

2009

Kenneth E. Winward v. Geraldine W. Goodliffe : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH E. WINWARD,

Plaintiff/Appellant,

v.

GERALDINE W. GOODLIFFE,

Defendant/Appellee.

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BRIEF OF APPELLANT

Case No. 20090972-CA

BRIEF OF APPELLANT KENNETH E. WINWARD

Appeal from a Judgment and Orders Entered by the Second Judicial District Court,
Weber County, Utah, Honorable W. Brent West, District Judge, Presiding

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UTAH APPELLATE COURTS

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

I. Issue: Whether the trial court erred in finding that Kenneth E. Winward (Mr. Winward) received \$630,433.00 in advancements on his inheritance where the findings are devoid of any analysis regarding the statutory and longstanding case law criteria for determining advancements. Preservation: The issue was preserved by motion and memoranda (R. 227, 241), during argument (R. 361-62, 365), through two objections to the findings of fact and conclusions of law (R. 199-201, 211-12), and by the trial court's rulings. (R. 192-97, 339-41). Standard of Review: The standard of appellate review for a trial court's findings of fact is clearly erroneous. *Young v. Young*, 1999 UT 38, ¶ 15, 979 P.2d 338.

II. Issue: Whether the trial court abused its discretion and committed errors of law in its admission of and reliance on inadmissible evidence over the objection and continuing objection to such evidence, which evidence had no foundation, was irrelevant, and represented rank hearsay. Preservation: The issue was preserved by motion and memoranda (R. 149, 227, 244; Motion for Limiting the Evidence that May Be Introduced at Trial, attached as Addendum A), objections made during argument (R. 361, 365), and the trial court's rulings to admit the evidence. (R. 361). Standard of Review: Trial court rulings on the admissibility of evidence are reviewed for an abuse of discretion. *Salt Lake City v. George*, 2008 UT App 257, ¶ 5, 189 P.3d 1284; *State v. Kell*, 2002 UT 106, ¶ 32,

61 P.3d 1019. Whether a particular piece of evidence is admissible is a legal question, which is reviewed for correctness. *Salt Lake City v. George*, 2008 UT App 257, ¶ 5, 189 P.3d 1284; *State v. Ramirez*, 817 P.2d 774, 782 n.3 (Utah 1991). To be reversible, an error in the decision to admit evidence must be prejudicial. *State v. Jacques*, 924 P.2d 898, 900 (Utah Ct. App. 1996).

III. Issue: Whether the trial court erred in awarding prejudgment interest to Appellee Geraldine W. Goodliffe (Ms. Goodliffe) on the amount Mr. Winward was found to owe the Myrtle Winward trust when the judgment entered was without any basis in law. Preservation: The issue was preserved by motion and memoranda (R. 227, 241), during argument (R. 361-62, 365), through two objections to the findings of fact and conclusions of law (R. 199-201, 211-12), and by the trial court's rulings. (R. 192-97, 339-41). The trial court did not address the issue of prejudgment interest separately from the issue of advancements. Standard of Review: A decision to award prejudgment interest is reviewed for correctness. *In re Fisher Family Inter Vivos Revocable Trust*, 2009 UT App 305, ¶ 9, 221 P.3d 845; *Stevensen 3rd East, LC v. Watts*, 2009 UT App 137, ¶ 27, 210 P.3d 977.

IV. Issue: Whether the trial court abused its discretion in failing to grant Mr. Winward's motions for relief under Utah R. Civ. P. 60(b) and for a new trial under Utah R. Civ. P. 59. Preservation: The issue was preserved by motion and memoranda (R. 227, 240), during argument (R. 365), and by the trial court's ruling. (R. 339-41). Standard of Review: The standard of appellate review is abuse of discretion. *Swallow v. Kennard*, 2008 UT App 134, ¶ 19, 183 P.3d 1052; *Markham v. Bradley*, 2007 UT App 379, ¶ 14,

173 P.3d 865. Thus, there must be no reasonable basis for the decision. *State v. Redding*, 2007 UT App 350, ¶ 8, 172 P.3d 319.

DETERMINATIVE LAW

The following provisions are relevant to this appeal and the issues presented and are attached verbatim in Addendum B:

- Utah Code Ann. § 25-5-4(1) (2009);
- Utah Code Ann. § 75-2-609 (2009).

STATEMENT OF THE CASE

I. Nature of the Case

This case involves an unlawful and inappropriate windfall judgment in favor of a trust beneficiary in an action, which notably failed to include as a party the trust at issue in the case. In making its award and entering its judgment and order, the trial court incorrectly applied the longstanding law on advancements by charging one trust beneficiary, Mr. Winward, with more than a decade's worth of gifts and/or loans from the trust—regardless of whether payments actually came to him or were even drawn from the trust corpus—without evidence of any contemporaneous writing indicating an advancement as required by law. The court based its decision on nothing more than unsupported and unfounded allegations from his sister, the other trust beneficiary, and unauthenticated notes and records. Consequently, Mr. Winward was not only deprived of any property he may have been entitled to receive under the trust but also became the subject of a judgment requiring payment to the other beneficiary in a sum exceeding the total value of the trust property at any prior time, which legally should not have been

deducted. Further, the trial court incorrectly found a breach of fiduciary duties of Mr. Winward as trustee during a period that pre-dated the assumption by him of the role of trustee. That appointment did not occur until the death of Myrtle Winward, the trust settlor and in no event could have occurred until the death of Richard Winward. Although specifically requested to correct its legal errors by granting a new trial under Rule 59 or relief from the judgment under Rule 60, the trial court refused to do so, expressing satisfaction that its original determination on advancements was correct. In an effort to achieve what it viewed as equitable, the trial court disregarded the established legal requirements for advancements and ignored the harm and prejudice caused by admitting and relying on inadmissible evidence.

