

1998

Jeannine Perrenoud and Linda Jenkins v. Lila Ann Harman and Lloyd Mitchell : Brief of Appellant

Utah Court of Appeals

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Randall L. Skeen; Attorneys for Appellees.

Scott B. Mitchell; Attorney for Appellants.

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IN THE UTAH COURT OF APPEALS

* * * *

JEANNINE PERRENOUD and
LINDA JENKINS,

Plaintiffs/Appellants,

vs.

LILA ANN HARMAN and LLOYD
MITCHELL,

Defendants/Appellees.

* * * *

*
* APPELLANTS' OPENING BRIEF
*

* Case No. 981721
*

* Priority 15
*

PLAINTIFFS' APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE WILLIAM A. THORNE PRESIDING

* * * *

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FILED
Utah Court of Appeals
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Julia D'Alesandro
Clerk of the Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.	1
STATEMENT OF THE CASE	2
I. Nature of the Case	2
II. Statement of Facts	2
SUMMARY OF ARGUMENTS	4
ARGUMENT	5
The trial court erred in granting defendants' Motion for Summary Judgment and denying plaintiffs' Motion for Partial Summary Judgment	5
A. Rhoda Thurber's revocation of the Declaration of Trust was in breach of her fiduciary duty to plaintiffs and is, therefore, voidable	5
B. Rhoda Thurber did not succeed to all of the powers previously belonging to the joint trustees	12
CONCLUSION	13
MAILING CERTIFICATE	13
ADDENDUM	
Declaration of Trust	
Hearing Transcript	
Findings of Fact and Summary Judgment	

TABLE OF AUTHORITIES

Cases

<i>In re Estate of West</i> , 948 P.2d 351 (Utah 1997)	5, 6, 7, 8, 9, 10, 12, 13
<i>Makoff v. Makoff</i> , 528 P.2d 797 (Utah 1974)	10, 11
<i>Mills v. Brody</i> , 929 P.2d 360 (Utah App. 1996)	1
<i>West v. West</i> , 915 P.2d 504 (Utah App. 1996)	6

Statutes and Rules

Utah Code Annotated section 78-2a-3(2)(j)	1
Utah Code Annotated section 75-7-302	9
Utah Code Annotated section 75-7-404(2)	10

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal by virtue of Utah Code Ann. section 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court erred in granting summary judgment in favor of defendants. Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). This issue was preserved in the trial court by plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary Judgment and Response to Defendant Harmon's Motion for Summary Judgment (R.63), and by the arguments presented to the trial court at the August 28, 1998 hearing on the parties' motions for summary judgment. (R.127)

2. Whether the trial court erred in denying plaintiffs' motion for partial summary judgment. Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). This issue was preserved in the trial court by plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (R.55), the Reply in Support of Plaintiffs' Motion for Partial Summary Judgment and Response to Defendant Harmon's Motion for Summary Judgment (R.63), and by the arguments presented to the trial court at the August 28, 1998 hearing on the parties' motions for summary judgment. (R.127)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.

There are no determinative constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation

is determinative or of central importance to this appeal.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from a final order of the Third Judicial District Court of Salt Lake County granting defendants' Motion for Summary Judgment and denying plaintiffs' Motion for Partial Summary Judgment.

II. Statement of Facts

1. On or about April 1, 1980, Joseph W. Thurber and Rhoda Thurber, as trustors, executed a Declaration of Trust in which they declared that they were holding in trust, among other things, the real property located at 2480 Alden Street, Salt Lake City, Utah. (R.6)

2. Joseph W. Thurber is the deceased father of plaintiff Jeannine Perrenoud and the deceased stepfather of plaintiff Linda Jenkins and defendants Lila Ann Harman and Lloyd Mitchell. Rhoda Thurber is the deceased stepmother of plaintiff Jeannine Perrenoud and the deceased mother of all of the other parties. (R.1-2)

3. The Declaration of Trust was properly recorded with the Office of the Salt Lake County Recorder on April 14, 1980. (R.2)

4. On April 1, 1980, the trustors also Quit-Claimed the real property to themselves as Trustees under the terms of the Declaration of Trust. The Quit-Claim Deed was properly recorded with the Office of the Salt Lake County Recorder on April 14, 1980. (R.2)

5. Joseph W. Thurber predeceased Rhoda Thurber. Thereafter, on or about August 5, 1992, Rhoda Thurber, as Trustee of the Joseph W. Thurber and Rhoda Thurber Trust, sold the real property. (R.3)

6. The purchasers, defendant Lila Ann Harman's daughter and son-in-law, Holli Bezzant and Robert Bezzant, executed a Promissory Note calling for monthly payments of \$612.00. (R.37)

7. Pursuant to the express terms of the trust, the proceeds of the sale of the real property became part of the trust res. (R.7)

8. Plaintiffs are two of the four beneficiaries of the trust. Defendants are the other two beneficiaries. (R.6)

9. The trust specifically states that "if one of the above listed should be deceased, the beneficiaries cannot be changed." (R.7)

10. Between January and July of 1997, and without authorization or consent, defendants Lila Ann Harman and Lloyd Mitchell wrongfully exercised dominion and control over the trust res in a manner inconsistent with plaintiffs' rights therein. Specifically, defendants received monthly payments on the above referenced Promissory Note in the sum of \$4,284.00 which they converted to their own use and benefit. (R.37)

11. Plaintiffs filed their Complaint commencing this action on September 4, 1997. An Amended Complaint was filed on or about March 2, 1998. Therein, plaintiffs allege causes of action for breach of fiduciary duty and conversion. (R.48)

12. Plaintiffs filed a Motion for Partial Summary Judgment on or about February 28, 1998, requesting that the trial court enter summary judgment on plaintiffs' conversion claim. (R.54)

13. On or about March 10, 1998, defendant Lila Ann Harmon filed her Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment. (R.30)

14. A hearing on both motions was held before the trial court on August 28, 1998. On October 4, 1998 the trial court entered Findings of Fact and Summary Judgment. Therein, defendants were granted summary judgment and plaintiffs' Complaint was dismissed with prejudice. (R.126a)

15. Plaintiffs timely filed their Notice of Appeal on October 30, 1998. (R.116)

SUMMARY OF ARGUMENTS

Plaintiffs became beneficiaries of the trust when it was created on April 1, 1980. Plaintiffs' beneficial interests were not contingent on their survival of the trustors as the trial court found. Accordingly, Rhoda Thurber, as trustee, owed a fiduciary duty to plaintiffs which she breached when she revoked the trust and sold the property to defendant Lila Ann Harman's daughter and son-in-law. The sale is, therefore, voidable.

Additionally, the trust instrument specifically prohibits any change of beneficiaries after the death of one of the trustors. The clear intent of this provision is that, after the death of one of the trustors, the other trustor would not be able to terminate the beneficial interest of his or her step-children.

