54.

Issue #2: Did the trial court err in denying Petitioners' request for attorneys' fees under sections 75-3-719 and 75-1-310 of the Utah Code?

Standard of review: Correctness. “Whether attorney fees are recoverable in an action is a question of law, which we review for correctness.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998).

Preservation for appeal: R. at 1057-58.

Issue #3: Did the trial court err in granting Defendants' motion for stay and other relief upon appeal under Rule 62 of the Utah Rules of Civil Procedure, despite Utah law stating that a stay and a supersedeas bond is not appropriate where, as here, there is a self-executing judgment?

Standard of review: Correctness. A court's interpretation of a rule is a conclusion of law, which is reviewed for correctness. *See Loporto v. Hoegemann*, 1999 UT App 175, ¶ 5, 982 P.2d 586.

Preservation for appeal: Petitioners' Opposition to Motion for Stay & Other Relief upon Appeal.¹

¹ Filed on March 11, 2008. This document was omitted from the 2nd Supplemental Judgment Roll and Index and therefore does not have a record citation.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The following statutory provisions are materially relevant to this appeal, and a copy of each is attached in Addendum A:

Statute of Limitation

Utah Code Ann. §78B-2-307(1)(a).

Probate Code: Intestate Estate

Utah Code Ann. § 75-8-101(2)(b).

Utah Code Ann. § 75-2-102(1)(b).

Utah Code Ann. § 75-2-102(2).

Utah Code Ann. § 75-2-103(1).

Utah Code Ann. § 75-2-206.

Attorneys Fees

Utah Code Ann. § 75-1-310.

Utah Code Ann. § 75-3-719.

STATEMENT OF THE CASE

This case involves a dispute over a decedent's property located at 2727 North Canyon Road, Provo, Utah ("the Property"). The trial court properly awarded Petitioners the Property. However, Petitioners appeal the trial court's decision to not award them their attorneys' fees and to grant Respondent a stay pending appeal.

Procedural History

In February 2005, Petitioners/Appellees filed a Petition to Set Aside Personal Representative's Transfers from Decedent's Estate. (R. at 28-34.) In October 2006, Respondent filed a motion for summary judgment. (R. at 511-619.) Respondent's motion was denied. (R. at 801-02.) A bench trial was then held on November 13-14, and December 6, 2007. After the bench trial, the court awarded the Property to the Petitioners via a constructive trust. (R. at 1178-79.) The trial court awarded Petitioners their costs but declined to award them their attorneys' fees. (R. at 1180.) Both Respondent and Petitioners filed notices of appeal. In March 2008, Respondent filed a Motion for Stay and Other Relief Upon Appeal. (R. at 1193-1201.) The trial court granted Respondent a stay pending appeal. Petitioners filed a second notice of appeal with respect to the stay.

Statement of Facts²

Harold LeFevre ("Harold") and his wife Edith had seven children (Petitioners Hal LeFevre, Julia Richmond, Jeffrey LeFevre, Kelly LeFevre, Daniel LeFevre, Bryce

² Because Respondent "is not directly challenging the trial court's findings" of fact, these facts are taken largely from those findings of fact and are undisputed. *See* Brief of Appellant, p. 7 n.38. The findings of fact and conclusions of law are in Addendum B.

LeFevre and Cynthia Giles). (R. at 1173.) Harold and Edith owned the Property at 2727 North Canyon Road, Provo, Utah as joint tenants. *Id.* Edith passed away in 1987. *Id.* Harold had sole title to the Property after Edith's death. *Id.* Harold later married Ellen Stout LeFevre ("Ellen"), who already had five children from a previous marriage (one of whom is Respondent Leland Stout) and who had her own home and property. *Id.* Harold and Ellen lived on the Property (Harold's home and the Property at issue in this appeal) during their marriage. *Id.* On March 19, 1993, Harold died intestate. *Id.*

On March 24, 1993, after Harold's funeral, Ellen called the seven LeFevre children together and admitted that she did not own the Property and asked them for permission to live on it. (R. at 1173-74.) Ellen and Petitioners verbally agreed that (a) Ellen would be allowed to stay on the Property until her death, and (b) that all of Ellen's and Harold's assets would be put into a trust to be distributed at Ellen's death, with Harold's estate going to his children and Ellen's estate going to her children. (R. at 1174.) Petitioners trusted Ellen and sought to maintain a good relationship with her. Hal took Ellen on vacation with his family shortly after Harold's death, and Bryce LeFevre continued to visit Ellen throughout the years. (R. at 1174, 1175.) Ellen's attorney testified that all he observed was a good relationship between Ellen and Petitioners. (R. at 1178.) Ellen never indicated to Petitioners that she had changed her mind about the terms of the agreement. (R. at 1176-77.) In fact, Ellen reaffirmed to Bryce LeFevre in 2001 that everything was set up according to their agreement. (Transcript 11/13/2007, pp. 196-98.)

On April 19, 1993, Ellen executed a will and the Ellen L. LeFevre Trust (“the trust”). (R. at 1174.) The trust included the Petitioners as beneficiaries but split the trust estate between the two families without regard to specific divisions of particular assets. (R. at 1174-75.) Ellen was the trustee. On July 23, 1993, as the personal representative of Harold’s estate, Ellen transferred the Property into the trust. (R. at 1175.) On June 13, 1994, Ellen amended the trust and specifically divided the Property between Petitioners and her children. *Id.* On September 11, 1995, Respondent took Ellen to her attorney’s office where she amended the trust a second time. *Id.* The second amendment took the Petitioners entirely out of the trust as beneficiaries. (R. at 1175-76.) The Petitioners were never notified of these amendments or given copies of the trust documents, even though the new provisions violated the parties’ agreement. *Id.*

Ellen passed away on October 28, 2004. (R. at 1176.) The Stouts did not notify Petitioners of her death, *id.*, even though Respondent knew LeFevre children that lived a couple of blocks down the road. (Transcript 11/13/2007, p. 174.) The Stout did not publish the obituary Ellen specifically prepared for publication upon her death. (R. at 1176.) In fact, the Stouts hurriedly buried Ellen without embalming her, had the house appraised, and were in the process of selling it to Respondent’s nephew when Petitioners learned of Ellen’s death. (Transcript 11/13/2007, pp. 128-30, 172-74.) The Stout children intended to disadvantage Petitioners by never making any effort to notify them of Ellen’s death and to exclude Petitioners from any participation in the distribution of Ellen’s estate. (R. at 1177.) Because of this, Petitioners did not discover that Ellen had

passed away until weeks after her death and did not become aware of Ellen's breach until they discovered she had passed away, contacted her attorney, and received copies of the trust documents. (R. at 1177-78.) Immediately upon this discovery, on February 28, 2005,³ Petitioners filed a Petition to Set Aside Personal Representative's Transfers from Decedent's Estate. (R. at 28-34, 1178.) In addition, the Petitioners requested that Hal LeFevre become the successor personal representative of Harold's estate. (R. at 61-72.)