II. Course of Proceedings and Disposition at Trial

Mr. Winward appeals from the trial court's final judgment and orders requiring him to pay Ms. Goodliffe \$560,765 plus interest and attorneys' fees and from the denial of his motions for relief under Rule 59 and Rule 60 of the Utah Rules of Civil Procedure on January 9, 2009 and January 5, 2010, respectively. (R. 222-24, 350-53). Mr. Winward, as one of two trustees, filed a Complaint on September 26, 2005, alleging Ms. Goodliffe's failure to account for trust assets received and requesting that the trial court order the sale of certain real property remaining in the trust. (R. 1-8). Ms. Goodliffe filed a Counter-Complaint on December 7, 2005 requesting a credit against remaining trust assets, an accounting, and Mr. Winward's removal as trustee. (R. 11-13). Mr. Winward filed an Answer to the Counter-Complaint and Ms. Goodliffe filed an Answer on the same day, December 20, 2005. (R. 14-19). Following a two-day trial on April 7-8, 2008

before the Honorable W. Brent West, district judge of the Second Judicial District Court, in and for Weber County, State of Utah, the trial court issued its written Decision, signed October 30, 2008 and entered November 3, 2008. (R. 192-98). This Decision is attached as Addendum C. On January 9, 2009, the trial court entered its Findings of Fact and Conclusions of Law and its final Order, signed December 29, 2008. (R. 213-24). These Findings and Order are attached as Addendum D. On January 13, 2009, Mr. Winward filed his Motion for a New Trial under Rule 59 and for Rule 60(b) relief. (R. 227-29). After hearing oral argument on May 6, 2009, the trial court denied Mr. Winward's Motion for a New Trial and for 60(b) Relief in its Order and Decision dated October 9, 2009, attached hereto as Addendum E. (R. 339-41). Although the court did not enter its Findings and Order until January 5, 2010, (R. 350-53), Mr. Winward timely filed a Notice of Appeal on November 6, 2009. (R. 342-44). Mr. Winward filed an Amended Notice of Appeal on January 14, 2010, after the Order had been officially entered. (R. 357-59).

III. Relevant Facts

A. Creation of Trust Documents

Mr. Winward and Ms. Goodliffe are siblings and the only children of Richard E. Winward and Myrtle Winward. (R. 213). On September 12, 1980, Richard and Myrtle Winward, with the assistance of Paul T. Kunz, Esq., created separate and reciprocal trust agreements with both Richard and Myrtle serving as co-trustees for each trust. (R. 107; 213-14; 361:17). A copy of the Myrtle Winward Trust is attached as Addendum F and a copy of the Richard E. Winward Trust is attached as Addendum G. On December 29,

1981, Richard and Myrtle amended their trusts because of a change in the law, thereby replacing page 3 of both trusts. (R. 109; 361:34-36; Richard E. Winward Trust, attached as Addendum G).

The Richard E. Winward Trust was originally funded with the following property: \$25.00, three tractors, 11 shares of water stock, 400 shares of common stock of Winward Electric Services, Inc., 50 shares of common stock of Texaco, Inc., and a parcel of real property. (R. 361:45-46; Schedule A to Richard Winward Trust, attached as Addendum G). The Myrtle Winward Trust was originally funded with \$25.00 cash. (R. 125). Richard and Myrtle Winward also executed pour-over wills that allowed for any of their assets not previously placed in their trusts to automatically go into their respective trusts when each died. (R. 213-14).

According to language in both trusts, upon the death of either trustor, the deceased person's trust would be converted into two separate trusts—one a marital trust for the surviving spouse, funded in an amount to achieve the greatest tax benefit, and one a residual trust for the benefit of the parents' two children, Kenneth and Geraldine. (R. 214). Article II, paragraph 5 of both trusts provides that “[a]ssets received from the Trustor by any of the Trustor's children by means other than the express conditions of this instrument, such as through life insurance beneficiary arrangements, joint tenancy survivorship, or express advancements, shall be taken into account in making [an] equal division” to the trustor's children. (R. 111, 214).

Mr. Kunz testified at trial that he reviewed the above provision with the Winwards, as was his practice with other clients. (R. 361:30-31). Mr. Kunz said,

I may make gifts through the years as a parent, but if I have a particular gift that I want to be taken into consideration in the disposition of this trust, then I say to them [my clients] “You should write on a slip of paper or someplace that ‘I have made an express advancement to Maurice Richards of \$5,000 for a down payment on his home,’ or whatever it is, ‘to be taken into consideration in allocating my trust shares among my children.’” And I tell them, “Just write something simple like that and then that will be taken into consideration. If you make gifts without doing that, they won’t be taken into consideration . . . under the trust because they’re—they’re outright gifts. And most people don’t keep track of them because they’d be so burdensome.

(R. 361:29).

The Myrtle Winward Trust does not refer specifically to any gifts, loans, or advances that should be deducted from Mr. Winward’s share as a trust beneficiary. (R. 107-26).

B. Death of Parents and Trustee Succession

Richard Winward died on August 1, 1992. (R. 214). Thus, the assets in his trust funded a marital trust for Myrtle with the residual to benefit Mr. Winward and Ms. Goodliffe. (R. 214). After their father’s death, Mr. Winward and Ms. Goodliffe became joint co-trustees of the Richard E. Winward trust with Myrtle. (R. 122, 215, 361:38-40; Addendum G (last page)). Mr. Winward and Ms. Goodliffe accepted the appointments to serve as trustees of the Richard E. Winward Trust on April 30, 1993. (R. 361:38-40; Addendum G (last page)). As trustees of the Richard E. Winward trust, Myrtle, Mr. Winward, and Ms. Goodliffe had authority to disperse up to the entire amount of the marital trust corpus to Myrtle for her support and maintenance (according to her accustomed standard of living) and were to pay marital trust income to Myrtle on at least a quarterly basis. (R. 110).