The trial court emasculated the trustors' intent by ruling that Rhoda Thurber was entitled to end run this prohibition by simply revoking the trust, thereby terminating the interest of her step-daughter, plaintiff Jeannine Perrenoud.

ARGUMENT

The trial court erred in granting defendants' Motion for Summary Judgment and denying plaintiffs' Motion for Partial Summary Judgment.

The determinative questions with respect to the issue of whether the trial court erred in ruling on the parties' respective motions for summary judgment are: (1) Whether Rhoda Thurber could, consistent with her fiduciary duty as trustee, revoke the trust by selling the property to defendant Harman's daughter and son-in-law; and (2) whether Rhoda Thurber, following Joseph W. Thurber's death, succeeded to all the powers previously belonging to the joint trustees. As discussed in detail below, plaintiffs respectfully submit that both questions must be answered in the negative and, therefore, that defendants' motion for summary judgment should have been denied and plaintiffs' motion for partial summary judgment should have been granted.

A. Rhoda Thurber's revocation of the Declaration of Trust was in breach of her fiduciary duty to plaintiffs and is, therefore, voidable.

Relying on the Supreme Court of Utah's decision in *In re Estate of West*, 948 P.2d 351 (Utah 1997), the trial court held that Rhoda Thurber did not breach any fiduciary duty to plaintiffs when she revoked the trust because at that time she was the sole surviving active beneficiary of the trust and

plaintiffs were contingent beneficiaries. Therefore, according to the trial court, Rhoda Thurber did not owe plaintiffs a fiduciary duty at the time she revoked the trust. Except for two crucial distinctions discussed in detail below, the *West* case is directly on point with the case at bar. It is not, however, helpful to defendants.

In that case, Herschel West and his first wife Hazel executed a Declaration of Trust declaring that they held their Provo home in trust for the benefit of themselves and **after their deaths** for their three adult children. After Hazel's death, Herschel executed a Quit Claim Deed conveying the property to himself and his second wife as joint tenants with full rights of survivorship. After Herschel's death and their discovery that the property was not included in his estate, the children brought suit against the second wife alleging that the Quit Claim Deed was voidable as a violation of Herschel's fiduciary duty as trustee. The trial court granted judgment on the pleadings in favor of the second wife. This Court reversed, *West v. West*, 915 P.2d 504 (Utah App. 1996), and the Supreme Court of Utah granted certiorari, 925 P.2d 963 (Utah 1996), reversed this Court's judgment, and reinstated the judgment of the trial court. 948 P.2d at 356.

In doing so, the Supreme Court identified three determinative questions: "(1) whether the West Trust did in fact authorize Hershel and Hazel as trustees to sell or otherwise dispose of the house and thereby revoke the trust, (2) whether

Herschel West, following Hazel West's death, became the sole trustee and succeeded to all the powers previously belonging to the joint trustees, and (3) whether Herschel West could, consistent with his fiduciary duty as trustee, remove the house from the trust by quitclaiming it to himself and his second wife." 948 P.2d at 353-354.

As indicated above, only the second and third of the questions posed by the *West* court are at issue in the case at bar: whether Rhoda Thurber succeeded to all the powers previously belonging to the joint trustees, and whether Rhoda Thurber could, consistent with her fiduciary duty as trustee, remove the house from the trust by deeding it to defendant Harman's daughter and son-in-law. Plaintiffs will address the second question in part B below.

With respect to the third question (i.e., "whether Herschel West could, consistent with his fiduciary duty as trustee, remove the house from the trust"), the *West* court held that as sole surviving trustee Herschel "could sell or dispose of the property as he saw fit. This involved no breach of his fiduciary duty since he was at that point the sole beneficiary." 948 P.2d at 356.

As stated above, the *West* case is directly on point with the case at bar, with two crucial distinctions. First, unlike Rhoda Thurber in the case at bar, Herschel West was not only the sole surviving trustee, he was also the **sole present beneficiary** of the trust. The Supreme Court explained as follows:

The trust instrument is clear that **the children do not become beneficiaries until the "death of the survivor"**¹ of the two settlors. The instrument provides:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we do hereby acknowledge and declare that we hold and will hold said real property and all our right, title and interest in and to said property and all furniture, fixtures and personal property situated therein on the date of the **death of the survivor of us**, IN TRUST.

1. For the use and benefit of the following (3) persons [naming the three children].

([Supreme Court's] emphasis added). The children's rights are subject to divestiture and will not ripen until the death of the surviving settlor.²

Consequently, we conclude that Herschel West, Sr., as sole trustee, could sell or dispose of the property as he saw fit. **This involved no breach of his fiduciary duty since he was at that point the sole beneficiary.**

948 P.2d at 355-356 (emphasis partly original).

Thus, the *West* court held that Herschel West's Quit Claim Deed to himself and his second wife was not in violation of his fiduciary duty to the beneficiaries of the trust because at that point **he was the only beneficiary**. Under the express terms of the trust, Herschel's children would not become beneficiaries until his death, or, in the language of the trust instrument upon the "death of the survivor of us." *Id.*

In the case at bar, however, plaintiffs have been present beneficiaries of the trust since its execution on April 1, 1980. In contrast to the trust instrument at issue in *West*, here the Declaration of Trust specifically states that:

¹Emphasis added.

²Citations omitted.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we do hereby acknowledge and declare that we hold and will hold said real property and all right, title and interest in and to said property and all furniture, fixtures and personal property situated therein IN TRUST:

1. For the use and benefit of the following FOUR persons in equal shares per stirpes:

1. LLOYD MELVIN MITCHELL (OUR SON)
2. LILA ANN HARMAN (OUR DAU.)
3. LINDA MARIE JENKINS (OUR DAU.)
4. JEANNINE PERRENOUD (OUR DAU.)

(R.6) Unlike the trust instrument at issue in *West*, there is no provision that plaintiffs were not to become beneficiaries until the "death of the survivor" of the two settlors.

In short, in *West* "the trust instrument [was] clear that **the children [would] not become beneficiaries until the `death of the survivor'**³ of the two settlors." Conversely, in the case at bar the trust instrument is clear that plaintiffs became beneficiaries on the date of its execution, April 1, 1980.

Thus, unlike *Herschel West*, in the case at bar Rhoda Thurber was **not** the sole beneficiary when she revoked the trust. Plaintiffs were also beneficiaries. Accordingly, Rhoda owed fiduciary obligations to plaintiffs as described in *West*:

[e]xcept as otherwise provided by the terms of the trust, a trustee shall observe standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another ... Any ... transaction which is affected by a substantial conflict of interest on the part of the trustee, is voidable by any interested person, ... unless ... the trust expressly authorized the transaction.⁴

948 P.2d at 355 (quoting Utah Code Ann. sections 75-7-302 &

³948 P.2d at 355 (emphasis added).

⁴Citation omitted.

404(2)).