Petitioners are entitled to the Property via their agreement with Ellen and under the Utah probate code. Harold's probate estate is still open and before the courts. The evidence at trial showed that Harold's net intestate estate totaled \$113,840.11. (Trial Exhibit, Tab 96.)⁴ Since Ellen received \$203,954.07 in nonprobate transfers, Petitioners are entitled to receive the entire intestate amount. (Trial Exhibit, Tab 97.) They filed their Petition in order to recover the Property wrongfully transferred away by Ellen and, in the alternative, to recover their share of Harold's estate.

³ The mailing certificate on the petition states that it was mailed on February 28, 2005. The Fourth District Court stamped the petition as filed on February 29, 2005, a date that does not exist. For the purposes of this appeal, it does not matter whether it was filed on February 28, 2005 or March 1, 2005.

⁴ Cited trial exhibits are included in Addendum C.

SUMMARY OF ARGUMENT

The trial court correctly awarded Petitioners the Property at issue. The trial court used its broad equitable powers to fashion a remedy for the damages suffered by Petitioners. In order to prevent unjust enrichment, a constructive trust arose by operation of law. The constructive trust was an appropriate remedy and did not need to be pled as a cause of action by Petitioners. Further, Petitioners are legally entitled to the Property by operation of Utah's probate laws. Thus, the trial court correctly awarded them the Property, and this Court should affirm the trial court's award.

The trial court correctly found that Ellen had a confidential, fiduciary relationship with Petitioners and that she breached her duties to them by changing the terms of her trust. Ellen had a fiduciary relationship with Petitioners as trustee of her trust; Ellen had a fiduciary relationship with Petitioners as personal representative of Harold's estate; and Ellen had a confidential relationship with Petitioners by virtue of the contract she entered into with them. Ellen breached her fiduciary, confidential relationship with Petitioners when she fraudulently changed the terms of her trust and deprived them of their share of their father's estate.

Finally, the trial court correctly found that no statute of limitation defense barred Petitioners' recovery. First, Respondent waived the affirmative defense of statute of limitation by failing to assert it in his responsive pleading. Second, Petitioners filed their petition within the statute of limitation, as tolled by the equitable discovery rule.

However, the trial court erred in failing to award Petitioners their attorneys' fees as

incurred in bringing this action. The probate code permits personal representatives to recover their costs and fees incurred in bringing or defending an action on behalf of the estate. There currently is no personal representative for Harold's estate. Petitioners filed a motion to have Hal LeFevre appointed as successor personal representative. Petitioners stood in the shoes of a personal representative and brought this action in good faith. Further, the probate code permits trial courts to award any party to a probate action costs and fees. In this case, justice requires that Petitioners recoup their attorneys' fees and costs. But for Ellen's fraud and Respondent's deception, Petitioners would not have had to bring this costly and protracted action. Under either statute, Ellen's estate should be required to pay for Petitioners' attorneys' fees.

In addition, the trial court erred in granting Respondent a stay pending appeal. The judgment in this case was self-executing because it, on its face, granted title of the Property to Petitioners. Where, as in this case, a judgment is self-executing, a stay and bond are ineffective. Utah law clearly states that where a judgment is self-executing, an appeal cannot stay the force and effect of the judgment. Petitioners were damaged by the trial court's imposition of an improper stay. They had all of the responsibilities and liabilities of ownership, without the ability to properly protect their interest.

This Court should therefore affirm the trial court's decision that Petitioners are the owners of the Property. This Court should reverse the trial court's failure to award Petitioners their attorneys' fees and to award Respondent a stay pending appeal and remand for a determination of attorneys fees' and damages.

ARGUMENT

The trial court correctly awarded the Property to Petitioners and its judgment should be affirmed. This case came before the trial court as an equity proceeding in a probate case. After a two-day bench trial, the trial court found that, based on the facts in evidence, a constructive trust arose by law to prevent unjust enrichment. The trial court's application of the law to the facts is granted some deference in view of the fact that questions involving constructive trusts are highly factual questions. *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994); *Pagano v. Walker*, 539 P.2d 452, 454 (Utah 1975); *In re Estate of Hock*, 655 P.2d 1111, 1114 (Utah 1982).

Respondent declares that he “is not directly challenging the trial court’s findings” of fact. Brief of Appellant, p. 7 n.38. However, to the extent Respondent does indirectly challenge the trial court’s findings, he “must first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings” *Grayson Roper Ltd. P’ship v. Finlinson*, 782 P.2d 467, 470 (Utah 1989) (quoted in *Ockey v. Lehmer*, 2008 UT 37, ¶ 34 n.32, 189 P.3d 51). Respondent has failed to marshal the evidence and demonstrate that they do not support the district court’s findings. Each of the district court’s findings is supported by the evidence.

Petitioners appeal only the trial’s courts failure to award them their attorneys’ fees and improper grant of a stay pending appeal. Both of these issues involve questions of law and are therefore reviewed for correctness, granting no deference to the trial court.

Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998); *Loporto v. Hoegemann*, 1999 UT App 175, ¶ 5, 982 P.2d 586. Though, in some respects, the issue of the stay pending appeal is now moot, this issue should be heard and decided by this court because it is “capable of repetition yet evading review.” *In re Johnson*, 2001 UT 110, ¶ 15, 48 P.3d 881.

I. THE TRIAL COURT CORRECTLY AWARDED PETITIONERS TITLE TO THE PROPERTY.

Petitioners are legally entitled to the Property at issue. First, the trial court correctly found that Petitioners were entitled to the Property because a constructive trust arose as a matter of law. Second, the trial court correctly found that Petitioners had a confidential relationship with Ellen and that she breached her duty to Petitioners when she transferred the Property to her children. Finally, the trial court correctly found that no statute of limitation issue barred Petitioners’ recovery.

A. The Trial Court Correctly Awarded Petitioners Title To The Property.

Petitioners are entitled to the Property at issue. A trial court has broad discretionary powers, particularly in cases of equity, to fashion appropriate remedies. The trial court properly found that a constructive trust arose as a matter of law to remedy the unjust enrichment caused by Ellen’s misdeeds. Further, even if the court incorrectly granted Petitioners title to the Property via a constructive trust, Petitioners were legally entitled to the Property by operation of probate law.