Following Richard's death, Myrtle continued to act as trustee of the trust in her name. (R. 122). The evidence is unclear as to *when* Mr. Winward and Ms. Goodliffe became trustees of the Myrtle Winward Trust, but some evidence suggests this did not occur until Myrtle's death. The Myrtle Winward Trust states that "[i]n the event of the death . . . of a trustee other than the Trustor, the Trustor shall have the right to select a substitute Trustee." (R. 122). The trust did not expressly mandate a substitute trustee upon the death of co-trustee Richard Winward. (R. 122). Ms. Goodliffe's counsel argued that "under the trust of Myrtle, they [Mr. Winward and Ms. Goodliffe] also became trustees upon Richard's death because—the attorney testified specifically that was the case[.]" (R. 362:324). This statement by counsel, however, misconstrued the testimony of Mr. Kunz, who confirmed in answering a hypothetical that Mr. Winward and Ms. Goodliffe would become successor trustees of Myrtle's trust when Myrtle (the trustor) dies. (R. 361:25-26). Ms. Goodliffe's counsel stipulated that she became a trustee of the Myrtle Winward Trust when Richard Winward died. (R. 361:223). Yet, the only documentary evidence produced on the subject was a document showing the parties' acceptance of their appointment as trustees of Richard's trust in 1993. (R. 361:38-40). No documentary evidence was presented to show the time at which the parties became joint trustees of the *Myrtle Winward Trust*. (R. 361:38-40). The trial court found that "once Richard died, then both children became joint trustees with their mother" but the court did not indicate to which trust he was referring or a point in time. (R. 362:343).

Myrtle Winward died on June 23, 1999. (R. 214). When Myrtle died, Mr. Winward and Ms. Goodliffe were appointed joint successor trustees of the Myrtle

Winward trust and continued as co-trustees of the Richard E. Winward residual trust. (R. 122; 215). Mr. Winward and Ms. Goodliffe were the only living beneficiaries of the Myrtle Winward Trust and the Richard E. Winward Trust. (R. 118; Addendum G). The trial court found that the assets remaining in both trusts were to be distributed equally to Richard and Myrtle's children upon Myrtle's death. (R. 214).

C. Legal Proceedings to Enforce Sale of Trust Property and for Accounting

In the years preceding Myrtle's death, she distributed various amounts of money and property to her two children, in the form of gifts and/or loans. (R. 361:212, 232-33; 362:296-97). Mr. Winward admitted that he borrowed from his mother \$228,494 that came from her trust assets. (R. 361:52). Moreover, after Myrtle Winward's death, the parties each received personal property from her trust without requiring an accounting or contribution from the other. (R. 219). For example, Ms. Goodliffe had joint checking accounts with Myrtle at Washington Mutual and the Bank of Utah, containing collectively \$60,000 to \$70,000 at the time of Myrtle's death. (R. 361:44). Disputes arose between the children after Myrtle's death regarding the allocation of trust funds and trust property. (R. 3-4, 11-12).

Six years after his mother's death, Mr. Winward initiated a lawsuit to request an accounting from Ms. Goodliffe, the co-trustee of the Myrtle Winward Trust, and to enforce the sale of certain real property that was in Myrtle's trust. (R. 1-8). The Richard E. Winward Trust is not at issue in the present appeal nor was it the subject of the underlying lawsuit. (R. 361:5-6). Rather, the issues before the trial court involved only

an accounting, determination, and enforcement of beneficiary rights under the Myrtle Winward Trust. (R. 192; 361:5-6; 365:74-75). Specifically the court was asked how to distribute the remaining trust property to the beneficiaries. (R. 365:74-75). Even though the Myrtle Winward Trust was not a named party to the dispute (R. 365:74), the Complaint and Counter-complaint sought relief under the Myrtle Winward Trust alone. (R. 4, 11). Prior to trial, the Mr. Winward made a motion in limine

for an Order to limit the evidence to be introduced at trial to the items raised in the trust itself or the Complaint and now [sic] allow any evidence related to personal property that was not transferred into the Trustee's name by the Trustor prior to her death, or gifts made to either party that were not designated in writing signed by the Trustor as express advancements or insurance or joint tenancies in accordance with the terms of the trust[.]

(Motion for Limiting the Evidence that May Be Introduced at Trial, attached as Addendum A). The trial court received but did not rule on Mr. Winward's motion. (R. 149, 361:13).

D. Trial and Judgment

Following a two-day trial on April 7-8, 2008, the trial court valued the Myrtle Winward Trust at \$223,441, finding that the trust assets included "6.5 acres of real property valued at \$196,000, six shares of water stock[,], and undistributed trust funds." (R. 218). The trial court also found that Mr. Winward breached his fiduciary duties as trustee. (R. 219). Specifically the court stated:

Plaintiff [Mr. Winward] received monies from the [Myrtle Winward] trust without the knowledge or consent of the Defendant [Ms. Goodliffe]. The use of the trust assets by Kenneth E. Winward without the consent and knowledge of Geraldine Goodliffe, was a breach of Kenneth Winward's duties as a trustee, and constituted a defalcation or misappropriation of trust funds while acting in his fiduciary capacity as a trustee.

(R. 215).

1. Admission of inadmissible evidence

At trial, Mr. Winward's counsel made, and the trial court allowed, a continuing objection to the introduction of evidence and testimony concerning financial transactions that were "in gifts or loans that were not documented in the trust[.]" (R. 361:92). Mr.

Maurice Richards, attorney for Mr. Winward, subsequently argued that

there's no evidence that's been presented at all that shows that any of this money was ever in the trust. I think the evidence is that the parents were making specific monies out of their own personal assets that they had not transferred into the trust . . . and there's got to be proof that these monies at one time were trust assets, not individual assets of Richard or Myrtle Winward.

