

1986

In the Matter of the Estate of Edward Miller Grim,
Deceased. Maxine Tate Grimm, individually and as
Supervised Personal Representative of the Estate of
Edward Miller Grimm; Linda Grimm; Edward
Miller Grimm II; and E. Lavar Tate, as Supervised
Personal Representative of the Estate of Edward
Miller Grimm v. Ethel Grimm Roberts, Rex
Roberts, Juanita Grim Morris and Juanita Kegley
Grimm : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 860262-CA
In the Matter of the Estate of
EDWARD MILLER GRIMM,

Deceased.

MAXINE TATE GRIMM, individually
and as Supervised Personal
Representative of the Estate of
Edward Miller Grimm; LINDA
GRIMM; EDWARD MILLER GRIMM II;
and E. LAVAR TATE, as Supervised
Personal Representative of the
Estate of Edward Miller Grimm,

Plaintiffs-Appellants,

vs.

ETHEL GRIMM ROBERTS, REX ROBERTS,
JUANITA GRIMM MORRIS, and
JUANITA KEGLEY GRIMM,

Defendants-Respondents.

Case No. 860262

860262-CA

REPLY BRIEF OF APPELLANTS

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF TOOELE COUNTY, STATE OF UTAH
HONORABLE JOHN A. ROKICH

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Clerk Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of)
EDWARD MILLER GRIMM,)

Deceased.)

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and as Supervised Personal)
Representative of the Estate of)
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GRIMM; EDWARD MILLER GRIMM II;)
and E. LAVAR TATE, as Supervised)
Personal Representative of the)
Estate of Edward Miller Grimm,)

Plaintiffs-Appellants,)

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JUANITA GRIMM MORRIS, and)
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Defendants-Respondents.)

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The plaintiffs-appellants file this reply brief in response to the defendants-respondents' disingenuous attempts to sustain the judgment below approving a Family Settlement Agreement pursuant to §§ 75-3-1101 and 1102 of the Uniform Probate Code. The defendants in their attempt to preserve the judgment below: (1) have switched positions by now claiming court approval of the FSA was not required; (2) now feel compelled to attack the validity of Mr. Grimm's spendthrift trust although the defendants did not propose and the court did not find the trust was invalid; (3) assert the lower court properly determined Maxine's claim for the intentional infliction of emotional distress and properly denied her a jury trial, although the lower court never adjudicated her claim; and (4) repeatedly engage in the miscitation and misleading citation of record and authority that not only fail to sustain the defendants' positions but cast a pale over the basic credibility of their brief.

I.

THE DEFENDANTS HAVE ABANDONED THE FOUNDATION OF THE LOWER COURTS JUDGMENT -- COURT APPROVAL OF THE FSA, THE ENFORCEABILITY OF THE FSA IS CONTROLLED BY §§ 1101 AND 1102 NOT § 912, COURT APPROVAL IS REQUIRED TO BIND "PARTIES AND NONPARTIES" AND AN FSA MATERIALLY ALTERING OR TERMINATING AN INTER VIVOS SPENDTHRIFT TRUST IS INVALID WITHOUT COURT APPROVAL UNDER §§ 1101 AND 1102.

A. The Defendants Have Abandoned the Need for Court Approval of the FSA Pursuant to §§ 1101 and 1102.

The defendants have abandoned the foundation of the lower court's judgment -- the need for court approval of the Family Settlement Agreement (FSA) pursuant to the Uniform Probate Code.

Utah Code Ann. §§ 75-3-1101, 1102. The foundation of the lower court's Judgment was the court's approval of the FSA. Simply look at the Judgment and Conclusions of the court. (CR. 1233-1231, CR. 1258-1256).

The reason for the defendants' abandonment is apparent. The plaintiffs' position both below and in this Court is the FSA under §§ 1101 and 1102 was not binding prior to court approval and subject to repudiation. (App. Br. at 7-8, 39-43). The plaintiffs' position is supported by the plain language of § 1101, precedent and public policy.

Section 1101 plainly provides: "a compromise of any controversy . . . , if approved in a formal proceeding in the court for that purpose, is binding on the parties thereto, including those unborn, unascertained or who could not be located." Utah Code Ann. § 75-3-1101 (emphasis supplied). Under the plain language of § 1101 and the approval structure of § 1102, a FSA is only binding upon court approval and subject to repudiation prior to court approval.

Precedent supports the plain language of § 1101 and uniformly holds settlement agreements subject to court approval are not binding and are subject to repudiation at any time prior to court approval. (See cases cited App. Br. at 40). The defendants do not dispute this Rule and they have not cited one case to the contrary. (Res. Br. at 44-45).

The only argument advanced by the defendants is that there is no public policy supporting the plain legislative direction that a Family Settlement Agreement shall only be binding

upon court approval. The defendants are wrong. The defendants ignore the legislative choice that the desires of the testator -- the desires of Mr. Grimm -- are entitled to deference. That policy is reflected in the Editorial Board Comment to §§ 1101 and 1102. The Editorial Board Comment states in material part, "The only reason for approving a scheme of devolution which differs from that framed by the testator . . . is to prevent dissipation of the estate in wasteful litigation A controversy which the court may find to be in good faith, as well as the concurrence of all beneficially interested and competent persons and parent representatives provide prerequisites which should prevent the procedure from being abused." Editorial Board Comment, §§ 75-3-1101, 1102 (emphasis supplied). The public policy is to respect the desires of the testator in the absence of the concurrence of his intended beneficiaries and the approval of the court. Without the prerequisites, concurrence and approval, the testator's wishes should control. Holding that a FSA is not binding prior to court approval and is subject to repudiation not only adheres to the plain language of the statute, but supports the public policy of deferring to the testator's desires without the concurrence of his intended beneficiaries.

The defendants now take the position that court approval of the FSA is not required in order to make the FSA a binding agreement. (Respondent's Brief (Res. Br.) at 40-47). The defendants' new position is that the enforceability of the FSA is controlled by § 75-3-912 and not §§ 75-3-1101 and 1102. Section 912 does not require court approval. Sections 1101 and 1102 do.

Obviously, the defendants by changing their position implicitly acknowledge that if the provisions of §§ 1101 and 1102 are controlling and court approval is required, the FSA is not binding and subject to repudiation prior to court approval.

The defendants have switched statutory horses in the middle of the stream. The position the defendants take now is not the position the defendants took below. In the lower court the defendants took the position that court approval of the FSA pursuant to §§ 1101 and 1102 was necessary and the court could approve the FSA despite plaintiffs' repudiation. (See Conclusions Nos. 8 and 9, CR. 1232-1231). The district court adopted the defendants' position. Indeed, the rationale of the lower court's decision denying the plaintiffs the right to jury trial on the issues of duress and failure of consideration was the court's view that the court could determine the validity of the FSA pursuant to § 1102. There is no question that that is what the court did. The lower court approved the FSA pursuant to §§ 1101 and 1102. (See Findings of Fact and Conclusions of Law Nos. 70A, 8 and 9, CR. 1234, 1232, 1231). Indeed, the defendants concede that in their brief -- the court "formally approved the FSA pursuant to § 75-3-1102." (Res. Br. 40).

The defendants thus seek to sustain the Judgment of the lower court approving the FSA on the ground court approval was not required. The defendants not only seek to sustain the lower court's Judgment contrary to their position below, but the lower court made absolutely no findings and entered no conclusions with regard to the applicability of § 912.

B. The Court Approval Provisions of §§ 1101 and 1102 Are Comprehensive and Control The Enforceability of Any FSA Compromising a Claim Relative to an Interest in The Decedent's Estate. The Need for Court Approval Does Not Turn on a "Party-Non Party" Distinction and The UPC Simply Does Not Divide The Issue of Enforceability of an FSA Compromise Between §§ 1101 and 1102 and § 912.

Beyond the defendants volte-face, the dispositive point is that the defendants are wrong. Sections 1101 and 1102, not § 912, are controlling. The defendants' abandonment is of no avail. Court approval under §§ 1101 and 1102 was necessary to make this FSA a binding settlement agreement under the Uniform Probate Code.