There is no question that Rhoda Thurber's revocation of the trust was in violation of her fiduciary duty to plaintiffs and was tainted by a conflict of interest. Plaintiffs' beneficial interests were terminated and effectively transferred to Rhoda's other two children. Accordingly, the revocation is voidable and the proceeds of the sale of the property remain part of the trust res. Defendants receipt and use of those proceeds for their own benefit was, therefore, actionable conversion under the undisputed facts of this case.

Also distinguishing the case at bar from *West* is the fact that in their Declaration of Trust Joseph Thurber and Rhoda Thurber specifically stated their intention that if one of them should die the other would not be able to do exactly what in effect Rhoda did after Joseph died, i.e., change the beneficiaries. The second to last paragraph of the Declaration of Trust provides that "If one of the above listed should be deceased, the beneficiaries cannot be changed." (R.7)

In *Makoff v. Makoff*, 528 P.2d 797, 798 (Utah 1974), the Supreme Court of Utah stated that:

The general rules of construction of written instruments apply to the construction of trust instruments, and those rules require a determination of the intention of the settlor... **[I]n ascertaining the intention of the settlor we may consider the entire instrument aided by the surrounding circumstances existing at the time of creation of the trust.**

(Emphasis added).

In the case at bar, the intention of Joseph and Rhoda Thurber is clear: after one of them died, the other would not be

able to cut his or her step-children out of the picture. Nonetheless, the trial court held that the trust instrument's prohibition against changing beneficiaries did not prevent Rhoda Thurber from revoking the trust and effectively transferring the res to defendants. (R.126c, paragraph 15) At the August 28, 1998 hearing on the parties' motions for summary judgment, the trial court explained as follows:

I'm going to grant Summary Judgment finding that the trust was terminated by the sell (sic) of the property. The language, I'm assuming for the sake of argument that Mr. Mitchell is correct that **the parties wanted to set up a trust that would not be changed after one died. I mean, I read that as the intent of the language where it says, "If one of the above listed should be deceased, the beneficiaries cannot be changed."** But I'm going to find as a matter of law that that is insufficient to prevent the revocation of the trust after one of them dies.

That the language is a revocable trust and as such one of the trustees can revoke it. They could not change the beneficiaries. The parties are not here, we're stuck with the language that they agreed upon. The language that they agreed upon was that the beneficiaries could not be changed as opposed to the trust could not be revoked. **I happen to think it's an unfortunate result but I think that's what the language compels.**

(R.127, pages 20-21)(emphasis added).

Plaintiffs respectfully submit that it is clear that in interpreting the trust instrument the trial court wanted to, but mistakenly believed it was prohibited from "consider[ing] the entire instrument aided by the surrounding circumstances existing at the time of creation of the trust." 528 P.2d at 798. To the contrary, the trial court believed it was constrained to look at the trust provision authorizing revocation without regard to the trust provision which the trial court specifically interpreted as

meaning that the trustors intended **"to set up a trust that would not be changed after one died."**

In other words, the trial court believed that both Joseph Thurber and Rhoda Thurber intended to restrict each others right to terminate their step-childrens' beneficial interests in the trust after the death of one of them. Nonetheless, the trial court believed that it was required to read the revocation language in the trust in isolation, thereby allowing Rhoda to end run that intention by simply revoking the trust, rather than changing beneficiaries.

B. Rhoda Thurber did not succeed to all of the powers previously belonging to the joint trustees.

As set forth above, one of the questions which the Supreme Court found determinative in *West* was "whether Herschel West, following Hazel West's death, ... succeeded to all of the powers previously belonging to the joint trustees..." 948 P.2d at 353. As it did with the other two questions, the Supreme Court also answered this question in the affirmative. However, its rationale for doing so is clearly not applicable to the case at bar. Justice Howe explained that the instrument at issue in that case must be construed as granting the sole trustee the same powers as the joint trustees previously had:

Otherwise, a sole trustee would have less power than the joint trustees held. That would be illogical, **as nothing in the trust instrument denies to a sole trustee any of the powers possessed by the joint trustees.**


948 P.2d at 354 (emphasis added).

However, as discussed in part A above, the trust instrument at issue in this case does in fact specifically deny a sole trustee power possessed by the joint trustees, i.e., the power to change beneficiaries. The trial court unequivocally stated its belief that the trustors **"wanted to set up a trust that would not be changed after one died."** (R.125, page 20) Accordingly, the case at bar is distinguishable from *West*.

CONCLUSION

Based on the foregoing, plaintiffs respectfully request that the trial court's order granting summary judgment in favor of defendants be reversed and that this case be remanded to the trial court with instructions for the entry of summary judgment in favor of plaintiffs with respect to their conversion claim.

DATED this 5th day of November, 1999.




Scott B. Mitchell
Attorney for Plaintiffs

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 6th day of November, 1999, via first class U.S. Mail, postage prepaid, to the following:

Randall L. Skeen
5788 South 900 East
Salt Lake City, Utah 84121



Addendum A

Declaration of Trust

DT-31

3422917

WHEREAS, WE, JOSEPH W. THURBER and RHODA THURBER, of the City/Town of SALT LAKE CITY, County of SALT LAKE, State of UTAH are the owners as joint tenants of certain real property located at (and known as) 2430 ALDEN in the City/Town of SALT LAKE CITY, State of UTAH which property is described more fully in the Dred conveying it from DEM F. SHAW & RICH C. SHAW to JOSEPH W. & RHODA THURBER, as "that certain piece or parcel of land with buildings thereon standing, located in said SALT LAKE COUNTY being

LOTS 1285 & 1286, HIGHLAND PARK PLAT A, TOGETHER WITH 1/2 vacated alley abutting on the West, according to the official plat thereof as recorded in the office of the Salt Lake County Recorder, Utah. Also house & furnishings.

THE FOLLOWING IS A LIST OF OUR PERSONAL PROPERTY TO BE RECORDED WITH TRUST:

AUTOMOBILES	TRUCKS	CAMPERS	TAILERS	BOATS
MOBILES HOMES	COLLECTIONS	GUNS	STAMPS	PAINTINGS
ANTIQUES	TOOLS & EQUIP.	COINS	FURS	JEWELRY

ANNUITY - TIAA & CREF (U. OF U.) - #1A51239 2, # CREF 0M19206-8

LIFE INSURANCE POLICY WITH THE ABOVE ACCOUNTS

CREDIT UNION - GARFIELD SMELTERMANS CU - # 713A (wife)

S.L. County EMP. CU - # (wife)

SAVINGS CERTIFICATES MONEY MARKET CERTIFICATES

SAVINGS - VALLEY WEST BANK - # 02-039659 both

CHECKING - VALLEY BANK - # 02 658054 SAFETY DEPOSIT BOX - #737

INSURANCE - METROPOLITAN LIFE INS. - # 32 421 082 (wife)

is out of Kennebec (husband) KENNEBETT

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we do hereby acknowledge and declare that we hold and will hold said real property and all right, title and interest in and to said property and all furniture, fixtures and personal property situated therein IN TRUST

1. For the use and benefit of the following FOUR persons, in equal share, *jointly* per stirpes:

1. LLOYD MELVIN MITCHELL, (OUR SON)
2. LILA ANN HARMAN (OUR DAU.)
3. LINDA MARIE JENKINS (OUR DAU.)
4. JEANNINE PERRENOUD (OUR DAU.)