(R. 361:109-110).

Mr. Winward's counsel also objected, on relevancy grounds, to the introduction of Defendant's Exhibit 3, a series of handwritten notes and computations supposedly made by Myrtle Winward. (R. 361:106-07; Trial Ex. 3, attached as Addendum H). Although some of the notes include a series of dates with dollar figures, none of the notes themselves are dated. (Addendum H). Moreover, no testimony was given as to the time the notes were made. (R. 361:94-110). The court overruled Mr. Winward's objection to Exhibit 3 without examining the relevancy or authenticity of each check or note because Ms. Goodliffe "made sufficient showing that some of these monies were taken out of some sort of an account that was listed as trustees." (R. 361:110). Similarly, the court received Exhibit 4, handwritten notes supposedly made by Richard Winward, subject to

Mr. Winward's continuing relevancy objection. (R. 361:121-22; Trial Ex. 4, attached as Addendum I).

Ms. Goodliffe's counsel offered and the trial court received as Exhibit 13 a notebook (Book No. 2) with 24 separately tabbed exhibits. (R. 157, 361: 151-201). Exhibit 13 was received over Mr. Winward's continuing relevancy objection to its introduction. (R. 361:58, 152). The contents of Exhibit 13 included handwritten notes, copies of checks, loan documents, correspondence, and title abstracts. (R. 269, Trial Ex. 13, attached as Addendum J). None of the notes state that a gift is to be deducted from Mr. Winward's inheritance under the Myrtle Winward Trust or expressly indicates an advancement. (Addendum J). In fact, many of the handwritten notes were identified as that of Richard Winward, Ms. Goodliffe, or Beth Winward—not Myrtle Winward. (R. 361:151-201). Several of the notations lack a date, signature, and, in some cases, any identifying information whatsoever. (R. 269, Exhibit 13: Tabs 4, 5, 14, 18, 19, 22, attached as Addendum J). Moreover, the contents of tabs 9-12, 15, and 22 were not offered or received by the court. (R. 361:4, 151-201). Yet, the trial court relied on the chart summarizing all the tab contents and charged Mr. Winward with payments listed thereon without regard to whether any evidence supported such charges and in spite of the fact that certain evidence considered by the court was never properly offered to or its reliability determined by the court. (R. 193, 198).

2. Interpretation of the Myrtle Winward Trust

Testimony at trial indicated that the Myrtle Winward Trust and Richard E. Winward Trust, though reciprocal, were entirely separate and did not pour over into one

another. (R. 361:31-38; 362:317-18). In spite of that testimony and without any factual or legal support, the trial court judge ruled from the bench:

I don't think we can use just one trust and ignore the other two, because the two that you want to ignore were already fixed. Mr. Winward had already died and his trust had come into effect, so I just simply think that we can't ignore them both.

Plus both trusts were mutual and they were reciprocal and they play off each other. And that brings into account the things that Mr. Echard [Ms. Goodliffe's counsel] has raised in regards to the breach of trustee.

(R. 362:343).

The trial court concluded that Myrtle Winward intended to treat her children equally and ruled that "all of the assets from the Richard E. Winward trust and the Myrtle Winward trust that were not used by Myrtle Winward during her life were to be distributed to the children equally after the death of Myrtle Winward, which was June 23, 1999." (R. 214). Accordingly, "any other transfers of property that occurred between the trustor and the children, shall be taken into account in determining an equal distribution." (R. 214-15). The trial court interpreted language in the Myrtle Winward Trust to mean that beneficiary arrangements, joint tenancy survivorships, and expressed advancements "are only illustrative of the possible transactions that could occur between the trustor and his or her children." (R. 215).

In discussing the evidence of funds transferred to or on behalf of Mr. Winward, the court acknowledged that "[t]here's no law as to whether there's a presumption that these are a gift or a loan. He may not be obligated in some instances to pay it back and they simply off—act as an offset and should be taken into account." (R. 341-42). The court also recognized that the trust speaks only "in terms of advancements, not loans."

(R. 218). Yet, without analyzing whether the evidence supported a finding of a legal advancement, the trial court justified its position as serving equity: “Equitably it doesn’t make any sense, in interpreting the provisions of this trust, why they [Richard and Myrtle] would gift him [Mr. Winward] hundreds of thousands of dollars and their daughter somewhat less.” (R. 362:342).

3. Findings on advancements

The trial court found that Ms. Goodliffe received no advancement of trust monies. (R. 218). In contrast, the court concluded that Mr. Winward received advancements of trust monies in the total amount of \$630,443, for which he owes the Myrtle Winward Trust \$216,201 plus interest. (R. 216, 218-19). Even though no evidence was offered or received regarding a contemporaneous writing from Myrtle meeting the legal requirements for an advancement, the trial court stated:

Clearly, there was some anticipation that these were either a loan or that they were going to be accounted for eventually. His parents—even his father and his mother went to great lengths to record the monies that were given to Mr. Winward. Equitably it doesn’t make any sense, in interpreting the provisions of this trust, why they would gift him hundreds of thousands of dollars and their daughter somewhat less.

Also, it doesn’t make sense to me why the parents would take out loans to make [Mr. Winward] a gift. That is more supportive that it was anticipated that these things would be accountable for.

(R. 362:342).

In calculating the total amount of advancements, the trial court found that Mr. Winward received \$201,804.28 in connection with the Club Manhattan (discussed hereafter) from August 1987 to the year 1992. (R. 215). The court also charged Mr. Winward with \$228,494.79 received from the sale of Myrtle Winward’s home, which

debt Mr. Winward admitted in his Complaint and by way of stipulation. (R. 3, 193). Finally, the court identified and accepted as advancements miscellaneous payments allegedly made to or on behalf of Mr. Winward between 1987 and 1991 in the amount of \$200,143.93. (R. 198, 216).