Sections 1101 and 1102 mandate court approval and a procedure for court approval for the compromise of all claims relative to any interest in a decedent's estate. Section 912 authorizes agreements among competent successors to alter the division of a decedent's estate. Section 912, however, is limited to agreements "to alter the interest, shares, or amounts" to which the parties are entitled under the decedent's will or the laws of intestacy. Section 912, as the Editorial Comment notes, simply permits those who are entitled to a share in the decedent's estate to alter the division of the estate among themselves. If, for instance, the deceased has left a codicil to a will that is clearly invalid but evidences an intent by the deceased to alter the distribution of his estate from his will, his devisees may agree among themselves to honor the invalid codicil. That, indeed, is exactly what happened in the Matter of Estate of Cruse, 710 P.2d 733 (N.M. 1985). The agreement altering the division of

the deceased's estate does not have to involve the settlement of any controversy or any claim. It may simply involve a redistribution of the decedent's property among the intended beneficiaries. A settlement agreement, however, involves more than an agreement to alter the division of the decedent's estate. It involves the settlement of controversies and claims of rights or interests in the decedent's estate. It involves an agreement reached in an adversary setting and generally involves both the release of claims and a redistribution of the decedent's estate, frequently to persons who were clearly not the intended beneficiaries of the decedent. It is the potential for the abuse of the testator's desires through the advancement of spurious and malicious claims that warrants the court approval provisions of §§ 1101 and 1102.

Any settlement compromising any claim of right or interest in a decedent's estate is subject to the court approval provisions of §§ 1101 and 1102. Simply, those sections are the provisions of the Uniform Probate Code applicable to the compromise of claims in a decedent's estate. That is what the statute says -- "a compromise of any controversy . . ." (§ 1101) -- "The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons . . . having beneficial interest or having claims which will or may be affected by the compromise." (§ 1102). This Court indeed has stated that settlement agreements compromising claims must be approved under the court approval provisions of §§ 1101 and 1102. In the Matter of the Estate of Frank Chasel, 42 Utah Adv. Rep. 3 (Sept. 15, 1986). In Chasel this Court said in part:

Compromise agreements authorized by Part 11 of the Probate Code must be approved in formal proceedings. Section 75-3-1101 . . . except for the requirement of court approval and other statutory requirements in Part 11 a compromise agreement under the Probate Code is like other compromise agreements.¹

Id. at 4.

The court approval provisions of §§ 1101 and 1102 are thus comprehensive insofar as they apply to the settlement of claims in a decedent's estate and reflect a policy that before the desires of the testator are altered based on the settlement of a claim in which all interested parties concur, a court still must be satisfied that there was a good faith claim controversy.

Certainly, §§ 1101 and 1102 are not meaningless. Even the defendants recognize that. (Res. Br. at 42). The defendants, however, in an attempt to take this FSA out of the court approval requirements of §§ 1101 and 1102 argue that the Uniform Probate Code divides the issue of enforceability of family settlement agreements between § 912 and §§ 1101 and 1102. Literally, the defendants' position is that family settlement agreements are made binding under two separate statutory provisions. The defendants

¹The defendants' citation In re Estate of Thompson, 601 P.2d 1105 (Kansas 1979) to refute the plaintiffs' hypothetical based on Chasel -- if William Chasel had found the new will prior to court approval of the settlement agreement, he could have repudiated the settlement agreement -- is a plain misstatement of authority. Indeed, contrary to the defendants' argument, in Thompson as well as in Chasel, the court had already approved the family settlement agreement prior to the discovery of the new will and that is precisely why the court refused to set aside the settlement agreement. Id. at 1108 (emphasis supplied).

contend that family settlement agreements become binding upon parties to the FSA without court approval under § 912, but that the court approval provisions of §§ 1101 and 1102 are necessary and only necessary to make family settlement agreements binding on "nonparties", such as minors, unascertained heirs and inalienable interest. (Res. Br. at 43-47). The defendants thus take the position that there is a "party-nonparty" distinction with regard to the enforcement of family settlement agreements.

The defendants rely on In re Peck's Estate, 34 N.W. 2d 533 (Mich. 1948) to support their "party-nonparty" division of enforceability between § 912 and §§ 1101 and 1102. The problem with the defendants' position is that In re Peck's Estate does not do that. Indeed, In re Peck's Estate establishes that the statutory evolution of §§ 1101, 1102 and 912 of the Uniform Probate Code provides no basis for the defendants' "party-nonparty" distinction, and, on the contrary, establishes §§ 1101 and 1102 are controlling.

In In re Peck's Estate, the defendants are correct that the court did uphold the enforceability of a settlement agreement that had not been approved by a Probate Court. The defendants are correct that the Court held that court approval was not necessary because there were no minors, unknown heirs or inalienable interest involved in the settlement. What the defendants do not point out to the court and what absolutely distinguishes In re Peck's Estate is the Michigan statute that was applicable to the In re Peck's Estate decision.

The controlling Michigan statute in In re Peck's Estate provided in material part:

Subject to the rights of creditors and taxing authorities, competent interested parties may agree among themselves to alter the interest, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy, in any way that they provide in a written agreement executed by all who are affected by its provisions. When there is, or may be, an interested party to the agreement who is a minor or incapacitated person or where there is an inalienable estate or future contingent interest, after notice to the representative of such person or interest as provided by supreme court rule, the probate court having jurisdiction of the matter may, if the agreement is made in good faith and appears just and reasonable for the person or interest, direct the representative of the person or interest to sign and enter into the agreement. (See MSA § 27-5191, emphasis supplied).

The reason the court held in In re Peck's Estate there was no necessity for court approval of a settlement agreement where there were no minors or inalienable interest is that the plain language of the statute required that distinction. The Michigan statute explicitly limited the need for court approval to settlement agreements where there were minors, incapacitated persons or inalienable interests. Id.

The 1948 Michigan statute controlling In re Peck's Estate is clearly and materially different from the Uniform Probate Code. The Uniform Probate Code was adopted in 1969. Section 912 of the Uniform Probate Code does have the first sentence of the Michigan statute but does not have the sentence of that statute limiting the need for court approval to agreements that affect "a minor or incapacitated person or where there is an inalienable

estate" The Michigan statute, moreover, did not have provisions comparable to §§ 1101 and 1102 of the Uniform Probate Code. For this purpose §§ 1101 and 1102 expanded the need for court approval of settlement agreements from settlement agreements that only affected minors, incapacitated persons or inalienable interests to the need for court approval of all settlement agreements compromising claims relative to an interest in a decedent's estate before such agreements became binding on parties and nonparties alike. This conclusion is established (1) by the deletion from § 912 of the limited court approval provision of the Michigan statute; (2) by the addition of two new comprehensive court approval provisions to the Uniform Probate Code - - §§ 1101 and 1102; and (3) the plain language of § 1101 and the approval structure of § 1102 that mandate court approval of all settlement agreements relative to claims in a decedent's estate before such compromises become binding on "parties and nonparties" alike.

The plain language of § 1101 again supports this conclusion. The defendants' new position simply ignores the phrase "is binding on all the parties thereto." Utah Code Ann. § 75-3-1101. The approval structure of § 1102, moreover, reinforces the plain language of § 1101. Section 1102 requires that "the terms of the compromise shall be set forth in agreement in writing which shall be executed by all competent persons" Utah Code Ann. § 75-3-1102. Section 1102 thus by its approval structure envisages that settlement agreements, the enforceability of which are conditioned on court approval pursuant to § 1101, will be settlement agreements "executed by all competent persons",

not just settlement agreements pertaining to minors, unborn heirs or inalienable interests. In short, the defendants' "party-nonparty" distinction for the need for court approval simply defies the evolution, plain language and approval structure of §§ 1101 and 1102 of the Uniform Probate Code.

C. Court Approval of This FSA is Unquestionably Required Because This FSA Materially Alters and Terminates an Inter Vivos Spendthrift Trust and Without Court Approval Such an FSA Even With The Consent of All Beneficiaries Would Be Invalid.

Certainly §§ 1101 and 1102 of the Uniform Probate Code are applicable to this Family Settlement Agreement. (PX. 58-59). This Family Settlement Agreement not only alters the division of Mr. Grimm's estate contrary to his desires in favor of Ethel and Nita and compromises their "claims" and their mother, Juanita Kegley Grimm's, "claims", but this FSA materially alters and terminates Mr. Grimm's inter vivos spendthrift trust. (See, App. Br. at 45-46).

The unchallenged rule is that beneficiaries of a trust may not materially alter or terminate a trust if such termination or alteration would frustrate a material purpose of the trust and this rule has uniformly been applied to preclude the material alteration or termination of a spendthrift trust. (See 4 Scott on Trusts, § 337.2 and App. Br. at 43-47). The consequence of this rule is that without court approval an FSA materially altering and terminating a spendthrift trust would be invalid and unenforceable regardless of repudiation. (App. Br. at 43-47). The absurdity of the defendants' new position is if there is no statutory basis for

court approval of this FSA -- if this FSA is not subject to court approval under §§ 1101 and 1102, this FSA would be invalid regardless of the plaintiffs' repudiation simply because it materially alters and terminates Mr. Grimm's trust. (Compare PX. 58 and 59 with PX. 11).