Upon the death of the survivor of us, unless all the beneficiaries shall predecease us or unless we shall die as a result of a common accident or disaster, our Successor Trustee is hereby directed forthwith to transfer said property and all right, title and interest in and to said property unto the beneficiaries absolutely and thereby terminate this trust; provided, however, that if any beneficiary be under 21 then he or she, the Successor Trustee shall hold the trust assets in continuing trust until such beneficiary attains the age of twenty-one years. During such period of continuing trust the Successor Trustee, in his absolute discretion, may retain the specific trust property hereinafter described if he believes it in the best interest of the beneficiary to do so, or he may sell or otherwise dispose of such specific trust property, investing and reinvesting the proceeds as he may deem appropriate. If the specific trust property shall be productive of income or if it be sold or otherwise disposed of, the Successor Trustee may apply or expend any or all of the income or principal directly for the maintenance, education and support of the minor beneficiary without the intervention of any guardian and without application to any court. Such payments of income or principal may be made to the parents of such minor or to the person whom the minor is living without any liability upon the Successor Trustee to see to the application thereof. If any such minor survives us but dies before the age of twenty-one years, at his or her death the Successor Trustee shall deliver, pay over, transfer and distribute the trust property being held for such minor to said minor's personal representatives, absolutely.

2. We reserve unto ourselves the power and right (a) to place a mortgage or other lien upon the property, and (b) to collect any rental or other income which may accrue from the trust property and, in our sole discretion as Trustees, either to accumulate such income as an addition to the trust assets being held hereunder or pay such income to ourselves as individuals.

3. We reserve unto ourselves the power and right during our lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary, and without giving notice to any beneficiary, but no such amendment or revocation shall be effective unless and until it is filed in the land records. The sale or other disposition by us of the whole or any part of the property shall constitute as in such whole or part a revocation of this trust.

4. The death during our lifetime, or in a common accident or disaster with us, of all of the beneficiaries designated hereunder shall revoke such designation, and in the former event, we reserve the right to designate new beneficiaries. Should we for any reason fail to designate such new beneficiaries, this trust shall terminate upon the death of the survivor of us and the trust property shall revert to the estate of such survivor.

5. Upon the death or legal incapacity of one of us, the survivor shall continue as sole Trustee. Upon the death of the survivor of us, or if we both shall die in a common accident, we hereby nominate and appoint as Successor Trustee hereunder the beneficiary first above named, unless such beneficiary be a minor or legally incompetent, in which event we hereby nominate and appoint as Successor Trustee hereunder the beneficiary whose name appears second above. If such beneficiary named second above shall be a minor or legally incompetent then we nominate and appoint as Successor Trustee hereunder.

(Name) N/A

(Address) _____
Number _____ Street _____ City _____ State _____

5035 98

6. This Declaration of Trust shall extend to and be binding upon the heirs, executors, administrators and assigns of the undersigned and upon the Successors to the Trustee.
7. We as Trustees and our Successor Trustee shall serve without bond.
8. This Declaration of Trust shall be construed and enforced in accordance with the laws of the State of UTAH

IN WITNESS WHEREOF we have hereunto set our hands and seals this 1st day of APRIL, 1980

(First co-owner sign here) Joseph W. Thuermer L.S.

(Second co-owner sign here) Richard A. Thuermer L.S.

Witness: (1) James L. Jones

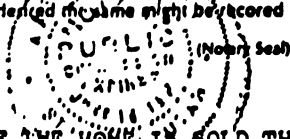
Witness: (2) James L. Jones

State of UTAH

County of SALT LAKE

City of SALT LAKE CITY

On the 1st day of APRIL, nineteen hundred and 80, before me came THURMER and THURMER known to me to be the individuals described in, and who executed the foregoing instrument, and they acknowledged that they executed the same, and in due form of law acknowledged the foregoing instrument to be their free act and deed and deposited the same with me for record as such.



Joseph W. Thuermer
Notary Public

IF THE HOME IS SOLD THE MONEY IS TO BE PUT INTO A TRUST, DESIGNATED "THE THURMER TRUST", TO BE DRAWN OUT AT 20 per cent PER YEAR, LOTS - BERG, SUNSET GARDENS OF THE VALLEY (EAST)

IF ONE OF THE ABOVE LISTED SHOULD BE DECEASED, THE BENEFICIARIES CANNOT BE CHANGED.

A MORE DETAILED LIST OF PERSONAL ITEMS AND DISTRIBUTION TO BE FOUND IN THE FAMILY REGISTRY BOOK.

2480 Allen St SLC 84106

59

Joseph Thuermer
James L. Jones

APR 14 10 01 AM '80

NOTARY PUBLIC
SALT LAKE CITY
UTAH

Addendum B

IN THE THIRD DISTRICT COURT IN AND FOR THE
STATE OF UTAH, SALT LAKE COUNTY

-o0o-

IN THE MATTER OF THE ESTATE)
OF: THURBER, RHODA) SUMMARY JUDGMENT
NELSON MITCHELL) Case No. 973900675

Judge William A. Thorne

-o0o-

BE IT REMEMBERED that on the 28th day of August,
1998, the above-entitled matter came on for hearing before
the Honorable William A. Thorne, sitting as Judge in the
above-named Court for the purpose of this cause, and that
the following proceedings were had.

-o0o-



ASSOCIATED PROFESSIONAL REPORTERS, L.C.

PARTIES

Heir: LINDA MARIE JENKINS
300 East 2750 South
Bountiful, UT 84010

Represented by: SCOTT B. MITCHELL
Attorney at Law
8 East 300 South #620
Salt Lake City, UT 84111

Other party: SCOTT B. MITCHELL

Heir: LLOYD M. MITCHELL
3146 South 8560 West
Magna, UT 84044

Petitioner: LILA ANN HARMAN
3836 Rosemary Street
West Valley City, UT 84120

Represented by: RANDALL SKEEN
Attorney at Law
4659 So. Highland Dr.
Salt Lake City, UT 84117

THOMAS MECHAM
Attorney at Law
79 So. Main #500
Salt Lake City, UT 84111

P R O C E E D I N G S

THE COURT: And the other matter is 973900675, the matter of the estate of Rhoda Thurber.

MR. MITCHELL: Good morning, Your Honor, Scott Mitchell on behalf of the parties.

UNIDENTIFIED SPEAKER: Randall Skeen and Tom Mecham on behalf of defendant, Your Honor.

THE COURT: Are you ready to go forward with the partial summary judgment on this?

MR. MITCHELL: Yes, Your Honor.