The court's findings implicitly recognize that certain payments to Mr. Winward are exempt from "advancement" status, such as the "personal check written by Myrtle Winward to Kenneth Winward" and a payment made to a third party, both of which were not included in any calculation of advancements. (R. 216). In spite of these deductions, the trial court charged Mr. Winward with numerous other expenses without any evidence that the funds came from the Myrtle Winward Trust, were actually paid to or received by Mr. Winward, or that Mr. Winward was even acting as a trustee during the time the funds were expended. (R. 198, 216; Trial Ex. 13: Tabs 1, 4, 7, 24, attached as Addendum J).

The trial court's findings are devoid of any identification or discussion of a writing supporting an advancement to Mr. Winward. (R. 213-21). Ironically, the court noted that "there is no written forgiveness of all these debts and obligations" while ignoring the requirements for even creating any type of debt or enforceable obligation. (R. 362:342). In spite of the fact that any personal gifts or loans from Richard and/or Myrtle Winward to Mr. Winward have no bearing whatsoever on the debt Mr. Winward may owe to the trust estate, the trial court entered a judgment against Mr. Winward in the amount of \$560,765, which included interest, plus Ms. Goodliffe's attorney fees. (R. 219-20).

4. Club Manhattan

The Club Manhattan is a private club located in Salt Lake City, Utah, which had been owned by Beth Winward, Mr. Winward's ex-wife since 1980. (R. 361:54-56). Beth Winward was at all times the registered owner of the club "on behalf of Myrt and Dick" as evidenced by her own testimony. (R. 361:85, 87, 91). Beth Winward also acted as the president of the Club Manhattan. (R. 267). Although there is testimony that Mr. Winward had some involvement in operating the Club Manhattan, he has at no time been the owner or an officer of the club. (R. 361:56, 85, 87, 91; 267). Further, all documented payments associated with the Club Manhattan were made before Mr. Winward became the trustee of any trust. (R. 198, 361:38-40; Addendum G). Notwithstanding these uncontested facts, more than \$200,000 of the amounts charged against Mr. Winward as advancements were payments from Richard and/or Myrtle Winward for expenses directly associated with and attributable to the Club Manhattan. (R. 198; 215).

E. Post-Judgment Proceedings

Mr. Winward requested a new trial on the grounds that the trial court made an error of law, and specifically an error in applying the law on advancements. (R. 240-41). On May 6, 2009, a hearing was held on Mr. Winward's motion for a new trial or other post-judgment relief. At that hearing, Judge West said in open court and on the record that he did not intend to award a judgment; "[N]owhere in my ruling do I award a judgment because I struggled a little bit with how I could because it's a suit by one individual against another individual, and nothing was brought on the basis of the trust." (R. 365:72-73). Although given the opportunity to correct its error and carry out its

expressed intentions by granting Mr. Winward's motion, the trial court confirmed its prior judgment in a decision issued October 30, 2009. (R. 339-40). Without providing any analysis or discussion, the court stated simply that it was "satisfied that its initial Ruling on 'advancements' was correct." . . . the evidence overwhelmingly supports the fact that these monies were advancements to the Petitioner [sic]." (R. 340).

SUMMARY OF THE ARGUMENT

The trial court committed reversible error through its findings that Mr. Winward received advancements in the absence of any evidence of a contemporaneous writing—either from Myrtle Winward or Mr. Winward. Additionally, the trial court abused its discretion when it accepted and relied on inadmissible evidence, which it then used to the detriment of Mr. Winward. In spite of objections made by Mr. Winward's counsel to its introduction, the irrelevant and unreliable evidence became the basis for a multi-hundred thousand dollar judgment against Mr. Winward. Accordingly, the inclusion of prejudgment interest in the total judgment entered against Mr. Winward was inappropriate and without legal basis. Based on the trial court's clear error of law, it was an abuse of discretion for the trial court to deny Mr. Winward's requests for a new trial or other post-judgment relief and affirm its erroneous ruling on advancements.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT MR. WINWARD RECEIVED \$630,433 IN ADVANCEMENTS.

Although the Richard E. Winward Trust and the Myrtle Winward Trust each included a provision that allowed for "express advancements" to be taken into account

when dividing shares among the beneficiaries (R. 111, 214; Addendum F and G), not all gifts should be considered advancements. Under Utah law, “to qualify as an advancement, the property given must have been owned by the decedent and there must be a writing declaring that the property given was an advancement.” *Young v. Young*, 1999 UT 38, ¶ 24, 979 P.2d 338. In this case, the trial court erred by concluding not once but twice that certain sums of money given to Mr. Winward “were advancements without applying the statutory standard for making such a determination.” *Young*, 1999 UT 38, ¶ 25.

A. There Are No Writings Indicating that All of the Monies Allegedly Received by Mr. Winward Were Advancements.

The Utah Supreme Court has mandated that a contemporaneous writing indicating an advancement is necessary—even when a person dies testate and even when the evidence otherwise suggests an intent to treat all beneficiaries equally. *Young*, 1999 UT 38, ¶ 26 (“Under the Utah Code, the determination of whether an intervivos gift is to be taken into account in the distribution of an estate requires written evidence.”). According to the Utah Code, there are only three ways in which this writing requirement can be satisfied:

Property a testator gave in his lifetime to a person is treated as a satisfaction of a devise in whole or in part only if: (a) the will provides for the deduction of the gift; (b) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise; or (c) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

Utah Code Ann. § 75-2-609 (2009). Thus, if the relevant testamentary document does not specifically reference a gift to be deducted, proof of an advancement requires “either a contemporaneous writing by the testator or acknowledgement by the beneficiary.” See *Young*, 1999 UT 38, ¶ 23 (holding “that the trial court erred in finding that the monies received [by settlor’s children] were advancements against their inheritances” because there was no writing indicating an advancement).