The plaintiffs in their opening brief have pointed out to the Court that there is a substantial body of authority that holds that even in the context of the Uniform Probate Code, courts will not approve FSA agreements materially altering or terminating a spendthrift trust on the ground that to do so would frustrate the testator's purpose in establishing an inalienable interest for his intended beneficiaries. (See cases cited App. Br. at 44-45). The plaintiffs in their opening brief acknowledged that the Restatement has adopted a modified rule. The Restatement takes the position that under § 75-3-1101 a court can approve a compromise materially altering or terminating a spendthrift trust if the court finds it was "in the best interests of the trust beneficiaries." See Restatement (Second) of Trusts, comment O (1959) and App. Br. at 46. But clearly court approval is essential and the only provision giving the court authority to approve an FSA materially altering or terminating a spendthrift trust is §§ 1101 and 1102 of the Uniform Probate Code. Section 1101 has language explicitly dealing with the court's power to approve an FSA materially altering or terminating a spendthrift trust -- "An approved compromise is binding even though it may affect a trust or an inalienable interest."

The statutory history of § 912, moreover, makes it clear that compromises materially altering or terminating a spendthrift trust are subject to the court approval provisions of §§ 1101 and 1102. Specifically, the Michigan statute applicable in In re Peck's Estate shows on its face that the power with regard to inalienable interest covered by the second sentence of that statute has been transferred in the Uniform Probate Code to §§ 1101 and 1102. (See Br. supra, at 9).

D. The Lower Court Made No Findings With Regard To The Validity of Mr. Grimm's Trust and His Trust, Contrary to The Defendants' New Position on Appeal, is Valid.

The defendants in a desperate attempt to wriggle out of the consequences of the plaintiffs' repudiation of the FSA prior to court approval, now attempt to rewrite the record below by claiming Mr. Grimm's inter vivos spendthrift trust was invalid. (Res. Br. at 52-56). The defendants in their brief now claim (1) "The lower court was correct in concluding that the alleged spendthrift trust did not affect the validity of the FSA", and (2) Mr. Grimm's trust was invalid. (See Point II, Res. Br. at 53-55).

The lower court made no findings and entered no conclusions with regard to the validity of Mr. Grimm's inter vivos spendthrift trust and made no determination that his trust did not affect the validity of the Family Settlement Agreement or the ability of the court to approve it. (See Findings of Fact and Conclusions of Law, CR. 1254-1231). Indeed, one of the deficiencies of the lower court's judgment that the plaintiffs claimed as error in their opening brief was "The court made no findings with

regard to the validity of the trust or its creation." (App. Br. at 66). The court, moreover, made no finding and entered no conclusion that the material alteration and termination of Mr. Grimm's trust was in the interest of his intended beneficiaries -- Maxine, Pete and Linda.² Simply, in summary, the lower court made no determination or analysis of any type of the impact of Mr. Grimm's trust in relationship to the court's approval of the FSA.

Defendants now take the position that Mr. Grimm's trust was invalid on the grounds (1) it was illusory, (2) it contained "few" assets, and (3) that under a valid spendthrift trust a beneficiary may only receive income and not the corpus. (Res. Br. at 53-55). The defendants further argue that even if the trust is valid, the plaintiffs have renounced their interest in the trust and in any event the FSA terminating the trust is in the best interests of the trust beneficiaries. The kindest thing to say about the defendants' position is that they are undeterred either by the facts, the law or the lower court's failure to make any findings or conclusions supporting their position.

Mr. Grimm's trust was not illusory or invalid. Utah has followed the rules of the Restatement (Second) of Trusts with regard to issues of validity. Sundquist v. Sundquist, 639 P.2d

²Maxine, Pete and Linda were the primary beneficiaries of Mr. Grimm's Trust. The LDS Church, however, was a contingent beneficiary. The LDS Church was not a party to the Family Settlement Agreement and there was no proof that the LDS Church had any notice of any petition by the defendants to obtain court approval of the Family Settlement Agreement. (See PX. 11 at 7).

181 (Utah 1981). This Court has held following the Restatement that an inter vivos trust is created "when a settlor with the intent to create a trust transfers property to a trustee in trust for, or declares that he . . . holds specific property in trust for, a named beneficiary." Sundquist v. Sundquist, supra, at 183.

The defendants' argument that Mr. Grimm's trust is illusory is predicated on the trustor's reservation of a power of revocation. (See PX. 11 at 11). The defendants rely solely on Alexander v. Zions Savings Bank & Trust Co., 273 P.2d 173 (Utah 1954), to support their position. Contrary to the defendants' position, the rule in Utah and the rule of the Restatement is the reservation of a power of revocation in the trustor of an inter vivos trust does not render the trust illusory or invalidate the trust. Horn v. First Security Bank of Utah, N.A., 548 P.2d 1265 (Utah 1976); Restatement (Second) of Trusts, §§ 37, 57. The Alexander case is not in point. Indeed, this Court has explicitly held that it is not in point. Horn v. First Security Bank of Utah, N.A., supra, at 1266. If the defendants had felt the need to call controlling authority contrary to their position to the Court's attention, they would have pointed out that in the Horn case in which this Court unequivocally held the reservation of a power of revocation does not invalidate an inter vivos trust, this Court said with regard to the Alexander case: "The case does not stand for the proposition that the reservation by the settlor of the right of revocation or the right to amend the trust made the same either testamentary or illusory." Id. at 1266.

The defendants' second argument attacking the trust is that Mr. Grimm did not transfer any, or at least very many, assets to his trust. (Res. Br. at 54). The defendants' position is not supported by the facts or the lower court's findings. (See App. Br. at 15-16; Findings Nos. 14, 16 and 17, CR. 1251-1250). At the time Mr. Grimm executed his trust he transferred all of his stock in Globe Investment Company to the trust. The transfer of the Globe Investment stock to his trust was established by a Bill of Sale attached to the original trust agreement transferring all of his Globe stock (PX. 11); the stock ledgers of Globe Investment Company reflecting that transfer and the issuance of a new stock certificate to Mr. Grimm's Trustee (PX. 12); the new Globe stock certificate issued and delivered to Mr. Grimm's trustee (PX. 13); and the uncontradicted testimony of Pete, Maxine and LaVar Tate that Mr. Grimm signed and delivered the Bill of Sale and stock certificates in Globe to the trustee, Pete, at the time Mr. Grimm executed his trust. (TRA. 45-6, TRB. 441-42, 666-67).

The court's findings do not dispute these facts. The court's finding relating to the transfer of the Globe stock is set forth in Finding No. 14. (CR. 1251). One of the misleading things that the defendants have done is to confuse the transfer of the Globe stock in July of 1977 and the assignment of other securities that were transferred by Mr. Grimm in August and September of 1977 when he returned to the Philippines. (See Res. Br. at 54). With regard to the transfer of the Globe stock in July the court found, "The only assets purportedly transferred to the trustee were the shares of Globe Investment Company". (Finding

No. 14, CR. 1251). "Purportedly" is not much of a finding. It certainly, however, is not a finding that Mr. Grimm did not transfer the Globe stock to his trust in July of 1977, and the fact that Mr. Grimm transferred the Globe stock is uncontroverted and, indeed, unchallenged by the defendants. The execution of the trust and the transfer and delivery of the Globe stock would, of course, alone create a valid inter vivos trust. Sundquist v. Sundquist, supra.

Mr. Grimm also transferred numerous additional assets to his trust in August and September of 1977 after he returned to the Philippines. Each one of the transfers was reflected in a written assignment signed by Mr. Grimm and notarized by Judge Tiongson. (PX. 14-55; TRB. 444, 449-450). Each one of the assignments was delivered by Mr. Grimm to Pete as trustee of the trust. (TRB. 450, 448-49; TRA. 52-53). The evidence that Mr. Grimm executed each one of the written assignments and delivered each one of the written assignments to his trustee was uncontroverted.

The lower court in Finding No. 17 (CR. 1250) in part found: "It is questionable if the assignments were in fact properly delivered to the Trustee because PETE testified that he placed the assignments in his dad's safety deposit box which was in the name of E. M. Grimm." "Questionable" again is not much of a finding. The finding, however, does not dispute the fact that the assignments were executed and delivered. Where Mr. Grimm's trustee placed the assignments after delivery is of no significance in terms of the transfer of the property covered by the assignments to the trust.