1. The trial court used its broad discretionary powers to do equity in this case by finding that a constructive trust arose as a matter of law.

The trial court correctly awarded Petitioners the Property via a constructive trust. Trial courts have inherent powers to do equity in the cases before them. For example, “[w]here land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.” *Decorso v. Thomas*, 50 P.2d 951, 956 (Utah 1935) (citation omitted). “The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity, and with the exception of such as are given to other courts, the jurisdiction of equity in all cases of trusts, express or implied, resulting or constructive, is unquestioned, especially where matters of account are involved.” *Id.* (citation omitted) (emphasis added). “We would turn the doctrine of equitable estoppel upon its head if we were to hold that the power to correct an inequity as unjust as the one here, would, without more, defeat our courts’ inherent power to seek and to do equity.” *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 678 (Utah App. 1990) (emphasis added).

The trial court in this case used its broad equitable powers to do justice in this case via the remedy of a constructive trust. The Utah Supreme Court has clearly held that a “constructive trust is an equitable remedy.” *Peirce v. Peirce*, 2000 UT 7, ¶ 12, 994 P.2d 193. A constructive trust is imposed to “prevent one for unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship” and is created when “a person acquires the legal title to property of another by means of an

intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own.” *Hawkins v. Perry*, 123 Utah 16, 23, 253 P.2d 372, 375 (1953) (citation omitted). A constructive trust is still found when “at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. The abuse of the confidential relation consists merely in the failure of the transferee to perform his promise.” *Id.* at 376 (citation omitted).

In *Acott v. Tomlinson*, the Utah Supreme Court decided a case with facts substantially similar to the present case. 337 P.2d 720 (Utah 1959). Defendant Tomlinson, his mother, and his six siblings owned mining shares left to them by their father. *Id.* at 722. Tomlinson wrote letters to his mother and six siblings, asking them to quitclaim their shares to him. *Id.* at 723. He stated that he would hold the shares for their benefit and that he would “account for all money and stock received therefrom.” *Id.* Tomlinson thereafter claimed all of the property for himself. *Id.* His siblings brought suit. The court found that from the fact “there is ample basis for the determination made by the trial court that the defendant agreed to hold the property under an express trust; or alternatively, that the transaction was so unfair and lacking in disclosure of material facts to plaintiffs to require the imposition of a constructive trust on the property for their benefit.” *Id.* at 724.

As in *Tomlinson*, the evidence presented in this case provide ample basis for the trial court’s determination that the transaction was so unfair and lacking in disclosure of

material facts to Petitioner to require the imposition of a constructive trust on the Property for their benefit. In this case, the trial court used its equitable powers to craft a fair remedy. Though Petitioners did not plead constructive trust as a cause of action, the facts giving rise to a constructive trust are pled in their petition. At trial, the trial court found that the facts gave rise to a constructive trust. Ellen did not own the Property. (R. at 1174.) She acquired title to it by means of a fraudulent verbal promise to Petitioners to hold it for them. *Id.* And then she retained title and disposed of it as she wished. (R. at 1175-76.) A constructive trust was needed to prevent Ellen and her children from unjustly profiting through fraud and violation of a confidential and fiduciary relationship. Petitioners entered into an agreement with Ellen in good faith, and she breached that agreement.

2. Even if the trial court erred in finding a constructive trust, Petitioners are legally entitled to the Property by virtue of the probate estate.

Petitioners are entitled to their share of their father's estate. The trial court correctly applied current probate law to this case. The Utah Uniform Probate Code specifically states

The code applies to any proceeding in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of application of the procedure of this code.

Utah Code Ann. § 75-8-101(2)(b). The code directs that all cases be decided under the current probate law unless any of the exceptions apply. The trial court found that

Respondent did not argue that any of the exceptions applied in this case. (R. at 1178.)

Therefore, Respondent cannot argue that the exceptions, and therefore the older versions of the probate code, apply on appeal. Further, this case was still pending when the current probate laws were adopted. Therefore, the above statute indicates that the current statutes apply and there is no issue of retroactive application.

Under the current law, the “intestate share of a decedent's surviving spouse is the first \$50,000, plus 1/2 of any balance of the intestate estate, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.” *Id.* § 75-2-102(1)(b). All of the nonprobate transfers received by the surviving spouse are deducted from her share of the intestate estate. *Id.* § 75-2-102(2). Under 75-2-206, nonprobate transfers to the surviving spouse are defined as “all property that passed outside probate at the decedent’s death from the decedent to the surviving spouse by reason of the decedent’s death.” *Id.* § 75-2-206. After the surviving spouse’s net share of the intestate estate is calculated and distributed, the remainder of the estate passes “to the decedent’s descendants per capita at each generation as defined in Subsection 75-2-106(2).” *Id.* § 75-2-103(1).

At trial, Petitioners presented evidence that the assets in Harold’s probate estate totaled \$211,363.38.⁵ The debts in the probate estate, including the mortgage on the

⁵ Respondent argues that he presented conflicting evidence of the value of Harold’s probate estate and nonprobate transfers at trial. However, the trial court specifically found that Respondent was not a credible witness as to any of the issues in the case. (R. at 1177.)

Property, totaled \$98,200.08, leaving a net probate estate of \$113,163.30. (Trial Exhibit, Tab 96.) Under the surviving spouse statute, Ellen would have been entitled to \$81,581.65 of the probate estate. However, that total is offset by any nonprobate transfers Ellen received as a result of Harold's death. The nonprobate transfers to Ellen totaled \$181,324.25.⁶ (Trial Exhibit, Tab 97.) The evidence therefore showed that Ellen therefore received more than the surviving spouse's share and the entire probate estate of \$113,163.30 should have been distributed to Petitioners.⁷ Since the Property was included in the probate estate, Petitioners are entitled to the Property either by operation of a constructive trust as a result of Ellen's fraud or by operation of the probate statutes.

B. The Trial Court Correctly Found That Petitioners Had A Confidential or Fiduciary Relationship With Ellen LeFevre, Which She Breached.

Ellen LeFevre, by her actions, created confidential and fiduciary relationships with Petitioners. Under Utah law, a confidential or fiduciary relationship exists in a variety of circumstances. The "personal representative of a decedent . . . stands in a fiduciary relationship to the creditors and heirs of the deceased." *Overturf v. Univ. of Utah Med. Ctr.*, 1999 UT 3, ¶ 11, 973 P.2d 413. A trustee owes "fiduciary duties to the beneficiaries of the trust." *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 918

⁶ Thus, even if, as Respondent argues, Ellen is credited for the entire \$64,144.22 mortgage that was marital debt and therefore half hers, Ellen still received a net of \$117,180.03. That amount is \$35,598.38 more than she was entitled to under the surviving spouse statute.