In *Young*, a case strikingly similar to the instant action, a father set up a trust to benefit his wife and five children. *Id.* ¶ 2. The named trustees included the trustor, the trustor’s wife, and the trustor’s oldest son. *Id.* The father/trustor died a couple years after establishing the trust. *Id.* ¶ 5. However, the mother lived for an additional four years, during which time she distributed various money to her children. *Id.* ¶ 6. Some of the children believed the monetary gifts to be advancements that would affect their future inheritance under the trust; however, other children saw the money as an outright gift. *Id.* ¶ 11. Although the trial court treated all the gifts as advancements in order to achieve equality among the children as did the trial court in this case, that portion of the *Young* decision was reversed and remanded. *Id.* ¶¶ 11, 26.

Similarly, in this case there has been disagreement about whether certain monies received by Mr. Winward should be charged against his inheritance under the trust at issue. (R. 3-4, 11-12). The law is clear that without writing—either from Mr. Winward or from the donee of the funds (Myrtle) made contemporaneously—none of the funds transferred to Mr. Winward prior to Myrtle’s death qualify as advancements as a matter of law. *Id.* ¶ 26. In spite of this, the trial court not only once but twice found that Mr.

Winward had received advancements in the absence of any legally recognized writing in support. (R. 216, 218-19, 339-40). The trial court was dead wrong in both instances. The trial court's findings are "devoid of any analysis concerning the statutory criteria for advancements," and, therefore, cannot be upheld. *Young*, 1999 UT 38, ¶ 25. Mr. Winward challenges the trial court's finding that he received advancements in the amount of \$630,443. In so doing, Mr. Winward marshals the evidence in support of the trial court's finding, which evidence has been cited above in the statement of facts and is further referenced below. *See Young*, 1999 UT 38, ¶ 15 (explaining appellant's burden to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" (quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989)) .

The trial court found that Mr. Winward received an advancement of trust monies based on the fact that his parents kept some financial records of transactions involving or remotely related to Mr. Winward. (R. 362:342). The facts supporting this finding are that Richard and Myrtle "went to great lengths to record the monies that were given to Mr. Winward" and the lack of "written forgiveness of all of these debts and obligations." (R. 362:342). This is a flawed and incorrect finding which directly conflicts with longstanding Utah case law.

1. The Myrtle Winward Trust does not provide for specific deductions from Mr. Winward's equal share as a beneficiary.

According to the Myrtle Winward Trust, the assets remaining in the trust after Myrtle Winward's death "shall be divided into equal shares, one for each of Trustor's children then living, and one for each of the Trustor's children then deceased, leaving living descendents." (R. 111; Addendum F). In calculating those equal shares, the trust directs that "[a]ssets received from the Trustor by any of the Trustor's children by means other than the express conditions of this instrument, such as through life insurance beneficiary arrangements, joint tenancy survivorship, or express advancements, shall be taken into account in making such equal division." (R. 111; Addendum F). Yet, the trust does not refer specifically to any gifts, loans, or advances that should be deducted from Mr. Winward's share as a trust beneficiary. Accordingly, any gifts or money advances which Mr. Winward may have received during his lifetime from Myrtle or Richard Winward cannot be deducted from his inheritance based on the trust language alone without a contemporaneous writing from Myrtle Winward or a written acknowledgement from Mr. Winward—neither of which exists.

2. Myrtle Winward made no contemporaneous writings indicating an advancement to Mr. Winward.

The evidence presented by Ms. Goodliffe supporting the judgment against Mr. Winward included a variety of handwritten notes, some allegedly made by Myrtle Winward. (Addendum J). Even assuming arguendo that these notes were actually made by Myrtle Winward and that they actually document the representations of certain witnesses, there is no proof that these writings were contemporaneous with the transfer of

property from Myrtle to Mr. Winward. (Addendum J). The payments improperly charged against Mr. Winward were made between 1987 and 1991. (R. 198; Addendum J). There is no proof that the notes of Myrtle Winward occurred contemporaneously with those payments or transfers. (Addendum J). None of the handwritten notes are dated; at best, some of the notes include a series of dates with dollar figures. (Trial Ex. 13, attached as Exhibit I). Moreover, although some testimony was given as to the timing of financial transactions, no testimony was given as to the time the notes—used to charge Mr. Winward with a debt—were actually made. (R. 361:94-110).

Equally as important, none of the handwritten notes or check copies bear a declaration that the corresponding amount is to be deducted from Mr. Winward's inheritance under the Myrtle Winward Trust. (Addendum J). Therefore, without evidence that the notes were made contemporaneously with the property transfer and without a declaration within the writing specifically stating that the property given is to be deducted from a future devise, the writings of Myrtle Winward that were introduced at trial do not establish that an advancement was made to Mr. Winward.

To reach what it considered an equitable result, the trial court charged Mr. Winward with numerous expenses paid by Richard and Myrtle Winward. (R. 362:342). Yet, in so doing, the trial court failed to follow the law on advancements. Whether equity would require the conclusion adopted by the trial court is completely irrelevant. Either the monies given to both children were "advancements" meeting the long-established legal requirements or they were not. In short, the trial court gave weight to insufficient writings, without engaging in the required statutory analysis.

Because the trial court ignored the necessary requirements for finding advancements to Mr. Winward, the court also justified its judgment against Mr. Winward through a finding that he breached his fiduciary duties as a trustee by defalcating funds from the Myrtle Winward Trust. (R. 215, 219). Interestingly, Mr. Winward was not a trustee of either trust until 1993 (R. 122, 215,, 361:38-40; Addendum G (last page)); yet, more than \$400,000 of the sums charged against him—and all of the improperly charged sums—were payments made before 1992. (R. 198, 215-16). Further, many of the payments charged against Mr. Winward did not even come from trust funds but rather came from Richard and Myrtle Winward individually. (Addendum J). Under the clear legal requirements of *Young* and Utah law, those charges must be set aside and deleted.