The defendants' position that to effect a transfer of corporate stock to a trust there must be a delivery of the stock certificate is not supported by the authority the defendants cite. (See Res. Br. at 54). The defendants' quotation from Bogert on Trusts (not "Bogart") cited by the defendant speaks for itself. Id. On the contrary, the cases hold that a transfer of corporate stock by gift may be effected by a written assignment and the delivery of the assignment without delivery of the corporate stock certificate. See, e.g., Kintzinger v. Millin, 117 N.W.2d 68, 76 (Iowa 1962); Home for Destitute Crippled Children v. Boomer, 31 N.E.2d 812, 821 (Ill.App. 1941); In re Spain's Estate, 46 N.Y.S.2d 789, 791 (Sup.Ct. 1944). Delivery of the assignment is sufficient. Id.

In this case that is what Mr. Grimm did. He executed a written assignment, he delivered the assignment to his trustee, Pete, and with regard to the assignments that related to transfers of corporate stock, he specifically in the assignments referred to the numbers of the stock certificates and total shares covered by each assignment. (See, e.g., PX. 15, 16, 17, 18 & 19). In the case of Far East Molasses Corporation, for instance, the assignment related to share certificates Nos. 8, 12, 18, 25, 35, 41 and 48, totalling 31,128 shares. (PX. 19).

Section 70A-8-309 of the Uniform Commercial Code and the predecessor provisions of the Uniform Stock Transfer Act do not change the requirements for the effectuation of an inter vivos gift of corporate stock. The courts have held that this provision of the Commercial Code does not change the common law rule and

does not require the delivery of the stock certificate.

Kintzinger v. Millin, supra; Home for Destitute Crippled Children v. Boomer, supra; Zaharion v. Security National Bank, 290 N.W.2d 84 (Mich.App. 1980). The courts have interpreted this provision of the Commercial Code as only dealing with the requirements for the protection of the corporation, for instance, in the payment of dividends:

We have held corporate stock may be transferred, as between the parties, by written assignment thereof without manual delivery of the stock certificates.

. . .

. . . although some decisions are to the contrary by what we think is the weight of authority which we are persuaded to follow, the rights of the parties as between themselves are not affected by the provisions of the Uniform Act. They were enacted for the protection of the corporation, so it might safely deal in payment of dividends or otherwise with the person in whose name the stock was registered.

Kintzinger v. Millin, supra, at 75, 76.

In summary, in the case of the Globe stock, Mr. Grimm effectuated a transfer of stock in Globe not only by assignment and delivery of the Bill of Sale but by the issuance and delivery of a new stock certificate in Globe in the name of the trustee to his trustee. The execution of the trust and the transfer of the Globe stock would, of course, alone create a valid inter vivos trust that could not be materially altered or terminated without court approval, but Mr. Grimm also validly transferred the property covered by written assignments that were executed and delivered by him to his trustee. (PX. 14-55). The trust was valid and the

property that Mr. Grimm intended to transfer to the trust was properly and validly transferred.

The defendants further argue that Mr. Grimm's trust is not a valid spendthrift trust because the trustee has the discretion to invade the corpus of the trust for Maxine's maintenance and support. The defendants rely solely on the 1931 case Rose v. Southern Michigan Nat. Bank, 238 N.W. 284 (Mich. 1931), overruled, In re Edgar Estate, 389 N.W. 2d 696 (Mich. 1986). The defendants' reliance on Rose displays a lack of candor. The shepardization of Rose discloses the defendants have failed to call to the Court's attention Preminger v. Union Bank & Trust Co., 220 N.W.2d, 795 (Mich. App. 1974). Preminger explicitly discusses the Rose decision and squarely holds contrary to the defendants' position that a spendthrift trust that grants the trustee the discretionary power to invade the corpus of the trust for the support and maintenance of the trust beneficiaries is a valid spendthrift trust. Id. In Preminger there was a family settlement agreement terminating a spendthrift trust that required court approval before it became a binding FSA. The spendthrift trust contained a provision giving the trustee the power in the trustee's discretion to invade the corpus for the support and maintenance of the trust beneficiaries. The proponents of the family settlement agreement claimed the trust was not a valid spendthrift trust under the Rose decision because the beneficiaries had more than a gift "only of income" and the trustee had the discretion to invade the corpus of the trust for the benefit of the trust beneficiaries. The Court held that the trust was a valid spendthrift trust regardless of

the discretion of the trustee and refused to approve the FSA on the ground that the termination of a valid spendthrift trust would frustrate a material purpose of the trustor.

Undeterred by their inadequate attacks on the validity of Mr. Grimm's spendthrift trust, the defendants alternately seek to avoid the consequence of the trust's validity by (1) arguing that the plaintiffs have renounced their interest in the trust; and (2) arguing if they haven't renounced their interest in the trust, the FSA terminating the spendthrift trust can be approved by this Court as being in the plaintiffs' best interests. (Res. Br. at 55-59). It is difficult to keep track of all of the defendants' arguments to avoid the plaintiffs' repudiation and the need for court approval of the FSA materially altering and terminating a spendthrift trust, but the defendants' arguments with regard to renouncement and best interests of the plaintiffs are some of their most disingenuous positions. First, there are absolutely no findings or conclusions with regard to any renunciation of the trust or the plaintiffs' "best interests." No such findings or conclusions exist. (CR. 1254-1231). Beyond that small hurdle, the plaintiffs never renounced their interest in the trust. There is no evidence of that. The defendants in their brief on the claim of renunciation cite the provisions of the Uniform Probate Code. (Res. Br. at 55). What the defendants don't point out to the Court is that insofar as the provisions of the Uniform Probate Code deal with renunciation, § 75-2-801 requires that renunciation

be "a written renunciation." Section 75-2-801. There is, of course, no exhibit and no evidence of any such written renunciation.

As far as the FSA being in the plaintiffs' best interests -- that is hardly so. How could an FSA derived from perjured petitions, burglaries and threats be in the plaintiffs best interests? But simply in economic terms, the FSA was not in the plaintiffs' best interests. Ethel and Nita received over \$1,000,000.00 more under the FSA than their father intended them to have. They increased their share from 3.7% of Mr. Grimm's estate to 25%. Under the FSA, assets Mr. Grimm placed in trust for the care and maintenance of Maxine were transferred and redistributed to Ethel and Nita. Under the FSA, Maxine instead of getting a marital share tax free had her share subject to the payment of taxes and expenses. (PX. 58 at 8). Finally, Ethel and Nita under the FSA not only got over six times the amount their father intended, they received substantially more than Pete and Linda. (See App. Br. with citations at 27-28).

E. The Plaintiffs Were Not Equitably Estopped From Repudiating The FSA When The Defendants As A Matter of Their Own Choice Failed to Seek Court Approval For Over Six Years.

The defendants, faced with the clear consequence of their failure to obtain court approval of the FSA prior to the plaintiffs' repudiation, attempt to throw in the kitchen sink to hold on to the FSA by resorting to a claim that the plaintiffs were

equitably estopped from repudiating the FSA.³ (Res. Br. at 47-53). The answer to the defendants' barnyard equity attack on the plaintiffs' repudiation is not only that the assertions supporting the attack are untrue and misleading, but the attack simply fails to embody the material elements of an equitable estoppel barring the plaintiffs from repudiation.

The defendants themselves are solely responsible for their failure to obtain court approval of the FSA. The first material element of any equitable estoppel is there must be some statement or action on which the parties claiming estoppel relied to their injury. Celebrity Club, Inc. v. Utah Liquor Control, 602 P.2d 689 (Utah 1979). The plaintiffs in this case, however, did not say or do anything to prevent the defendants from seeking court approval. David Salisbury was the defendants' witness. (TRB. 72). Mr. Salisbury unequivocally testified he never did anything to prevent the defendants from filing the FSA for court approval. (TRB. 272). Rex Roberts testified his lawyer, Donald

³The defendants also rely on court Conclusions Nos. 6 and 7 with regard to waiver and ratification. The court's Conclusions with regard to waiver and ratification have absolutely nothing to do with the plaintiffs' right of repudiation. The court's Conclusions with regard to waiver and ratification, while wholly conclusory, relate solely to grounds the plaintiffs had to set aside the FSA "at the time of its execution." (Conclusions Nos. 6 and 7, CR. 1232). Grounds to set aside the FSA at the time of its execution do not relate to the plaintiffs' right to repudiate the FSA, which right the plaintiffs had after the execution of the FSA and prior to court approval. Waiver or ratification would no more avoid the need for court approval than the execution of the FSA itself. Consensual acts by the parties simply cannot avoid the statutory requirement of court approval.