⁷ Because Harold's estate is still before the trial court, the trial court had the authority to directly transfer the Property to Petitioners. The court did not, as Respondent argues, need to place the Property back in the probate estate prior to awarding it to Petitioners.

(Utah 1993). And a “fiduciary or confidential relationship may be created by contract” *Wardley Corp. v. Welsh*, 962 P.2d 86, 90 n.5 (Utah App. 1998) (quoting *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 748 (Utah 1982)).

In this case, the evidence showed that Ellen had a confidential and fiduciary relationship with Petitioners by virtue of three different positions. First, Ellen owed Petitioners fiduciary duties because of her status as the personal representative of their father’s estate and their status as heirs of the estate. (R. at 1175.) Second, Ellen owed Petitioners fiduciary duties because of her status as the trustee of her trust and their status as beneficiaries of that trust. (R. at 1174-75.) Finally, Ellen had a confidential relationship with Petitioners by virtue of the contract she made with them with respect to the Property. (R. at 1174.)

The trial court correctly found that Ellen LeFevre “abused [her] confidential, fiduciary relationship with the LeFevre children when she (and the Stout children) changed the material terms and conditions of the agreement.” (R. at 1174.) A trustee owes a duty of loyalty to the beneficiaries, which requires her “to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust.” *Nat’l Parks & Conservation Ass’n*, 869 P.2d at 918. Ellen was the personal representative of the Decedent’s estate and the trustee of the trust created from her agreement with Petitioners. As the personal representative, Ellen had the duty to distribute the decedent’s estate according to the probate code. As the trustee, Ellen had the duty to distribute the Property in the trust according to her agreement with Petitioners. However, the evidence

showed that Ellen breached her contract with Petitioners as well as her duties to them as personal representative and as trustee when she fraudulently changed the terms of her trust to exclude Petitioners.

C. The Trial Court Correctly Found That Petitioners' Petition Was Not Barred By A Statute Of Limitation Issue.

No statute of limitation issue bars Petitioners' right to recovery in this case. First, Respondent waived the defense of a lapsed statute of limitation when he failed to assert it in his objection to Petitioners' petition. Second, even if Respondent did not waive the defense, Petitioners filed their petition well within the applicable statute of limitation.

1. Respondent waived his right to assert the affirmative defense of a lapsed statute of limitation by failing to assert it in his responsive pleading.

Because Respondent failed to assert a statute of limitations defense in his Objection to Petitioners' Petition to Set Aside Personal Representative Transfers from Decedent's Estate, he waived the right to assert the defense. Under Utah law, a "party waives a statute of limitations defense by failing to raise it in a responsive pleading or by motion before submitting a responsive filing." *Keller v. Southwood N. Med. Pavilion*, 959 P.2d 102, 106 (Utah 1998); Utah R. Civ. P. 12(h). In this case, Petitioners filed a Petition to Set Aside Personal Representative Transfers from Decedent's Estate. (R. at 28-29.) Respondent filed his responsive pleading in the form of an objection to the petition. (R. at 76-91.) In his objection, Respondent makes no mention of a statute of limitations defense. *Id.* He therefore waived the defense and cannot properly assert the defense on appeal.

2. Even if Respondent did not waive his right to assert a statute of limitations defense, Petitioners filed their petition within the applicable statute of limitation.

Petitioners filed their petition within the applicable statute of limitation. The following statute of limitation applies to Petitioners' action:

“An action may be brought within four years: (1) after the last charge is made or the last payment is received: (a) upon a contract, obligation, or liability not founded upon an instrument in writing.”

Utah Code Ann. § 78B-2-307(1)(a).

The general rule regarding statutes of limitations is that they start running “upon the happening of the last event necessary to complete the cause of action.” *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 20, 108 P.3d 741 (citation omitted).

However, the equitable discovery rule tolls the statute of limitations “until the discovery of facts forming the basis for the cause of action.” *Id.* at ¶ 21 (citation omitted). “The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which [are] review[ed] for correctness.” *Id.* at ¶ 18 (quoting *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742).

The equitable discovery rule will toll a statute of limitations if either (1) “a plaintiff does not become aware of the cause of action because of the defendant’s concealment or misleading conduct” or (2) “the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.” *Id.* at ¶ 25 (citation omitted).

Under the concealment version of the equitable discovery rule, the plaintiff must first make a prima facie case showing that the defendant committed fraudulent concealment. *Charlesworth v. Reynolds*, 2005 UT App 214, ¶ 25, 113 P.3d 1031. Fraudulent concealment requires that a person with “a legal duty or obligation to communicate certain facts remain[s] silent or otherwise act[s] to conceal material facts known to him.” *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 (Utah 1997). Utah courts find fraudulent concealment when a fiduciary breaches his or her duty to “speak the truth.” *Charlesworth*, 2005 UT App 214, ¶ 26 (“A fiduciary’s breach of the ‘duty to speak the truth’ is sufficient to establish fraudulent concealment.”) (citations omitted). The plaintiff must then show that ““(1) they neither knew nor reasonably should have known of the facts underlying their causes of action before the . . . limitations period expired; or (2) notwithstanding their actual or constructive knowledge of the facts underlying their causes of action within the limitations period, Plaintiffs acted reasonably’ by delaying the filing of a complaint until after the expiration of the limitations period.” *Id.* at ¶ 25 (citation omitted). The policy behind this rule was discussed by the Utah Supreme Court:

If we were to look only to whether a plaintiff theoretically *could* have brought a suit before the limitations period expired without looking to the relative reasonableness or unreasonableness of that action under the circumstances, we would reward a defendant's fraudulent and deceptive misbehavior by depriving an innocent plaintiff of a reasonable period within which to act. This we refuse to do. “[T]o permit one practicing a fraud and then concealing it to plead the statute of limitations when, in fact, the injured party did not know of and could not with reasonable diligence have discovered the fraud” would be “not only subversive of good morals, but also contrary to the plainest principles of justice.”

Russell Packard, 2005 UT 14, ¶ 28 (emphasis in original) (citation omitted). Inquiry or constructive notice is found “only at that point at which a plaintiff, reasonably on notice to inquire into a defendant’s wrongdoing, would have . . . discovered the facts . . . despite the defendant’s efforts to conceal [them].” *Charlesworth*, 2005 UT App 214, ¶ 29.