3. The only written acknowledgement from Mr. Winward relates to proceeds received from Myrtle Winward's home.

In Mr. Winward's Complaint he admitted that he received money from the sale of Myrtle Winward's home to "pa[y] off a trust deed note secured by a trust deed in the amount of \$228,494.79, which is agreed that it was the Trustee, Kenneth E. Winward's debt." (R. 3). This document is a writing. And it acknowledges that a certain amount is to be deducted from Mr. Winward's devise under the Myrtle Winward trust. Specifically, Mr. Winward stated, "Defendant, Geraldine W. Goodliffe is entitled to receive the first \$228,494.79 from the liquidation of the Trust assets." (R. 3). This written acknowledgement was sufficient to allow the trial court to charge Mr. Winward with \$228,494.79 in advancements but no more than that amount.

4. *Expenses attributable to the Club Manhattan which Richard and Myrtle may have paid cannot be deemed advancements to Mr. Winward.*

“The general rule is that a corporation is an entity separate and distinct from its officers, shareholders and directors[.]” *Dygert v. Collier*, 2004 UT App 25, 2004 WL 253554, *1 (Utah Ct. App. Feb. 12, 2004) (quoting *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App.1998)). This means that “no organizer, member, manager, or employee of a company is personally liable . . . for a debt, obligation, or liability of the company.” *Daines v. Vincent*, 2008 UT 51, ¶ 40, 190 P.3d 1269 (quoting Utah Code Ann. § 48-2c-601 (2007)) (finding no evidence that defendant acted “in anything other than a representative capacity”).

In this case, payments made to the Club Manhattan or on the club’s behalf cannot be counted as advancements to Mr. Winward personally because Mr. Winward was never the owner or an officer of the Club Manhattan. (R. 361:56, 85, 87, 91; 267). Even if Mr. Winward had been an owner or officer of the Club Manhattan, which he was not, the club is and was its own separate entity. (R. 361:54-56). Moreover, the club was at all relevant times owned by Beth Winward, who was not Mr. Winward’s wife at the time she took ownership and who was under no obligation to assume the role of owner. (R. 361:54-56, 85, 87, 91). Beth Winward testified that she owned the Club Manhattan on behalf of “Myrt and Dick.” (R. 361:85). Thus, any financial contributions made by Richard and Myrtle to the Club Manhattan were their personal decision, made at their own discretion, and do not qualify as advancements to Mr. Winward. In spite of any involvement Mr. Winward may have had in operating the Club Manhattan and regardless if Mr. Winward

requested that his parents contribute money to the Club Manhattan, payments made on the club's behalf cannot be deemed personal advancements to him.

It is also noteworthy that all the payments made toward the Club Manhattan for which Mr. Winward was held responsible occurred before Richard's death and before Mr. Winward became a trustee of the Myrtle Winward Trust. (R. 198, 361:38-40; Addendum G (last page)). "The law is without exception that a trustee is not liable to a beneficiary for a breach of trust committed by a predecessor trustee." *City of Fairview Okla. v. Norris*, 234 F.2d 199, 203 (10th Cir. 1956). Some evidence was presented to the trial court that Richard and Myrtle Winward, as trustees, made payments on behalf of the Club Manhattan. (Trial Ex. 13: Tabs 1-8, attached as Addendum J). Yet, it is entirely irrelevant to the instant case whether these payments of expenses were proper allocations of trust funds because Mr. Winward was not a trustee of any trust at the time of the payments nor was he the direct recipient of the benefit. (R. 198, 361:38-40; Addendum G (last page); Addendum J). If there was any mismanagement of trust funds prior to the time that Mr. Winward accepted the appointment to serve as trustee, such cannot be held against Mr. Winward. Therefore, the judgment entered by the trial court must be reduced and altered by the amount of all club expenses the court attributed to Mr. Winward as advancements or otherwise.

B. The Court's Findings Do Not Indicate Whether the Proceeds Allegedly Advanced to Mr. Winward Were Trust Property or Individually Owned by Myrtle Winward.

The law regards as different the personal property of a settler/trustor and the property contained in a trust: "[O]nce the settlor has created the trust he is no longer the

owner of the trust property and has only such ability to deal with it as is expressly reserved to him in the trust instrument.” *Davis v. Young*, 2008 UT App 246, ¶ 18, 190 P.3d 23 (quoting *Flake v. Flake*, 2003 UT 17, ¶ 12, 71 P.3d 589).

In this case, the trial court’s final decisions failed to distinguish between the two possible sources from which Mr. Winward could receive monies. (R. 192-98, attached as Addendum C; R. 213-24, attached as Addendum D; R. 339-41, attached as Addendum E). It appears that Myrtle Winward the individual and the Myrtle Winward Trust were treated by the trial court as one in the same. According to the law, any disbursements of property from the Myrtle Winward Trust would be governed by the trust instrument itself. In contrast, Myrtle Winward had discretion during her lifetime to use and transfer her individually-owned property that was not part of the trust res. The trial court’s refusal to distinguish between the sources of money allegedly transferred to Mr. Winward skewed its findings on advancements. Although transfers made by Myrtle to her children from her personal assets could be deemed advancements of her children’s inheritance, such would need to be shown through a qualifying writing. Moreover, any loans made to Mr. Winward are relevant only insofar as the loans were made from the trust estate. Any personal loans from Richard and/or Myrtle Winward to Mr. Winward have no bearing whatsoever on the debt Mr. Winward may owe to the trust estate. In any event, the writing requirement for a finding of advancements has not been satisfied in this case.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING AND RELYING ON INADMISSIBLE EVIDENCE OVER THE OBJECTION AND CONTINUING OBJECTION TO SUCH EVIDENCE.