Holbrook, advised him to file the FSA. (TRB. 994). The plaintiffs simply did nothing to prevent the defendants from obtaining court approval of the FSA prior to repudiation. Indeed, any claim the defendants relied on the plaintiffs in their failure to seek court approval of the FSA is conclusively contradicted by the defendants total failure to even attempt to obtain court approval of the FSA until February 13, 1985, almost five years after the plaintiffs' clear and unequivocal repudiation and over four years after this action was commenced. (See App. Br. at 6-8 with citations).

The defendants claim the defendants suffered injury by reason of the defendants' acts in conformity with and reliance on the FSA is absolutely untrue. Ethel and Nita have already received every dime that they were entitled to under Mr. Grimm's estate plan. The uncontroverted evidence in this case shows under Mr. Grimm's estate plan, his two wills and his trust, Ethel and Nita were to each receive \$96,423.00. (PX. 169B). In fact, Ethel and Nita have each received \$100,000.00 in cash (TRA. 358, DX. 229), to say nothing about the gold and pearls they retained from the property and valuables that Ethel and Rex took from Maxine's home. (TRB. 936, 937). In short, the FSA did not prejudice Ethel's and Nita's financial position.

The defendants were not prejudiced from asserting any claim for more to Mr. Grimm's estate. They did not have any bona fide claims. (See Br. infra at 38-43). The FSA, however, did not deter them from asserting any claim regardless of its validity. The defendants could have asserted any claim to Mr. Grimm's estate

they wanted to in the lower court. There was nothing to prevent the defendants from claiming in the alternative that if the FSA was subject to repudiation or invalid, that they were entitled to a claim for more than Mr. Grimm wanted to give them under his estate plan. The defendants could have claimed that Mr. Grimm's marriage to Maxine was invalid, that his trust was invalid, that he was incompetent or that they were compulsory heirs under the law of legitime. They could have made those claims below but they did not do so. Clearly, they did not make those claims because there was no merit to any of them. But the plaintiffs did not prevent them from making those claims. The FSA did not prejudice their legal position.

The further claims the defendants make in their brief of injury by reason of their compliance with the FSA are untrue or misleading: (a) The defendants claim they were injured because under the FSA they agreed to the filing of a Philippine tax return excluding the Everett Steamship receivable and the Globe stock as Philippine assets. The filing of a Philippine tax return did not prejudice the defendants' interest in Mr. Grimm's estate. The defendants confuse taxation with inheritance. Mr. Grimm did not distribute all of his personal property under his Philippine Will. (Compare PX. 7 with PX. 6). Under Mr. Grimm's Philippine Will, Mr. Grimm only gifted his personal property "which is situated in the Philippine Islands." (PX. 7). Globe was a U.S. corporation and its business and stock were located here, not in the Philippine Islands. The Everett Steamship receivable on the other hand was situated in the Philippine Islands, but with regard

to that asset, the defendants got more than their share. They received \$100,000.00 each, which was more than they were entitled to under Mr. Grimm's Philippine Will. (PX. 169B; TRA. 358; DX. 229). (b) Certainly, the defendants were not injured by their payment of a portion of the bribe to the Philippine taxing authorities over Maxine's objection that they arranged, orchestrated and lied about. (TRA. 203-208; TRB. 71, 938). The payment of a bribe is hardly the foundation of an equitable estoppel. (c) Typical of the defendants' misleading assertions and citations, is their complaint Maxine borrowed \$500,000.00 from Globe Investment. The FSA had nothing to do with her ability to borrow the money from Globe. Without the FSA, Globe was an American asset in which Ethel and Nita had no interest. But what is misleading is that the defendants fail to point out -- Maxine paid the money back -- all \$500,000.00 of it with interest. (TRA. 309). (d) Finally, the defendants make repeated references to the benefits that the plaintiffs received under the FSA. There are two simple answers to those assertions. The first is the plaintiffs never received anything under the FSA that they were not entitled to under Mr. Grimm's estate plan, and second, the test for equitable estoppel is not whether the plaintiffs benefit, but whether the defendants were injured.

The fundamental answer to the defendants' claim of equitable estoppel is that the plaintiffs never did or said anything to prevent the defendants from seeking court approval of the FSA and that the defendants did not, contrary to the claims in their brief, compromise either their monetary or legal positions by

reason of the FSA or any conduct of the plaintiffs in conformity with the FSA.

II.

THE LOWER COURT WAS CORRECT IN HOLDING THE
DEFENDANTS HAD NO RIGHT TO \$150,000 IN
ATTORNEYS' FEES UNDER THE FSA ON THE GROUND
THE FSA WAS NOT BINDING PRIOR TO COURT APPROVAL

The lower court correctly rejected the defendants' application for \$150,000 in attorneys' fees under the FSA on the ground the FSA was not binding prior to court approval. The defendants are overly modest in their cross appeal. The defendants fail to mention the amount of attorneys' fees requested. The defendants claimed attorneys' fees in this case in the amount of \$149,490. The defendants claimed attorneys' fees not only for Ethel and Nita but for Rex.⁴ (Aff. R. Brent Stephens, dated 9/6/85).

The only basis for a claim of attorneys' fees by any of the defendants was the FSA which provided in paragraph 14C for attorneys' fees to the prevailing party "in the event of any legal action . . . to enforce . . . this agreement." (PX. 58 at 12). All of the legal services for which the defendants sought an attorneys' fee award had been performed, of course, prior to the lower court's approval of the FSA. The lower court rejected the defendants' application on the ground that the defendants could not seek to enforce the attorneys' fee provision of the FSA prior to court approval of the FSA.

⁴Rex, of course, was not a party to the FSA. (PX. 58 and 59).

The lower court was correct in holding the FSA was not enforceable prior to court approval. Utah Code Ann. § 75-3-1101. The lower court, however, was fundamentally inconsistent and wrong in holding the court could approve the FSA despite the plaintiffs' uncontroverted prior repudiation. The correct rule dispositive of both the defendants' cross appeal and the plaintiffs' appeal is that a settlement agreement, including an FSA, subject to court approval is not binding and is subject to repudiation prior to court approval.

III.

THE CO-EXECUTORS OF MR. GRIMM'S PHILIPPINE WILL, CHARLES PARSONS AND BYRON S. HUIE, WERE "INTERESTED PERSONS" ENTITLED TO NOTICE PURSUANT TO § 75-3-1102(c)

The defendants concede in their brief that under the approval structure of § 1102 notice must be given to all "interested persons." (Res. Br. at 59). They further concede that notice was not given to Charles Parsons and Byron S. Huie designated by Mr. Grimm as co-executors of his Philippine Will. (PX. 7 at 5; see App. Br. at 47-48 with citations).

The defendants claim that Mr. Parsons and Mr. Huie were not interested persons because Maxine and LaVar Tate were appointed as supervised personal representatives of Mr. Grimm's estate by stipulation in the lower court (PR. 58) and that the Philippine proceeding "was handled as an intestate matter." (Res. Br. at 60). The defendants' position is that while they concede that Mr. Parsons and Mr. Huie were designated by Mr. Grimm as co-executors in his Philippine Will and that Mr. Parsons and Mr.

Huie did not receive notice pursuant to § 1102(c), the failure of such notice is of no consequence because Mr. Parsons and Mr. Huie were not in fact appointed as personal representatives of Mr. Grimm's estate.

The defendants' position both ignores the definition of the Probate Code defining "interested persons" and the circumstances regarding the appointments of supervised personal representatives in the lower court and the Philippine proceedings. Contrary to the defendants' position, § 75-1-201(20) specifically defines "interested persons" to include Mr. Huie and Mr. Parsons -- "It also includes persons having priority for appointment as personal representative" 75-1-201(20) (emphasis supplied). Persons designated in a will as co-executors are persons having priority for appointment. Section 75-3-203. The definition of "interested persons" under the Uniform Probate Code thus is not whether in fact someone is appointed as a personal representative but whether a person has priority to be appointed as a personal representative, and persons designated by will have such priority. The standard, of course, makes great sense in the context of the approval of a family settlement agreement because without notice to a person having priority for appointment, there would be no opportunity for such person to oppose approval of the settlement and there would be nothing to bind such person from proceeding in other jurisdictions -- the Philippines, Hong Kong, Japan -- with the probate of a testamentary devise inconsistent with a global settlement agreement.