MR. SKEEN: Yes, Your Honor, but I believe, I'm not sure they're partial, I think they're cross motions for complete summary judgment.

THE COURT: Okay.

MR. MITCHELL: Actually mine's a partial motion for summary judgment, though at this time I can't remember why.

THE COURT: Okay, go ahead, Mr. Mitchell.

MR. MITCHELL: Your Honor, this involves a trust, a declaration of trust that was signed and recorded in April of 1980. The trustors were Joseph Thurber and Rhoda Thurber. They were the stepparents and parents of the plaintiffs and defendants. The plaintiff, Linda Jenkins, and defendants were the children of Rhoda Thurber, and Mrs. Burne who's here in the court today was the daughter of

1 Joseph Thurber

2 The trust transferred a lot of property, the main
3 property being the residence, the party's residence into the
4 trust. The problem arose when Joseph died, Rhoda took the
5 property, sold it and transferred everything to the
6 defendants in her will, she's now deceased. It's my
7 understanding also that defendant Lloyd Mitchell died over
8 the weekend or late last week sometime.

9 In any event, the facts of this case, except for
10 in two respects, are identical to the Supreme Court's
11 decision in the Estate of West. The two important
12 distinctions are in the West case the children didn't become
13 beneficiaries specifically and by the terms of the trust
14 until the trustors died. In this case, the language is
15 different. And I don't know if the Court's had the benefit
16 of reading the briefs but it's spelled out pretty distinctly
17 by both parties in the briefs.

18 The other fact is that, and actually there's two
19 facts, the Declaration of Trust in this case provides that,
20 and it's aimed at making a protective barrier to protect
21 each parties children, in other words, to protect the
22 stepchildren when the, when that childrens' parent died.
23 And the trust provides if one of the above listed trustors
24 should be deceased the beneficiaries cannot be changed. In
25 other words, what if Joseph dies, Rhoda can't cut Jeanine

1 out, okay, that's specifically in the trust, and that's a
2 distinction with the West case.

3 I just want to read a passage from the West case
4 that deals with this. "The trust incident is clear that the
5 children do not become beneficiaries," and this is the
6 Court's quotes, "the death of the survivor of the two
7 settlers." Then it goes to reason of trust.

8 THE COURT: Is that pursuant to the language of
9 the trust or is that just by operation of law?

10 MR. MITCHELL: That is pursuant to the language of
11 the trust. The Court goes on to quote the language of the
12 trust and the emphasized language in the trust that the
13 Court, in the whole passage, is death of the survivor of us.
14 Okay, that's not in our trust. Then the Court goes on to
15 say the children's vested rights are subject to divestiture
16 and will not ride until the death of the surviving settler.

17 In our case it transfers it in trust and
18 specifically identifies these beneficiaries and says nothing
19 about surviving until it goes down, and this is something
20 defendant's brought up in their brief, when it talks about
21 after they die then it talks about distributing to the
22 surviving beneficiaries, okay, but nothing in the granting
23 language, and that's the language and the important part of
24 the West case. But I think even more important, as a matter
25 of construction, the first rule of construction is that

1 is the intention of the parties.

2 Now, in the West case the trust, there was no
3 limitation on the trustors, or the trustees right to revoke
4 or alter the trust ever. In our case it's specifically, and
5 this is a formed trust, that the language that I'm pointing
6 out to the Court about the beneficiaries cannot be changed
7 when one of the parties dies, that's typed in, okay, that's
8 the parties themselves that put that in there, that's not
9 just boiler plate.

10 And I'll read another part from the West case.
11 The West case had three part test, only two of which are at
12 issue before the Court today. One of those is, okay, the
13 two trustors had the power to sell the property and revoke
14 the trust before one of them died, okay. The Court found
15 that to be present in West and that's present indisputably
16 in this case. The second test is after one of the trustors
17 die whether the other trustor inherited all powers, in other
18 words, whether she could revoke that. And here in the West
19 case the Court said a sole trustee would, held that they did
20 in that case because otherwise a sole trustee would have
21 less power than the joint trustees held, and the Court said,
22 "That would be illogical as nothing in the trust instrument
23 denies a sole trustee any of the powers possessed by the
24 joint trustee."

25 In our case it clearly does. It says after one of

1 us dies you can't change the beneficiaries, you can't cut
2 Jeanine out of her inheritance.

3 THE COURT: Well, what about withdrawing property
4 from the trust though, is that restricted? are

5 MR. MITCHELL: It is. What is says in here is if
6 the home is sold, and that's what happened, the money is to
7 be put in a trust designated the Thurber Trust, okay, that
8 wasn't done. Basically what they did is they started
9 distributing it to Rhoda while she was alive and then to the
10 defendants after she died. So, I'll reserve the rest of my
11 time for rebuttal.

12 THE COURT: Mr. Skeen?

13 MR. SKEEN: Thank you, Your Honor. May I
14 approach? I've got a copy of the case that is in the trust
15 so that the Court can follow along. Your Honor, this is a
16 fairly complex case factually, but I think it's pretty
17 simple legally. One thing I think Counsel and I both agree
18 on is that the matter can be disposed of via Summary
19 Judgment, and secondly, that the West case is controlling,
20 and I don't know whether we just read it differently or not.

21 But just to start out, if I could go over just the
22 facts so that we're all on the same page there, on April 1st
23 of 1980, Joseph and Rhoda Thurber executed the Declaration
24 of Trust, a copy of which I've provided to Counsel and the
25 Court. In 1995, Joseph died and later that year, or excuse

1 me, 1985, Joseph died. ~~Later that year~~ on December 16th,
2 Rhoda executed a will which revoked all prior testamentary
3 instruments. On June 29th of 1992, she executed a second
4 will, which again, revoked all prior testamentary documents
5 and neither one of the two wills mentioned, the '85 or the
6 '92 mentioned the plaintiffs as beneficiaries.

7 They, incidentally, were stepchildren of Rhoda's
8 and maybe Counsel didn't make that clear.

9 THE COURT: And children of Joseph's?

10 MR. SKEEN: And children of Joseph's, correct.

11 THE COURT: Okay.

12 MR. SKEEN: On August 15, of 1992, Rhoda sold the
13 home, which I think forms really the basis of the dispute.

14 THE COURT: The home is conveyed in this
15 Declaration of Trust to the trust?

16 MR. SKEEN: Yes. Anyway, in 1992 the home is sold
17 to (inaudible), one of which is a granddaughter of Rhoda,
18 pursuant to a contract which paid \$612 per month.