The determination of whether a plaintiff would reasonably discover facts is a “highly fact-dependent legal question.” *Id.* at ¶ 30 (citation omitted). Therefore, the legal question of whether a statute of limitation has been tolled is also a fact question, and the fact finder should be given some deference in its determination. *See State v. Pena*, 869 P.2d 932, 935-40 (Utah 1994).

Under the exceptional circumstances version of the equitable discovery rule, the court uses a balancing test and weighs “the hardship imposed on the claimants by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time.” *Snow v. Rudd*, 2000 UT 20, ¶ 11, 998 P.2d 262. However, this balancing test has already been conducted in “cases involving beneficiaries’ claims of trustee misconduct.” *Id.* In *Snow*, the court held that because of the “close familial relationship involved” and because “the beneficiary will be less likely to question the motives of the trustee and [is] less likely to sue.” the discovery rule needs to be applied to prevent unjust results. *Id.* Consequently, the discovery rule is applied to “protect the interests of a beneficiary” until “the beneficiary knows or should know of the alleged breach of repudiation.” *Id.* In other words, when a case “involves a trust, a trustee cannot take advantage of a statute of limitations defense until something has occurred to give the

beneficiary a ‘clear indication’ that a breach or repudiation has occurred” *Id.* (quoting *Walker v. Walker*, 17 Utah 2d 53, 58, 404 P.2d 253, 257 (Utah 1965); *Acott v. Tomlinson*, 9 Utah 2d 71, 76-77, 337 P.2d 720, 724 (Utah 1959)). Therefore, in cases involving a trust, the statute of limitations will not start running “until the beneficiary knows or through reasonable investigation could have learned of a breach or repudiation.” *Id.*

Under either version of the equitable discovery rule, the statute of limitation was tolled in this case until weeks after Ellen’s death. Under the concealment version, Petitioners’ evidence established a prima facie case that Ellen committed fraudulent concealment when she failed to “speak the truth” regarding her changes to the trust. In fact, the trial court specifically found that Petitioners were never notified of these amendments or given copies of the trust documents. (R. at 1175-76.) Petitioners also demonstrated that they neither knew nor should have known of the facts underlying their cause of action until after Ellen’s death. Their agreement with Ellen was that she could live on the Property until her death, at which time the Property would be transferred to them. Thus, as the trial court found, until Petitioners learned of her death and her failure to maintain the trust as agreed, they had no reason to question their stepmother. (R. at 1177-78.)

Under the exceptional circumstances version of the equitable discovery rule, Utah courts have already determined that the discovery rule should be applied in “cases involving beneficiaries’ claims of trustee misconduct” because of the “close familial

relationship involved.” Thus, under the balancing test, the equities weigh in favor of the discovery rule applying to Petitioners.

Evidence at trial showed that Petitioners did not discover the facts underlying their claims against Ellen until weeks after her death. Ellen died on October 28, 2004. Weeks later, Petitioners learned of her death and contacted her attorney to inquire about the estate. (R. at 1177-78.) When they discovered that the trust terms had been modified to exclude them, they immediately filed their petition on February 28, 2005, well within the applicable four-year statute of limitation.

II. THE TRIAL COURT ERRED IN FAILING TO AWARD PETITIONERS THEIR ATTORNEYS’ FEES AS INCURRED IN THIS MATTER.

Petitioners should have been awarded their attorneys fees. Petitioners are entitled to recoup their attorneys’ fees under two statutes found in the Probate Code:

“When not otherwise prescribed in this code, the court, or the Supreme Court on appeal from the court, may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require.”

Utah Code Ann. § 75-1-310 (2009).

“If any . . . person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys’ fees incurred.”

Utah Code Ann. § 75-3-719 (2009). Petitioners should be awarded their attorneys’ fees as incurred in this matter under both sections 75-3-719 and 75-1-310.

Under section 75-1-310, justice requires that Petitioners be awarded their attorneys’ fees as incurred in this matter. The trial court found that Ellen breached her

fiduciary duties to Petitioners and defrauded them. But for her fraud and Respondent's deception, Petitioners would not have been forced to bring this suit, which has been protracted and costly, to reverse that fraud. Ellen and her children should not be allowed to perpetrate such hardship on Petitioners. The trial court erred in failing to find that justice requires that Petitioners be awarded their attorneys' fees.

Under section 75-3-719, Petitioners should be reimbursed by the estate for having to bring this action. Ellen was the personal representative of Harold's estate until her death in 2004. *See* Utah Code Ann. § 75-3-609 (2009). Since that time, no successor personal representative has been appointed. Petitioners made a motion to have Hal LeFevre designated. Though not officially designated, Petitioners stood in the place of a personal representative and brought this suit in good faith on behalf of the estate. Petitioners should therefore be awarded from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred. Since Harold's estate is still open and subject to the jurisdiction of the trial court, the trial court should have awarded Petitioner his attorneys' fees and costs.

Further, because Petitioners were entitled to their attorneys' fees and costs in the trial court, they should also be awarded their attorneys' fees and costs on appeal. *See Glew v. Ohio Sav. Bank*, 2007 UT 56, 181 P.3d 791.

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S REQUEST FOR A STAY PENDING APPEAL.

Respondent was not entitled to a stay pending appeal. Though, in some respects, the issue of the stay pending appeal is now moot, this issue should be heard and decided

by this court because it is “capable of repetition yet evading review.” *In re Johnson*, 2001 UT 110, ¶ 15, 48 P.3d 881. The question of the appropriateness of a stay pending appeal is always going to be moot on appeal. This Court should therefore decide the issue to prevent future incorrect application of stay law.

Though an appellant generally has the option of giving a supersedeas bond and obtaining a stay pending appeal, a stay and accompanying supersedeas bond is ineffective and procedurally unnecessary where, as in this case, the judgment was self-executing. *See* Utah R. Civ. P. 62(d). This idea has long been held in Utah law. The Utah Supreme Court held early on that “where . . . the judgment is self-executing, and no act of a ministerial officer is necessary to make it effective, an appeal does not suspend or otherwise stay the force and effect of the judgment.” *In re Grant*, 44 Utah 386, 390, 140 P.2d 226, 228 (1914). In fact, the court held that “as a self executing judgment requires no proceeding for its enforcement, there is nothing upon which a stay bond can operate in the case of such a judgment. *Id.* (internal citations omitted).