The circumstances and limitations, moreover, with regard

to the appointment of the supervised personal representatives below demonstrate as a practical matter that Mr. Huie and Mr. Parsons were interested persons. It is true that Maxine and LaVar Tate were pursuant to stipulation appointed as supervised personal representatives of Mr. Grimm's estate in the lower court. (PR. 60-57). The order appointing Maxine and Mr. Tate, however, specifically limited their power with regard to Mr. Grimm's estate to deal with property located in Utah or in the United States of America. The order appointing the supervised personal representatives provided in material part: ". . . the authority and power of the supervised personal representatives, E. LaVar Tate and Maxine Tate Grimm, is limited and restricted to dealing with the real and personal property of the decedent, Edward Miller Grimm, which is located in the State of Utah, or in the United States of America. . . ." (PR. 58) (emphasis supplied)). The restriction on the power of the supervised personal representatives appointed below precluding them from dealing with any property of the estate outside of the United States reinforces, as a practical matter, that persons designated by Mr. Grimm as co-executors of his Philippine Will were interested persons within § 1102(c). Certainly the course of the proceedings in the lower court recognized that Mr. Parsons and Mr. Huie were interested persons because they indeed did receive notice of the Petition for Probate and Appointment of Supervised Personal Representatives. Yet, they received no notice of the defendants' petition to approve the FSA. (PR. 24; App. Br. at 47-48 with citations).

The defendants' claim that Mr. Huie and Mr. Parsons were not interested persons because the proceedings in the Philippines were intestate proceedings is outrageous. The proceedings in the Philippines were commenced as intestate proceedings because Ethel filed a perjurious petition that Mr. Grimm had died intestate and that she was the only resident heir in the Philippines. (PX. 79 and 80; see App. Br. at 18-20 with citations). Maxine unequivocally objected to Ethel's appointment. (PX. 88; App. Br. at 20-21 with citations). After the execution of the FSA the proceedings in the Philippines were not conducted as intestate proceedings but were conducted pursuant to the FSA. (DX. 214). A proceeding pursuant to an FSA cannot be used to deny status as interested persons to co-executors of a will displaced by an FSA in a § 1102 proceeding to approve the FSA. That bootstrap rationale would avoid the very reason for notice to "interested persons" before court approval of a FSA.

IV.

THE PLAINTIFFS' RIGHT TO JURY TRIAL

A. The Plaintiffs Had a Right to Trial By Jury on the Issues of Duress and Failure of Consideration.

The defendants' arguments to avoid the plaintiffs' constitutional right to jury trial on the issues of duress and failure of consideration simply boil down to a contention that the court could decide those issues first even though those issues were presented for trial both by the defendants' \$10,000,000 counterclaim for breach of the FSA and the plaintiffs' claims to set aside the FSA. The defendants contend the lower court avoided

the plaintiffs' right to jury trial on the issues of duress and failure of consideration by determining the validity of the FSA and ordering its enforcement so that the court never had to reach the defendants' \$10,000,000 counterclaim for breach of contract. (Res. Br. at 62). The defendants are partially correct. The court did decide the issue of validity first, including the issues of duress and failure of consideration. (TRB. 1125; Findings Nos. 43, 65, 66, 67 and 69, CR. 1240-1235). But, that is the problem not the answer.

The validity of the FSA in terms of duress and failure of consideration was at issue both for purposes of the plaintiffs' claims and the defendants' counterclaim.⁵ When the same issues are raised both in equitable and legal claims, the constitutional right to trial by jury under Article I, Section 10 of the Utah State Constitution requires the legal claims be tried to a jury first. International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418 (Utah 1981) ("The Court rejected the contention that there was no jury right when a claim for damages was only incidental to the injunctive relief sought, and held that a jury trial should be accorded the parties on the issues of fact raised in a legal cause of action when legal relief is sought in conjunction with equitable relief."² Id. at 421). The precise problem is that the court decided the issues of duress

⁵Duress and failure of consideration, of course, go to the question of the validity of the FSA. In the Matter of the Estate of Frank Chasel, supra, at 421.

and failure of consideration first. In doing so, the court violated the plaintiffs' right to trial by jury.

The desperation of the defendants' position is demonstrated by the defendants' hypothetical. (Res. Br. at 62). The defendants postulate "Assume that 'X' sues 'Y' for breach of contract alleging damages. 'Y' answers by stating the contract is invalid for a number of reasons. 'X' decides to dismiss the lawsuit against 'Y'. 'Y' has no right . . . to require the trial proceed so that he can assert his affirmative defenses." (Res. Br. at 62-63). But, the defendants did not dismiss their \$10,000,000 counterclaim before trial. They went to trial on that counterclaim, putting at issue plaintiffs' affirmative defenses of duress and failure of consideration. The right to jury trial is determined by the claims and issues submitted for trial, not by the court's decision after trial.

B. Maxine Was Entitled to a Jury Trial on Her Claim of Intentional Infliction of Emotional Distress.

Before turning to the defendants' attempt to avoid Maxine's right to trial by jury on her claim for the intentional infliction of emotional distress, the first point to be made is that Maxine is entitled to an adjudication of her claim.

There is absolutely no question that the lower court simply did not adjudicate her claim. The lower court did not grant the defendants' motion for a directed verdict. (TRB. 1121-1127). The lower court at the close of the evidence simply stated, "The court finds the case in favor of the defendants and against the plaintiffs" (TRB. 1125, 1121) and that it would

"submit a memorandum as to my decision" (TRB. 1125, 1121). The lower court never prepared the memorandum and the findings and conclusions of the court simply don't mention let alone adjudicate Maxine's claim for the intentional infliction of emotional distress.⁶ On the failure of adjudication alone, Maxine has a right to a new trial on her claim and that trial by constitutional right must be a trial by jury.

The defendants attempt to avoid Maxine's right to jury trial on her claim for the intentional infliction of emotional distress by arguing (1) Maxine has failed to make out a prima facie case under Utah law (Res. Br. at 64-68); a party has no right to jury trial when equitable issues "predominate" (Res. Br. at 68-70); (3) Philippine law, not Utah law, is applicable and that Philippine law does not recognize a claim for the intentional infliction of emotional distress (Res. Br. at 64); and (4) somehow Maxine waived her right to trial by jury by not excepting to the court's ruling at the end of trial finding "in favor of the defendants and against the plaintiffs." (Res. Br. at 70).

The defendants first two points do not require further argument. The plaintiffs have set forth in detail the overwhelming evidence supporting Maxine's claim for the intentional infliction of emotional distress in their opening brief (App. Br. at 50-51), and defendants' assertion that the test of the right to

⁶The defendants concede there was no finding by the lower court with regard to Maxine's claim for the intentional infliction of emotional distress. (See Res. Br. at 65).

jury trial is whether equitable claims "predominate" is simply not the law. Compare International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418 (Utah 1981) with Colman v. Dillman, 624 P.2d 713 (Utah 1981).

The defendants' arguments with regard to Philippine law are wholly specious:

1. The defendants did not prove, cite or do anything else to establish Philippine law with regard to the intentional infliction of emotional distress in the lower court and the lower court, contrary to Rule 44(f), made no findings with regard to Philippine law. Rule 44(f), Utah Rules of Civ. Proc. ("the law of such . . . foreign country is to be determined by the court . . . and included in the findings").

2. The rule in Utah and the uniform rule is that in the absence of the proof of foreign law, foreign law is presumed to be the same as the law of the forum. Maple v. Maple, 566 P.2d 1229 (Utah 1977) ("The rule is that unless the law of a foreign jurisdiction is proved to be otherwise, it will be presumed to be the same as the law of the forum state." Id. at 1230); Whitmore Oxygen Co. v. Utah State Tax Commission, 196 P.2d 976 (Utah 1948); Wachs v. Winter, 569 F. Supp. 1438 (E.D.N.Y. 1983).

3. It is by no means clear that Philippine law should apply since Maxine was in Utah when the Roberts commenced their campaign of outrageous conduct to coerce Maxine into an FSA. She was in Utah when Ethel obtained her appointment as a special administratrix through a perjurious petition, when Ethel and Rex broke into her home and took her possessions and when she made a

written demand that Ethel relinquish her appointment and return her property. (See, App. Br. at 18-21 with citations; and see particularly PX. 79, 80, 82, 84, 85 and 88). The choice of law rules reflected in the Restatement (Second) of Conflicts is that the law of the place of injury will usually determine whether the actor's conduct was tortious. See, Restatement (Second) of Conflicts, §§ 145, 156.