19 THE COURT: Did the title documents identify the
20 trust as the holder of the home?

21 MR. SKEEN: I believe so. I don't have copies of
22 those with me, Your Honor, but I believe they did. Well,
23 which trust? She formed a secondary trust in--

24 THE COURT: Okay, of the one that you just handed
25 me. this--

1 MR. SKEEN: ~~The old one~~, the 1980 one?

2 THE COURT: Right, was that the '80 trust?

3 MR. SKEEN: Yes.

4 THE COURT: I guess it is.

5 MR. SKEEN: Uh-huh.

6 THE COURT: And so the title documents would have
7 identified this trust, the '80 trust as the holder of the
8 home?

9 MR. SKEEN: I believe that they did.

10 THE COURT: And so the proceeds from that sale
11 they should have funneled into the trust, did they not do
12 that?

13 MR. SKEEN: Well, they did not because, again,
14 consistent with our argument and with the West case, they
15 didn't need to. The trust was revoked. And then the
16 final-

17 THE COURT: Are there documents that revoke this
18 trust as opposed to simply, it says, revokes testamentary
19 instruments.

20 MR. SKEEN: Right, those are the only ones, but
21 it's going to be done pursuant to the terms of the 1980
22 trust, I'm getting right to that.

23 THE COURT: Okay.

24 MR. SKEEN: The last fact, Your Honor, is that on
25 December 22nd--oh, I wanted to indicate when she did sell

1 the home she lived on the ~~proceeds of~~ the \$612 per month
2 until she died on December 22, of 1996. Now, the West case
3 identifies three issues, and Counsel alluded to them as
4 well. And they're the identical issues in this case, the
5 ones that were identified by the Court are the exact same
6 ones.

7 The first issue is did Rhoda have the authority
8 pursuant to the trust to terminate the trust pursuant to the
9 terms thereof? I'm not sure whether plaintiffs' agree, I
10 think I heard them say they do, but just so we're all on the
11 same page, drawing your attention to paragraph three of the
12 1980 Declaration of Trust. It says, "We reserve unto
13 ourselves the power and right at any time during our
14 lifetime to amend or revoke in whole or in part the trust
15 hereby created without necessity of obtaining consent of any
16 of the beneficiaries and without giving notice to any
17 beneficiary, but no such amendment or revocation shall be
18 effective unless and until it is filed in the land records."

19 That's part one, that was identified, and
20 incidentally the language is virtually identical in the West
21 case trust. That language states pursuant to the Supreme
22 Court that that gives the settlers, which would be Rhoda and
23 the decedent at that time, the opportunity and ability
24 without notifying the beneficiaries, without doing anything
25 to terminate the trust.

1 The second sentence, ~~however~~, applies to the
2 trustees. It says, "The sell or disposition by us of the
3 whole or any part of the property held here under shall
4 constitute as to such whole or part revocation of this
5 trust." So I think reading the West case, and clearly the
6 language of the 1980 trust, it does allow the trust to be
7 terminated.

8 And the second issue is, well, and I might
9 indicate also that once the property, the real property was
10 conveyed to Pizzance the trust was absolutely terminated.
11 Whether it had been so in the 1992 will, the 1995
12 disposition document.

13 THE COURT: Did the West case talk in terms of the
14 "us" that's there? Does that require--

15 MR. SKEEN: It did. It did.

16 THE COURT: --that the trustors to be both alive?

17 MR. SKEEN: It did, yes, and it said they do not.
18 That's one of the prime holdings. That's why the West case
19 is precisely on point. Now, the second issue is just what
20 you've stated. The second issue is can a surviving co-
21 trustee or co-settler unilaterally exercise the right to
22 terminate a trust subsequent to the death of the co-trustee?
23 The West case said absolutely. The trust says absolutely.

24 I draw your attention first to paragraph five of
25 the trust "Upon the death or legal incapacity of one of

1 us, the survivor shall ~~continue as sole trustee~~." In the
2 West case it said exactly the same thing. They held that
3 once Mr. West's prior spouse had died he was the sole
4 trustee and had all the authority under the will and under
5 statutory law to act as such. Now, in fact, we have a code
6 section that paraphrases that, it's Utah Code Annotated
7 75.7.405(2), and it clearly says that once you have the
8 demise of one trustee or settler then the survivor has all
9 the authority of both of them, and that includes the
10 authority to revoke.

11 Now, the third issue, and I think again, if I'm
12 reading it right, I think plaintiffs' agree with that. I
13 think what they're disputing is really the third issue, and
14 that is whether or not Rhoda had the authority or was it a
15 breach of her fiduciary duty to terminate the trust? And in
16 the ~~Confidential~~ Continental Bank case which we cited in our brief and
17 also was cited by the West Court it says, and I quote, "The
18 trustee can exercise exclusive control over trust property
19 subject to the limitations imposed by law or by the trust
20 instrument."

21 Now, if we give that third issue, was she able to
22 basically terminate the trust, we know that she has the
23 authority to do it, but could she terminate the trust and do
24 what she did without violating her fiduciary duty? The

1 precludes that. Well, ~~and they say that~~, in their brief
2 they said, "Well, it doesn't say upon the death of the
3 survivor of us," type language. And, you know, they say
4 that that differentiates us from the West case."

5 Well, if I draw the Court's attention, it's the
6 very next paragraph under where the beneficiaries are named.
7 It says, "Upon the death of the survivor of us, unless all
8 the beneficiaries shall predecease us or unless we shall die
9 as a result of a common accident or disaster, our successor
10 trustee," this is after they die, "is hereby directed to
11 forthwith transfer said property and all right title and
12 interest to said property unto the beneficiaries absolutely
13 and thereby terminate this trust."

14 That is precisely the language in the West case,
15 it's just in a different part of the West trust. They're
16 both these little form book trusts, is what the West Court
17 calls them. And it just happened to be one paragraph
18 farther below is all. But it says exactly the same thing.
19 What does it say? The survivor of us, provided all the
20 beneficiaries are still alive, says, "Our successor
21 trustee," and this is after both of us die, "is directed to
22 transfer the property."

23 Now, that tracks exactly with the third issue as
24 identified in the West Court. What happened there is West,
25 Hershel West was the beneficiary of the trust and he was

1 also the trustee. ~~This case is a~~ little bit different
2 because the beneficiaries of the trust were Rhoda and the
3 other named plaintiff and her brother, Lloyd, who died last
4 week. But the Supreme Court clearly states that, these
5 beneficiaries have different status, and that's the
6 important, and the ruling in the West case. The
7 plaintiff's, Your Honor, were contingent beneficiaries
8 subject to change. Whereas Rhoda, just like Hershel West,
9 was an active beneficiary.

10 And the case says exactly that. In fact, in
11 probably the best language in the case for us, and I'll draw
12 your attention to page 354 of the West case, which I've
13 provided, and I've hi-lighted it in yellow. It defies
14 common sense--

15 THE COURT: Just a moment.

16 MR. SKEEN: 354, it's on the right hand column,
17 about 60 percent down.

18 THE COURT: Okay.

19 MR. SKEEN: "It defies common sense that a couple
20 creating a revocable inner viva voce trust naming themselves
21 as trustees would deliberately preclude themselves from
22 fully utilizing the property for their own benefit while
23 both or either one of them was alive, particularly when it
24 appears that the purpose of the form book trust document may
25 have been simply to avoid probate. Therefore, we conclude

1 that upon the death of ~~Hazel West~~, ~~Hershel~~ West succeeded to
2 all the powers exercisable by the joint trustees, including
3 the power to sell or dispose of the property which works as
4 a revocation of the trust."