Further, the public policy behind stays pending appeal and supersedeas bonds does not apply to the self-executing judgment in this case. The “purpose and effect of supersedeas is to restrain the successful party and the lower court from taking affirmative action to *enforce* a judgment or decree.” *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979) (emphasis added). In fact, a supersedeas bond “operates against the *enforcement* of the judgment and not against the judgment itself.” *Gumberts v. East Oak Street Hotel Co.*, 88 N.E.2d 883, 885 (Ill. 1949) (emphasis added) (cited in *Mills*,

590 P.2d at 1248 n.12).

In this case, the judgment is self-executing, in that it requires no proceeding or action to be taken for its enforcement; the judgment is executed by its own terms. By virtue of the judgment, Petitioners have title to the Property at issue. Thus, there is nothing upon which a stay bond can operate.

The inappropriateness of a supersedeas bond in a case such as this is illustrated by the fact that Petitioners cannot find and Respondent has not cited any authority for the appropriate amount of a supersedeas bond in such a case. (R. 1193-1201.) Rule 62(j) states that “a court shall set the supersedeas bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the appeal and assures payment in the event the judgment is affirmed.” Utah R. Civ. P. 62(j). Thus, the purpose of the supersedeas bond is reaffirmed by the rule to be the protection of the party who won the judgment in the first place. The purpose is not to protect the interests of the judgment debtor should he perhaps obtain a reversal. In light of such a purpose, a supersedeas bond was prohibited by the rules in this case because the judgment is self-executing.

Petitioners have been damaged by the entry of the stay. They have all of the responsibilities and liabilities of homeowners without the power to protect their interest. With use and direction of the Property out of their hands, they have been prevented from selling the home prior to the crash of the real estate market. They are unable to rent and maintain the home. They are unable to control the repair and condition of the home.

They are incurring tax liabilities and liabilities for violations of Provo City ordinances. In short, Petitioners have been wrongfully deprived of their ability to protect their interest in the home. Because the trial court erroneously granted Respondent a stay pending appeal, Petitioners should be awarded damages incurred as a result, including but not limited to the rental value of the Property since the stay entered, the costs of repairing the home, unpaid taxes, and any assessments or fees levied by Provo City because of the condition of the Property.

CONCLUSION

Therefore, in light of the foregoing, this Court should affirm the trial court's decision that Petitioners are the rightful owners of the Property. This Court should reverse the trial court's failure to award Petitioners their attorneys' fees and remand for a determination of attorneys' fees in the trial court and on appeal. This Court should also reverse the trial court's improper stay pending appeal and remand for a determination of damages.

RESPECTFULLY SUBMITTED this 23d day of January 2009.

HILL, JOHNSON & SCHMUTZ, LC

Stephen Quesenberry
Attorneys for Petitioners/Appellees

PROOF OF SERVICE

I hereby certify that, on the 23d day of January 2009, two true and correct copies of the foregoing **BRIEF OF APPELLEES/CROSS-APPELLANTS** were hand-delivered to the following:

LESLIE W. SLAUGH (3752)
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 1248
Provo, Utah 84603

ADDENDA

Addendum A – Relevant Statutes

Addendum B – Findings of Fact and Conclusions of Law (February 20, 2008)

Addendum C – Trial Exhibits, Tabs 96 and 97

Addendum “A”

Addendum “A”

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78B-2-307. Within four years.

An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

(a) upon a contract, obligation, or liability not founded upon an instrument in writing;

(b) on an open store account for any goods, wares, or merchandise; or

(c) on an open account for work, labor or services rendered, or materials furnished;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection **25-6-5(1)(a)**, which in specific situations limits the time for action to one year, under Section **25-6-10**;

(b) Subsection **25-6-5(1)(b)**; or

(c) Subsection **25-6-6(1)**; and

(3) for relief not otherwise provided for by law.

Renumbered and Amended by Chapter 3, 2008 General Session

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75-8-101. Time of taking effect -- Provisions for transition.

(1) This code takes effect on July 1, 1977.

(2) Except as provided elsewhere in this code, on the effective date of this code:

(a) This code applies to any wills of decedents dying thereafter.

(b) The code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code.

(c) Every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this code and is subject to the duties imposed with respect to any act occurring or done thereafter.

(d) An act done before the effective date in any proceeding and any accrued right is not impaired by this code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right.

(e) Any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

Enacted by Chapter 150, 1975 General Session

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75-2-102. Intestate share of spouse.

(1) The intestate share of a decedent's surviving spouse is:

(a) the entire intestate estate if:

(i) no descendant of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse;

(b) the first \$50,000, plus 1/2 of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(2) For purposes of Subsection (1)(b), if the intestate estate passes to both the decedent's surviving spouse and to other heirs, then any nonprobate transfer, as defined in Section **75-2-206**, received by the surviving spouse is chargeable against the intestate share of the surviving spouse.

Repealed and Re-enacted by Chapter 39, 1998 General Session

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75-2-103. Share of heirs other than surviving spouse.

(1) Any part of the intestate estate not passing to the decedent's surviving spouse under Section **75-2-102**, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(a) to the decedent's descendants per capita at each generation as defined in Subsection **75-2-106(2)**;

(b) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(c) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation as defined in Subsection **75-2-106(3)**;

(d) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection **75-2-106(3)**; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

(2) For purposes of Subsections (a), (b), (c), and (d), any nonprobate transfer, as defined in Section **75-2-205**, received by an heir is chargeable against the intestate share of such heir.

Repealed and Re-enacted by Chapter 39, 1998 General Session

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75-2-206. Decedent's nonprobate transfers to the surviving spouse.

Excluding property passing to the surviving spouse under the federal Social Security system, any death benefits paid to the surviving spouse under any state workers' compensation law, and property excluded under Section **75-2-208**, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

(2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner; and

(3) all other property that would have been included in the augmented estate under Subsection **75-2-205**(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

Amended by Chapter 243, 2008 General Session

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75-1-310. Costs -- In discretion of court.

When not otherwise prescribed in this code, the court, or the Supreme Court on appeal from the court, may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require.

Enacted by Chapter 150, 1975 General Session

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75-3-719. Expenses in estate litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred.