4. Most importantly, the defendants' assertion as to Philippine law according to the authority on which they rely is wrong. To establish Philippine law, the defendants rely on J. Sangco, Philippine Law on Torts and Damages, 513-528 (1973). (See Res. Br. at 64). But if the defendants had simply called the court's attention to the authority they cite, it transparently does not support their position but supports Maxine's claim. On pages 513 and 514 Sangco discusses damages for mental anguish or suffering. He states:

Generally, damages for mental anguish are limited to cases in which there has been a personal physical injury or where the defendant wilfully, wantonly, recklessly, or intentionally caused the mental anguish Nor will damages be generally awarded for mental anguish which is not accompanied by a physical injury, at least, where maliciousness, wantonness or intentional conduct is not involved. A number of recent cases, however, have held that damages for mental anguish will be allowed in a proper case even though not accompanied by physical injury. Id. at 514 (emphasis supplied).

In short, the authority that the defendants cite supports Maxine's claim for the intentional infliction of emotional distress even under Philippine law and supports Mr. Sangco's conclusion

". . . our law on the subject is becoming more and more indistinguishable, with very few exceptions, from the Anglo-American tort law." Id. at 8.

The defendants are not only wrong in their assertions of Philippine law, they have not relied on the sources for Philippine law that would establish that law pursuant to Rule 44(f). Rule 44(f) in a civil code country requires "a copy of a statute" to determine foreign law and does not permit the proof of foreign law solely by secondary sources. Indeed, this is a classic case for the admonition of the Advisory Committee to the Utah Rules of Evidence which has cautioned that in determining foreign law ". . . the foreign law of some jurisdictions might best be left proved through witnesses if resort to sources available in the State of Utah is questionable." See Advisory Committee Note to Rule 201, Utah Rules of Evidence. The admonition of the Advisory Committee is particularly appropriate where the defendants made absolutely no attempt to establish foreign law in the lower court.

The defendants' attempt to claim that Maxine waived her right to jury trial is another kitchen sink effort by the defendants. (Res. Br. at 70-71). There was no such waiver. The plaintiffs filed a timely demand for trial by jury. (CR. 873-871). A jury was impaneled (TRA. 3) and the plaintiffs steadfastly maintained their right to jury trial on Maxine's claim for the intentional infliction of emotional distress in argument both before trial and on the hearing on the defendants' motion for

directed verdict at the close of the plaintiffs' case.⁷ (TR. Hearings July 26 and 30, 1985 and TRB. 843). At the close of evidence the court simply ruled in favor of the defendants and against the plaintiffs (TRB. 1125, 1121) and dismissed the jury. (TRB. 1125). The court never gave any reason for its decision, never produced its promised memorandum and the plaintiffs were not required to take exception to the court's adverse ruling in order to preserve Maxine's right to jury trial on her claim for the intentional infliction of emotional distress.

V.

**THE DEFENDANTS DID NOT ASSERT CLAIMS,
THEY DID NOT HAVE BONA FIDE CLAIMS AND
THE FORBEARANCE OF NONASSERTED MERIT-
LESS CLAIMS, COUPLED WITH OUTRAGEOUS
CONDUCT, DOES NOT SUPPORT A DETERMINA-
TION OF GOOD FAITH CONTROVERSY**

The defendants acknowledge that the lower court adopted a subjective good faith rather than an objective bona fide or reasonable claim standard in determining whether the forbearance of claims can constitute adequate consideration for an FSA. The plaintiffs' position is that only the forbearance of bona fide or reasonable claims can constitute adequate consideration. (Compare

⁷At the hearing on the motion for directed verdict at the close of plaintiffs' case, counsel for the plaintiffs told the court, "But the one issue I don't want your Honor to overlook in this case, there is a claim for the intentional infliction of emotional distress. And, your Honor, there is a prima facie showing" (TRB. 843). Defendants responded in part, "With respect to the claim for infliction of emotional distress . . . our position simply is that there is no jury question on that issue." (TRB. 862).

App. Br. at 54-64 with Res. Br. at 72-82). Meritless claims, claims without merit in fact or law, cannot under the great weight of authority serve as consideration to justify the alteration of a testator's estate plan. The defendants concede that the plaintiffs have adequately discussed this issue in their opening brief and no further argument or reply is required.

The defendants, however, do not discuss and do not reply to other critical arguments of the plaintiffs' addressed to the failure of consideration. The defendants do not question or respond to the uncontroverted fact that the defendants never asserted any claim for more to Mr. Grimm's estate prior to the execution of the FSA. (App. Br. at 61-64 with citations). The plaintiffs' point is three-fold. One is that the defendants' own testimony, the testimony of Ethel, Rex and their lawyer, Donald Holbrook, is they never asserted any claim, whether a bona fide claim or a good faith claim, to Mr. Grimm's estate prior to the execution of the FSA. Id. Second, without the assertion of a claim, the forbearance of a claim cannot constitute the bargained for consideration for a FSA. Id. Third, without the assertion of a claim, no logical determination can be made that the defendants in good faith believed they had a claim to Mr. Grimm's estate or to put the proposition directly, if the defendants in good faith believed they had claims to Mr. Grimm's estate, however meritless, they would have asserted them.

The point is not academic. Take the defendants' position that they had a bona fide claim as compulsory heirs under the law of legitime to Mr. Grimm's estate. (Compare App. Br. at 59-61

with Res. Br. at 79-82). But that claim not only was without merit, that claim was never asserted. (See App. Br. at 61-64 with citations). That not only is the testimony of Ethel, Rex and their lawyer, Donald Holbrook (Id.), it is reflected in a letter from Mr. Holbrook. On April 6, 1978, Holbrook wrote Rex Roberts stating in part:

From time to time we have been advised that your Philippine lawyers have researched the Philippine laws of succession. As soon as possible, we would appreciate all the information they can provide on this subject. (DX. 308).

No information relative to the law of legitime claim was ever furnished Mr. Holbrook -- none. But, more importantly, by April 6, 1978, the basic deal for the division of Mr. Grimm's estate under the FSA already had been extracted from Maxine by Ethel and Rex in the Philippines. (PX. 95, 92, 96, 190; TRB. 236, 240-42, 245-46, 915-916, 642, 654-55). If the defendants in good faith believed Ethel and Nita were compulsory heirs, they would have furnished Mr. Holbrook with the promised legal research and they would have asserted the claim.

The defendants not only did not assert any claim for more to Mr. Grimm's estate prior to the execution of the FSA, they had no bona fide claim asserted or unasserted. The defendants now raise three possible claims for more to Mr. Grimm's estate -- the invalidity of his divorce, the invalidity of his trust and a claim they were compulsory heirs under the law of legitime. None of these claims has any merit, (see App. Br. at 56-57 with citations), and the lower court did not find that any of these

claims were meritorious. (CR. 1254-1231).

1. The decree of divorce awarded Juanita from Mr. Grimm after her appearance and trial was not subject to collateral attack 30 years later. (See App. Br. at 58 with citations; Restatement (Second) of Judgments, § 31 (1982)). Under the Restatement (Second) of Conflicts, a judgment whose purpose is to determine a change in a person's marital status is conclusive upon the parties to the action and under Nevada law a divorce that is binding upon the parties may not be contested or attacked by third persons not parties to the action. Nevada Revised Statutes, 125.185; Gutowsky v. Gutowsky, 238 N.Y.S. 2d 877 (Sup. Ct. 1963).

2. The plaintiffs have previously discussed the defendants' spurious attacks on the validity of Mr. Grimm's Trust. (Br. supra at 13-20). There was no bona fide claim, contrary to the defendants' position, that Mr. Grimm's trust was illusory, that the assets he intended to place in the trust were not validly transferred, or that under a valid spendthrift trust a beneficiary may only receive income and not the corpus. Id..