5 That, Your Honor, is exactly what we have here.
6 You have two distinct groups of beneficiaries. You have an
7 active beneficiary that has all the rights to do basically
8 whatever they want with that property during their lifetime,
9 that's why it's an inner viva voce trust. And then you have
10 a secondary contingent group that, who's rights arise upon
11 death of the surviving trustee provided there has been no
12 other distribution, sell, termination or revocation of the
13 trust. And that is simply in a nutshell what the case says
14 and what this case is all about.

15 The, we wouldn't be here today, Your Honor, if
16 Rhoda hadn't, pursuant to the terms of the trust, sold the
17 home or if Rhoda hadn't, pursuant to the terms of the trust,
18 terminated the trust by doing new wills, preparing new
19 wills. Now, it's interesting, and I'm not sure it's even an
20 issue because I think that the three part test as defined by
21 the West Court case, those three prongs have been met
22 clearly. I mean, this case is right on point. And then, of
23 course, we get to this other language about the home was
24 sold, it's put into a trust, blah, blah, blah, please note
25 that we don't know, and there's no authentication of when

1 that language was put in. ~~The signatures~~ are above that and
2 there's no initialing.

3 And on the first page where there were some strike
4 outs you'll notice that the parties to the trust initialed
5 that so it is not a self authenticating instrument in any
6 event. But I don't think we even need to get that far. I
7 think the trust was terminated according to the terms of the
8 trust and according to the law as defined in the West case.
9 Thank you.

10 MR. MITCHELL: Your Honor, the trust instrument
11 was recorded on April 1, 1980. The suggestion that somehow
12 this was put in later is ridiculous. The December 1985 will
13 is not in evidence, it's not an issue in this case, it's
14 never been brought up, hasn't been briefed, we've never seen
15 it. I assume that the June 29, 1992, will is on file
16 somewhere, but it's certainly never been briefed, it's not
17 an exhibit, it's nothing. The effect of those wills on this
18 case is not at issue.

19 Counsel says that we're not disputing two and
20 three of the West case and that's not correct. The West
21 case, and Counsel reads the part of the West case that says,
22 "Defies common sense that a couple creating a revocable
23 inner viva voce trust naming themselves as trustee would
24 deliberately preclude themselves from fully utilizing the
25 property for their own benefit." That's clearly not the

1 case in ours. You look ~~above that~~ a couple of sentences,

2 "Nothing in the trust instrument denies--

3 THE COURT: Okay, where are you?

4 MR. MITCHELL: Two sentences above the language
5 on, and I've got the advanced reports, so--

6 THE COURT: Two sentences above, it's "For
7 example?"

8 MR. MITCHELL: Okay, three sentences above. I
9 apologize.

10 THE COURT: Okay, "That would be illogical?"

11 MR. MITCHELL: "As nothing in the instrument
12 itself denies a sole trustee any of the powers possessed by
13 the joint trustee." In our case the trust instrument
14 specifically denies the sole trustee the power to change the
15 beneficiaries, okay. What they intended on doing is
16 ~~preventing~~ Joseph from ~~cutting out~~ the defendants and
17 plaintiff, Linda Jenkins, after Rhoda died and preventing
18 Rhoda from doing exactly what she did in this case and that
19 is cutting Jeanine out after Joseph died. That's exactly
20 what they intended to do, and that's the first rule of
21 construction in interpreting a trust is the intent of the
22 parties, okay.

23 That is a factual distinction with the West case
24 that decides this case right there, okay. As far as the
25 contingent beneficiary argument, the West Court, when it

1 emphasizes the death of ~~the survivor of us~~ and says, the
2 children's vested rights, and talks about contingent
3 beneficiaries, points to the Grossbeck case. And the
4 Grossbeck case, which is 935P(2)12.55 talks about a
5 contingent remainder, IE, the beneficiaries interest is
6 contingent upon surviving the grand tort, okay. And that's
7 exactly the case in West.

8 This is an easy case. The West case is
9 controlling, but the West case says, one, if the trust
10 instrument says something that controls it. If it doesn't,
11 then they can revoke it with the power of revocation. But
12 here the trust instrument specifically says after one of us
13 dies you can't do that, okay. We're going to submit it on
14 that basis, Your Honor.

15 MR. SKEEN: Your Honor, may I have one last word,
16 there were cross motions?

17 THE COURT: Go ahead.

18 MR. SKEEN: Even if the Court, the Court, it's a
19 smokescreen. We don't need to get to the issue of whether
20 or not they could change beneficiaries, you don't even need
21 to get that far. The document itself, she didn't change the
22 beneficiaries, she terminated the trust, and there's a
23 distinction there. And by right and by law in the West case
24 the three prongs were met, we showed them right in the trust
25 itself. And, therefore, she didn't change the

1 beneficiaries, she didn't ~~add~~ ~~she didn't~~ take them away,
2 she terminated it pursuant to her legal authority to do so.
3 Thanks.

4 MR. MITCHELL: Your Honor, the intent of the
5 parties was to prevent, and it's obvious, it's very clear,
6 it's undisputed that that was the intent of Joseph and Rhoda
7 was to prevent Rhoda from doing exactly what she did. The
8 argument that she didn't change beneficiaries, that's not
9 it, that's not it. Maybe she didn't change beneficiaries,
10 she revoked the trust contrary to the intent. But suppose
11 she could revoke the trust, and she couldn't, okay, she
12 couldn't do that because that's how the parties intended it
13 and it's very clear. Suppose she could revoke the trust.
14 Could she do it in violation of her fiduciary duty
15 (inaudible)? No, she couldn't, and that's the distinction
16 in West. It doesn't require, this trust does not require
17 that Jeanine or that Jeanine survive Rhoda in order to be a
18 beneficiary, okay.

19 They point out that this trust has the same
20 language as the West trust. Well, Your Honor, it has the
21 same language but it's in a different paragraph, it has a
22 different meaning, and it has a different scenario. What
23 this language upon the death of the survivor says is that on
24 the death of the survivors you give the property away and
25 terminate the trust. It doesn't say that the beneficiaries

1 don't become beneficiaries ~~until the death~~ of a survivor.

2 So when Counsel stands up here and says that it does, take a
3 look at that, Your Honor. It's a silly argument and I don't
4 know how you can stand up here and make it.

5 THE COURT: One at a time.

6 MR. MITCHELL: What this case is about, this is
7 not a case about greedy people, okay. The defendants aren't
8 greedy. Let me tell you what this case is about. There's,
9 the State of Utah has a \$35,000 medical lien on the will,
10 okay. If defendants win this case the State of Utah's paid
11 \$35,000, okay. If plaintiffs win this case, plaintiffs are
12 paid \$20,000 or something. So what the defendants are
13 doing, and it's the defendant Lila Harman, she is doing this
14 out of spite, okay. She knows that it's more money that's
15 going to go in her pocket if we win, but she wants to cut
16 Mrs. Purñue out.