Enacted by Chapter 150, 1975 General Session

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Addendum “B”

Addendum “B”

FILED
Fourth Judicial District Court
of Utah County, State of Utah

2-20-08 KS Deputy

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Petitioners Hal LeFevre, Julia Richmond, Jeffrey LeFevre, Kelly LeFevre, Daniel LeFevre,
Bryce LeFevre, and Cynthia C. L. Giles

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY STATE OF UTAH

IN THE MATTER OF THE ESTATE OF:

HAROLD ALMA LEFEVRE and
EDITH K. LEFEVRE

Probate No. 933400210
Judge: Gary D. Stott

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT held a bench trial in the above-captioned matter on November 13, 2007 and December 6, 2007. Petitioners were represented by Stephen Quesenberry of Hill, Johnson & Schmutz and Respondent was represented by Richard L. Peterson of Howard, Lewis & Peterson, P.C. After hearing testimony, carefully evaluating the evidence, witnesses and exhibits presented by each party, reviewing the parties' briefs and other pleadings, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Harold and Edith LeFevre had seven children ("LeFevre children"), who are:
Harold R. ("Hal") LeFevre, Julia Richmond, Jeffrey LeFevre, Kelly LeFevre, Daniel LeFevre, Bryce LeFevre, and Cynthia C. L. ("Capri") Giles.
2. Harold and Edith, as joint tenants, owned a home at 2727 North Canyon Road in Provo, Utah (the "Home").
3. Edith passed away in 1987.
4. Harold married Ellen Stout later in 1987.
5. Ellen had five children of her own ("Stout children"), who are: Leland Stout, Mary Kovarik, Jolynn Stevenson, Valerie Asvitt and Carol Wilkerson.
6. On September 23, 1991, by virtue of Edith's death, Harold received the property.
(Trial Ex. 1, Tab 16.)
7. Harold and Ellen lived in the Home until Harold died on March 19, 1993. At that time, the Home was titled solely in Harold's name.
8. Harold's funeral was held five days after his death and both the LeFevre children and Stout children attended.
9. Bryce LeFevre stayed at the Home while he was in Provo for the funeral.
10. On March 24, 1993, after Harold's funeral, Ellen called the LeFevre children together.

11. The meeting was held at the Home with most of the LeFevre children present, but none of the Stout children present.

12. The meeting was friendly and calm.

13. Ellen discharged all debts that the LeFevre children owed to Harold or his estate.

14. Ellen acknowledged to the LeFevre children that she did not own the Home and asked if she could continue to live in the Home until her death.

15. Ellen also proposed that she would set up a trust for the house and her estate. At her death, the home and properties would be divided to the respective families. The LeFevre children would receive their father's home and estate and the Stout children would receive Ellen's property and estate.

16. The LeFevre children that were present unanimously agreed to Ellen's above proposal knowing their father would have wanted Ellen to be able to stay in the Home.

17. In addition, the LeFevre children agreed with Ellen that Hal and Leland would serve as successor co-trustees upon Ellen's death.

18. The agreement was not put into writing.

19. Months after the funeral, Hal took Ellen on a vacation with his family.

20. On April 19, 1993, Ellen met with her attorney and created the trust.

21. The terms of the trust were materially different than those agreed upon at the meeting with the LeFevre children. Instead, the trust stated that the LeFevre children and Stout

children would receive a 50% division of the trust estate, without regard to specific divisions of particular assets.

22. The trust was also inconsistent with the verbal agreement between Ellen and the LeFevre children because it named Kelly LeFevre as a successor co-trustee, instead of Hal.

23. Kelly was a high school dropout, a drug abuser and homeless. Thus, the LeFevre children never would have agreed to allow Kelly to represent their interests in the trust.

24. Copies of the trust or other communication about its terms were never conveyed to the LeFevre children.

25. On July 23, 1993, Ellen, as the personal representative of Harold's estate, transferred the Home into her trust, as agreed upon.

26. Bryce continued to visit Ellen throughout the years and had a good relationship with her.

27. On June 13, 1994, Ellen amended her trust without notifying the LeFevre children. She gave her own home at 830 East 2320 North in Provo, Utah to her children and divided the Home between the LeFevre children and her children.

28. On September 11, 1995, Leland took Ellen to her attorney's office where she amended the trust, again without notifying the LeFevre children.

29. On September 11, 1995, Leland took Ellen to her attorney and they amended the trust a second time without ever notifying the LeFevre children. The wording for distribution of

the Canyon Road house follows the first amendment with one exception. The language limits the distribution to the "then living child of the Trustor." Exhibit 1:8, ¶ 6.3. This amendment from "beneficiary" to "child" eliminated the LeFevre children from receiving any portion of the Canyon Road house because they are not her "children," as defined in Article Two of the Second Amendment to the Ellen L. LeFevre Trust. Exhibit 1:8, ¶ 1. Thus, the second amendment to the trust completely took the LeFevre children out of the trust as beneficiaries and gave the Home solely to the Stout children.

After several years of residing in the home, Ellen gradually became reclusive and would not invite the LeFevre children to the home. When some of the LeFevre children came to visit her, she would not invite them in, but would speak to them from between the door. Leland helped her install mirrors, an answering machine, and a caller ID to avoid meeting or talking with the LeFevre children. She appeared to the LeFevre children to be losing energy to entertain visitors and not able to endure long talks.

30. Ellen passed away on October 28, 2004.

31. The Stout children never published an obituary that their mother wrote to give notice to the community of her passing.

32. None of the LeFevre children were notified of her death.

33. Ellen never indicated to the LeFevre children that she had changed her mind about the terms of their verbal agreement. In other words, Ellen never indicated that (1) she changed

the co-trustee of the trust from Hal to Kelly, and (2) she left the Home to the Stout children and not the LeFevre children.

34. The Stout children intended to disadvantage the LeFevre children by never making any effort to notify them of Ellen's death and to exclude the LeFevre children from any participation in the distribution of Ellen LeFevre's estate.

35. Leland Stout's testimony does not have any credibility regarding any issues in this case because: (1) his testimony about his repairs in caring for the property and Home is not consistent with the evidence, (2) his testimony that the LeFevre children were always demanding money from Ellen is not consistent with the evidence (which evidence demonstrates that the Stout children received the most frequent and substantial loans from Ellen), (3) of his status with Kelly as co-trustees of Ellen's trust, especially considering Kelly's lifestyle and Kelly's siblings' lack of confidence in him, (4) of the fact that Leland took Ellen to her lawyer to amend the trust to exclude the LeFevre children as beneficiaries of the trust, and (5) of the fact that Leland has not been steadily employed for a significant period of time while living off of funds he received from the sale of a pawn shop many years ago, and receiving support, financial and otherwise, from his mother, Ellen and her estate.

36. The LeFevre children did not become aware that Ellen did not follow the agreement regarding the Home until after they discovered she had passed away, contacted her

attorney and received copies of the trust and amendments. Upon their discovery, the LeFevre children immediately filed the petition in this case.

37. Steve Skabelund, Ellen's attorney, testified that in 1995 all he observed was a good relationship between Ellen and the LeFevre children. In fact, he was not aware of any contention between Ellen and the LeFevre children until this action.