3. The defendants had no valid claim that they were compulsory heirs under the law of legitime. The issue has nothing to do with the Philippines accepting the renvoi based on Mr. Grimm's domicile. The issue turns on the Philippine law of succession after accepting the renvoi. The law of succession in the Philippines established at trial by the controlling statute and eminent counsel is that under Article 16 of the Philippine Code, the children of American citizens domiciled in the

Philippines are not compulsory heirs. (See App. Br. at 59-61 with citations).⁸

The failure of the defendants to assert any claim and the lack of merit to the claims the defendants now assert not only demonstrates there was no bargained for consideration and no bona fide claim, these factors also demonstrate that the defendants did not assert any claim in good faith. If the defendants' claims were without merit, if they never did any research to substantiate a claim, as their lawyer requested, there is no reasonable basis for any good faith belief in those claims. You cannot profess good faith without reason or simply close your eyes to the truth. If the defendants did not assert their claims, there is further reason to question their good faith belief in those claims. Indeed, one of the cutting questions to the defendants' professed good faith is if they really believed these claims were good faith claims, why didn't they assert them in the court below? If they had any claims for more to Mr. Grimm's estate, why didn't they plead those claims as alternative claims to the FSA for a greater participation in Mr. Grimm's estate? When the failure of the defendants to assert claims prior to the FSA and the meritless

⁸Mr. Angara's telegram to Mr. Salisbury of February 17, 1978, is categorically consistent with Mr. Binavince's testimony -- "Under Philippine law, the order of succession, the amount of successional rights and the intrinsic validity of the testamentary provisions are regulated by the national law of the decedent, whatever may be the nature of the property and regardless of the country wherein said property may be found" (DX. 253 at 3007).

nature of the claims they now assert are coupled with the defendants' outrageous conduct -- Ethel's perjurious petition and Ethel's and Rex's break in to Maxine's home -- in securing the FSA, how can there be any basis for a determination that the defendants asserted claims in good faith or that this was a compromise of a good faith controversy as required by the Uniform Probate Code? See Utah Code Ann. § 75-3-1102. People who act in good faith do not need to resort to that type of conduct.

VI.

THE DEFENDANTS HAVE BEEN UNABLE TO RESPOND TO THE PLAINTIFFS' CHALLENGE TO THE LOWER COURT'S FINDINGS

The defendants simply have been unable to respond to the plaintiffs' detailed attack on the inadequacies of the lower court's findings. (Compare App. Br. at 64-73 with Res. Br. at 82-83) The defendants literally do not respond to any of the substantial and serious challenges to the lower court's findings raised by the plaintiffs. (Id.). These points need to be made with regard to the defendants' attempt to avoid the serious issues the plaintiffs have raised with regard to the inadequacy of the lower court's findings:

1. The defendants acknowledge that the lower court, eight months after trial, without any prior articulation of the grounds or reasons for its decision and even before all of the evidence had been transcribed, adopted virtually verbatim the findings and conclusions proposed by the defendants. (Res. Br. at 82-83). This practice destroys the foundation for the standard

deference to the factual determinations below and warrants a full and fair review of the plaintiffs' carefully documented challenges to the lower courts findings.

2. The defendants attempt to dismiss the plaintiffs' carefully documented Statement of Facts by merely claiming the lower court resolved conflicts in the evidence against the plaintiffs. (See App. Br. at 10-31 and at 64-73). The defendants do not point to one single factual assertion in the plaintiffs' Statement of Facts as unfounded or unsupported by the plaintiffs' citation to transcript and exhibit. The plaintiffs in their opening brief based their Statement of Facts, not on the plaintiffs' version of the evidence, but on the testimony of the defendants, the defendants' witnesses and written exhibits. There is not a single critical assertion of fact contained in the plaintiffs' Statement of Facts that is not based on either the testimony of the defendants, the defendants' witnesses or the written exhibits.⁹ The plaintiffs invite this Court's careful review of its citations to the record.

3. The defendants do not respond to the principal criticism the plaintiffs raise with regard to the lower court's findings. The plaintiffs pointed out in their opening brief, "The principal failure of the lower court's findings is its omissions or failure to decide subsidiary or subordinate facts that were

⁹Defendants' principal witnesses were the defendants Ethel and Rex Roberts, Donald Holbrook and David Salisbury.

submitted for its adjudication." (App. Br. at 65). The defendants have absolutely no response to the plaintiffs' detailed attack on the lower court's failure to decide subsidiary or subordinate facts submitted for its adjudication. The lower court cannot discharge its Rule 52 responsibility by simply avoiding the adjudication of significant controverted factual issues. (See App. Br. at 65-73 with citations).

4. The defendants attempt to create the appearance of support for the lower court's findings by having their Statement of Facts purportedly represent an annotation of the lower court's determinations. But the critical findings of the lower court are not supported by the record or by the defendants' citation to the record. The plaintiffs will not reargue the numerous inaccuracies in the court's findings that the plaintiffs have previously documented. (See App. Br. at 64-73 and at 10-31 with citations). Two critical examples, however, make the point. Two of the, if not the two most significant, events leading up to the signing of the FSA were Ethel's perjurious petition to gain control of her father's estate in the Philippines and Ethel's and Rex' burglary of Maxine's home. Certainly, the defendants' willingness to go to such lengths to obtain an FSA are significant for the purposes of determining whether this FSA was a compromise of a good faith controversy and in assessing the quality of the coercion the Roberts subjected Maxine to in order to obtain an FSA. The lower court's findings relating to Ethel's perjurious petition are set forth in Finding No. 30 and the lower court's findings with regard

to the Roberts' burglary of Maxine's home are set forth in Finding No. 31. (CR. 1247-46).

(a) With regard to Ethel's perjurious petition, the lower court, first, simply abdicated its responsibility and made absolutely no determination whether the critical verified assertions of that petition were perjurious. (See App. Br. at 18-20 and at 67-68 with citations). The court did find that Ethel's appointment as Special Administratrix "was in accord with Mr. Salisbury's recommendation." The defendants purport to cite record support for this finding. (See Res. Br. at 15). The defendants' citations lend absolutely no support to this finding. The finding that Ethel acted on Salisbury's recommendations is as false as Ethel's petition. Mr. Salisbury made no such recommendation. Mr. Salisbury had not even met Maxine on December 29, 1977 when Ethel filed her perjurious petition. (See PX. 79, 88, 174; TRB. 223). The fact that Mr. Salisbury had not even met Maxine, and had absolutely nothing to do with the estate on December 29, 1977, is supported by the testimony of David Salisbury and his office records. (PX. 174; TRB. 223).

(b) With regard to the Roberts' burglary of Maxine's home, the court determined the Roberts "visited" Maxine's home and removed her possessions "for safekeeping." The Roberts burglarized Maxine's home. Even the lower court found that they removed Maxine's possessions "without express permission." The findings, however, that the Roberts merely "visited" Maxine's home and removed property for "safekeeping" are outrageous. The Roberts had Maxine's phone number in Utah but never called. (TRB.

638). Maxine's home was guarded in the same manner that it had been guarded for 30 years. (TRA. 111-115). Certainly, the Roberts had never attempted to "visit" Maxine's home and remove her property while Mr. Grimm was alive. (TRB. 20). The Roberts cleaned out Maxine's home. (TRA. 111-115; TRB. 20-25). They even removed a safe that was so big it required 3 men to haul it away. (TRB. 23-25). Some "visit". As for "safekeeping", the Roberts refused to return Maxine's property after written demand, after she returned to the Philippines, they told her they would not return her property until she signed an FSA and did not do so. (PX. 88; TRB. 636-641, 936-937, 1009, 17-25; TRA. 118)

CONCLUSION

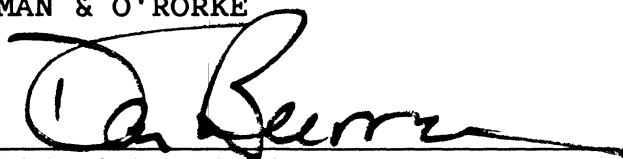
The defendants' cross-appeal for attorneys' fees should be denied and the Judgment of the lower court should be reversed with instructions in accordance with the questions presented and the precise relief sought by the plaintiffs-appellants in their opening brief.

DATED this 4th day of June, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

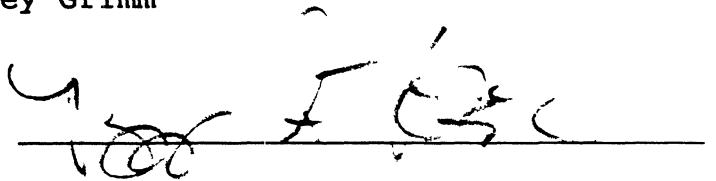
THIS IS TO CERTIFY that four (4) true and correct
copies of the foregoing REPLY BRIEF OF APPELLANTS were
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A handwritten signature, likely of Juanita Kegley Grimm, is written over a horizontal line. The signature is stylized and appears to be "J. Kegley".

3065B