17 This is simply a matter of spite. It is not
18 legally justifiable, it's not factually justifiable and it's
19 not morally justifiable.

20 THE COURT: I'm going to grant Summary Judgment
21 finding that the trust was terminated by the sell of the
22 property. The language, I'm assuming for the sake of
23 argument that Mr. Mitchell is correct that the parties
24 wanted to set up a trust that would not be changed after one
25 died. I mean, I read that as the intent to the language

1 where it says, "If one of ~~the above~~ listed should be
2 deceased, the beneficiaries cannot be changed." But I'm
3 going to find as a matter of law that that is insufficient
4 to prevent the revocation of the trust after one of them
5 dies.

6 That the language is a revocable trust and as such
7 one of the trustees can revoke it. They could not change
8 the beneficiaries. The parties are not here, we're stuck
9 with the language that they agreed upon. The language that
10 they agreed upon was that the beneficiaries could not be
11 changed as opposed to the trust could not be revoked. I
12 happen to think it's an unfortunate result but I think
13 that's what the language compels.

14 Counsel, not for the purpose of argument, but just
15 to preserve Appellate Review, is there anything that you
16 want me to address specifically?

17 MR. MITCHELL: Perhaps the third prong of it, the
18 test.

19 THE COURT: Which was which one?

20 MR. MITCHELL: Whether it breached fiduciary duty.

21 THE COURT: Okay, I'm going to find that there is
22 not a fiduciary duty to the beneficiaries until they have
23 arrived, which is basically after the surviving trustee
24 dies.

25 MR. MITCHELL: Thank you. Your Honor

1 MR. SKEEN: ~~Thank you, Your Honor.~~

2 THE COURT: Anything that you want to address, Mr.
3 Skeen, for the record?

4 MR. SKEEN: No, Your Honor.

5 THE COURT: Okay, will you draw the findings in
6 the Order then?

7 MR. SKEEN: I will. Thank you.

8 THE COURT: Thank you.

9 (Proceedings concluded)

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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Julie Lay, do hereby certify that
pages, numbered 1 through 23, contain a true
transcript of the electronically recorded
was transcribed by me to the best of my ability
tapes furnished to me.

DATED: September 16, 1998


JULIE LAY

I, Lanette Shindurling, Certified Shorthand
and Notary Public for the State of Utah,
that the foregoing transcript prepared by
transcribed under my supervision and direction

Lanette Shindurling

My Commission Expires:

Addendum C

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JEANNINE PERRENOUD; and)	
LINDA JENKINS)	
)	
Plaintiffs,)	FINDINGS OF FACT AND
)	SUMMARY JUDGMENT
vs.)	
)	
LILA ANN HARMAN, individually)	
and in her capacity as Personal)	
Representative of the Estate of)	
Rhoda Nelson Mitchell Thurber;)	Civil No. 97390675
LLOYD MITCHELL;)	
JOHN DOES I THROUGH V; and)	
JANE DOES I THROUGH V)	
)	Judge William A. Thorne
Defendants.)	

Plaintiffs' and Defendants' Cross-Motions for Summary Judgment came on regularly for hearing on the 28th day of August, 1998, before the Honorable William A. Thorne, District Court Judge. Plaintiff Perrenoud was present and represented by her counsel, Scott B. Mitchell and Defendants were not present but represented by their counsel, Randall L. Skeen and Todd R. Mecham. Based upon the pleadings and papers contained within the Court's file, the

evidence presented at the hearing, argument of counsel and good cause appearing, the Court hereby finds and orders as follows:

FINDINGS OF FACT

1. On April 1, 1980, Joseph Thurber and Rhoda Thurber executed an inter-vivos trust known as the Thurber Trust. Pursuant to the terms of the Thurber Trust, Joseph and Rhoda Thurber were appointed as Trustees. Thereafter certain property, as identified within the Trust was transferred to the Trust.

2. Paragraph 3 of the Thurber Trust authorized the Thurbers to revoke the Trust by selling or otherwise disposing of any part of the property held within the Trust, without obtaining the consent of any named beneficiary.

3. Paragraph 5 of the Thurber Trust authorized a surviving co-trustee to act as sole trustee of the Trust.

4. In 1985, Joseph Thurber died.

5. On June 29, 1992, Rhoda Thurber executed a Will and Trust which revoked all prior testamentary instruments. Said Will and Trust did not identify Plaintiffs as beneficiaries and appointed Defendants as trustees and beneficiaries.

6. On or about August 15, 1992, Rhoda Thurber sold the property and home identified in the Trust documents to Robert Bezzant and Holli Bezzant.

7. On December 22, 1996, Rhoda Thurber died.

8. Pursuant to order of this Court, Defendant Lila M. Harman was appointed Personal Representative of the Estate of Rhoda Nelson Mitchell Thurber.

9. Rhoda Thurber as surviving co-Settlor and sole trustee had authority to terminate the Thurber Trust prior to her death.

10. Rhoda Thurber was an active beneficiary of the Trust and Plaintiffs were contingent beneficiaries of the Trust.

11. As the sole surviving acting beneficiary, Rhoda Thurber could act to terminate the Thurber Trust without breaching a fiduciary duty to any contingent beneficiary.

12. Rhoda Thurber did not change the beneficiaries of the Thurber Trust.

13. The Thurber Trust was terminated by Rhoda Thurber upon her sale of the property on or about August 15, 1992.

14. There are no witnesses to provide testimony and, therefore, the Court must construe the clear language of the Trust documents.

15. The Trust provisions relating to changing beneficiaries and disposition of proceeds from sale of the home are insufficient to prevent Rhoda Thurber from revoking the Trust.

16. Defendants did not convert any property belonging to Plaintiffs.

17. Rhoda Thurber did not owe Plaintiffs a fiduciary duty with respect to administration of the Thurber Trust as the same had been revoked.

18. Defendant Lila M. Harman did not owe Plaintiffs a fiduciary duty with respect to the Thurber Trust as the same had been revoked.


ORDER OF SUMMARY JUDGMENT

Based upon the foregoing Findings of Fact and good cause appearing, the Court hereby orders as follows:

1. Summary judgment is hereby entered in favor of Defendants pursuant to their Counterclaim and against Plaintiffs; and
2. Plaintiffs' Complaint is hereby dismissed with prejudice.

DATED this 4 day of October, 1998.

BY THE COURT:


WILLIAM A. THORNE
District Court Judge

CERTIFICATE OF SERVICE

The foregoing Findings of Fact and Order was mailed to Scott B. Mitchell at 175 South Main Street, Salt Lake City, UT 84111 on this 3 day of September 1998.


SECRETARY