CONCLUSIONS OF LAW

1. U.C.A. §75-8-101(2)(b) states,

The code applies to any proceeding in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of application of the procedure of this code.

2. The present probate law directs that all cases be decided under the current probate law unless any of the exceptions apply.

3. The Stout children have not argued any of the exceptions; therefore, the Court finds that the present probate law applies.

4. Pursuant to equity, fairness and to effect the intent of Harold and Ellen at the time of Harold's death, the Home belongs solely to the LeFevre children.

5. Equity will create a trust to prevent unjust enrichment or when a confidential relationship is abused. *Haws v. Jensen*, 209 P.2d 229, 231 (Utah 1949) ("A constructive trust [is] an equitable remedy to prevent unjust enrichment, [and] arises by operation of law."); *Renshaw*

v. Tracy Loan & Trust Co., 49 P.2d 403 (Utah 1935) ("It is the confidential relationship plus the abuse of the confidence thus imposed, that authorizes equity to construct a trust for the benefit of the party whose confidence has been abused.").

6. Ellen held a confidential or fiduciary relationship with the LeFevre children when they permitted her by common consent to place the Home in her trust.

7. Ellen and the LeFevre children entered into an agreement regarding the Home, which agreement was that the Home would be given to the LeFevre children upon Ellen's death and that Hal would be the successor co-trustee of the trust.

8. Ellen abused the confidential, fiduciary relationship with the LeFevre children when she (and the Stout children) changed the material terms and conditions of the agreement, without prior authorization and/or ratification from the LeFevre children.

9. The changed material terms and conditions allowed the Stout children to be unjustly enriched by receiving the Home.

10. Equity requires that the Home be held as an asset of a constructive trust for the LeFevre children.

11. Therefore, the prior transfer of the Home for the benefit of the Stout children is set aside and shall become an asset of the LeFevre children from their father's estate.

12. A judgment should be entered which gives free and clear title of the Home to the LeFevre children.


13. Except for the Home located on Canyon Road, the remaining assets shall go to the Stout children.

14. Petitioners are awarded their costs, to be established by a verified memorandum of costs.

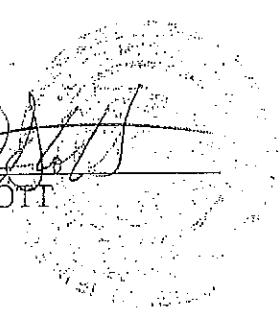
15. Each party shall pay their own attorney fees.

DATED this 20 day of February 2008.

BY THE COURT:



JUDGE GARY D. STOTT
District Court Judge



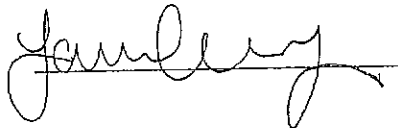
CERTIFICATE OF MAILING

The undersigned hereby certifies that on the ____ day of February 2008 she caused a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to be delivered to the following:

Richard L. Peterson
Howard, Lewis & Peterson, P.C.
120 East 300 North
PO Box 1248
Provo, Utah 84603

Sent Via:

☒ Hand -Delivery
☐ Facsimile
☐ Mailed (postage prepaid)



Addendum “C”

Addendum “C”

Harold LeFevre's Intestate Estate

	Name	Account #	Amount (3/93)	Notes	Stipulat. Value	Respondent's Proposed Value
1	Chatfield Dean & Co.	28300674	\$51		Y	
2	Personal Property		\$3,000	Estimate (includes: antique bureau, couches, love seat, chairs, Dodge truck, Chrysler Lebaron, lawn mower, tools, photographs, etc.)	Y	
3	East Lawn	87-03-002	\$4,975		Y	
4	Silver Screen Partners III	90950	\$5,000		Y	
5	Robo Enterprises, Inc.	10071	\$3,925	Estimate by Ellen	N	-25.32
6	2727 North Canyon Rd., Provo, UT 84604	20:055:0003	\$130,000	Appraisal of 1993 value	N	\$102,714
7	637/639 S. 300 W., Provo, UT 84601	21:049:0001	\$62,996	1993 fair market value from Utah County	N	\$55,000
8	Zion's Bank	32-40677-9	\$1,466.87		N	\$733.43 (JT)
Total Intestate Assets			\$211,363.38			

	Name	Amount (3/93)	Notes	Stip. Val.	Respondent's Proposed Value
Debts					
1	2727 North Canyon Rd., Provo, UT 84604	\$64,144.22	Mortgage	Y	
2	637/639 S. 300 W., Provo, UT 84601	\$25,758.96	Mortgage	Y	
4	Probate Costs	\$1,430	The 1993 and 1995 probate matters.	Y	
5	East Lawn Lots	\$2,070		Y	
3	Funeral	\$4,796.90	*Interment service and vault \$780 *Lot \$995 *Headstone \$63.75 *Daily Herald \$98.60 *Deseret News \$22.80 *Walker Mortuary \$3826.00 *Long Distance Phone Costs: \$30 *Medical Expenses: \$180.75 *\$1,200 paid by Hal LeFevre	N	\$5,996.90
Total Intestate Debts					
		\$98,200.08			
Total Intestate Estate					
		\$113,163.30			

Nonprobate Transfers from Harold LeFevre's Estate

	Name	Account #	Amount (3/93)	Beneficiary (if applicable)	Notes	Stip. Val.
1	Jackson National Life	1183765/93L0556	\$100,000	Ellen		Y
2	Thomas James Assoc.	JH-06886-0	\$.74	Ellen		Y
3	Sterling Trust Co.	018690	\$33,535.30	Ellen		Y
4	Prudential Securities	OUQ-R03444-84	\$5,154.61	Prob.: Ellen and 7 children	\$4330.71 per LeFevre child \$155.61 for Ellen	Y
5	Geneva Steel Union Pension		\$9,031.92	Ellen		Y
6	220 W. 500 S. Provo, UT 84601	04:019:0017	\$10,000	Ellen (jt tenant)	*1993 FMV from UT Co. is \$20,000	Y
7	GroupAmerica Ins. Co.		\$25,000	Ellen		Y
8	Wages from Geneva		\$3,255.05	Ellen		Y
9	UCCU	720955	\$225.53	Ellen	Harold and Ellen were joint tenants with rights of survivorship. Account value was \$451.07.	Y
10	Smith Barney	883-67171-19	\$120.10	Ellen	Previously called Shearson Lehman Bros.	Y
Nonprobate transfers to Ellen			\$181,324.25			
Nonprobate transfers to Petitioners			\$4330.71			