A. Exhibits 3, 4, and 13 Were Not Legally Admissible Nor Was the Testimony About Such Exhibits.

The trial court received evidence which was clearly inadmissible on numerous grounds including a lack of foundation, irrelevancy, and hearsay based on the fact that certain documents were out-of-court statements offered to prove a liability against Mr. Winward. Specifically, the trial court abused its discretion in receiving Exhibits 3, 4, and 13 when such contained handwritten notes and documents which were not properly authenticated, lacked any foundation, and which had no relevancy to any issue in this action.

“The general rule governing the admissibility of writings or other documentary evidence is that the proponent, prior to introducing such evidence, must first authenticate the evidence by showing that it is what the proponent claims it to be.” *State v. Jacques*, 924 P.2d 898, 901-02 (Utah Ct. App. 1996); Utah R. Evid. 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). As it relates to the authentication of handwriting, a non-expert may state his or her opinion if “first, that the witness is shown to be familiar with the handwriting, and second, that it is established the witness’s familiarity was not gained for purposes of the litigation.” *State v. Jacques*, 924 P.2d 898, 901 (Utah Ct. App. 1996). Even when a document has been authenticated, that completes only step one. The document must also

be relevant to the case at hand meaning it has “any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Utah R. Evid. 401.

In this case, although Ms. Goodliffe and Beth Winward identified the handwriting of certain documents and even established a simple chain of custody for some of the documents, authentication was not complete on any exhibit. (R. 361). One is left wondering whether certain writings have any connection to the issues involved in this case when no foundation was laid as to when the writings were created, what the writings represent, and how the writings pertain to the Myrtle Winward Trust. The contents of trial Exhibits 3 and 4, for example, are not dated. (Addendum H-I). Even if the writings were actually made by Myrtle and Richard respectively, there is no evidence when these writings were created and for what purpose. (Addendum H-I). A shopping list, budget sheet, or board game score sheet could be interchangeable with the documents received by the trial court because there is no context for the proffered evidence. Further, the checks and payments related to the Club Manhattan have no bearing on the trial court’s determination of what the parties should each receive under the Myrtle Winward Trust. The evidence related to the Club Manhattan does not make it more or less probable that the parties breached their duties as trustees because the transactions predated the assumption by Mr. Winward and Ms. Goodliffe of the role of trustees. Moreover, the Club Manhattan evidence does not impact the determination of the amount each beneficiary is entitled to receive under the trust. In its discretion, the court should have

excluded evidence that was not adequately identified, for which no foundation was laid and which totally lacked relevancy.

B. Mr. Winward's Counsel Made Timely and Specific Objections to Improper Evidence.

“[I]n order to preserve a contention of error in the admission of evidence for appeal, a [party] must raise a timely objection to the trial court in clear and specific terms.” *State v. Schreuder*, 726 P.2d 1215, 1222 (Utah 1986) (refusing to address evidentiary issues where no objections were made at the trial court level); *see also* Utah R. Evid. 103(a) (2009) (requiring that “a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”).

Here, Mr. Winward has preserved his contention of error because his counsel made numerous objections throughout the trial in an effort to exclude inadmissible and prejudicial evidence. First, when Ms. Goodliffe's counsel began to elicit testimony based on Book No. 2, or what was formally introduced and received as Exhibit 13, counsel made and was granted a continuing objection regarding the admissibility of and testimony about Exhibit 13. (R. 361:57-58, 152). Mr. Winward's counsel made a second continuing objection “as to any money that was in gifts or loans that were not documented in the trust,” which objection the trial court also sustained. (R. 361:92). Additionally, Mr. Winward specifically objected to the materiality and relevance of trial Exhibits 3, 4, and 13. (R. 361:106-07, 121-22, 152). Nonetheless, the trial court overruled these objections and ultimately received nearly all of Ms. Goodliffe's proffered evidence.

(R. 157; 361:110, 121-22, 151-201). Mr. Winward's counsel filed a motion in limine seeking to limit the evidence which would be introduced at trial. (R. 149; Addendum A). Although the trial court received this motion, it did not rule on it. (361:13). As discussed above, however, the trial court recognized and overruled the objections made on Mr. Winward's behalf to evidence that lacked foundation and relevancy and, in certain instances, constituted rank hearsay.

C. The Trial Court's Error in Allowing Inadmissible Documentary and Testimonial Evidence Was Severely Prejudicial to Mr. Winward.

For an erroneous ruling on evidence to be reversed, one must show that "a substantial right of the party [has been] affected[.]" Utah R. Evid. 103(a) (2009). Otherwise, "[t]he doctrine of harmless error applies to 'errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.'" *State v. Jacques*, 924 P.2d 898, 902 (Utah Ct. App. 1996) (quoting *State v. Villarreal*, 857 P.2d 949, 957-58 (Utah Ct. App. 1993)) (concluding that trial court's error in admitting authentication testimony was not harmless and reversing). An error is not harmless if it affects the outcome of a case.

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

In this case, it is clear that Mr. Winward's rights have been substantially and

adversely affected. He has not only been deprived of assets he might otherwise have received under the Myrtle Winward Trust, but also he has been ordered to pay an inconceivable sum to Ms. Goodliffe based on nothing more than her self-serving testimony and evidence that should have been excluded. The trial court even relied on exhibits which it did not receive at trial to arrive at the amount of its judgment against Mr. Winward. (R. 157, 193, 198).

In order for a written agreement to support a finding that one must answer for another's debt, the Statute of Frauds requires such an agreement to be dated and signed by the party to be charged. Utah Code Ann. § 25-5-4(1) (2009). Such documentation is likewise necessary to hold a person liable for their own debt obligation. *See e.g., Finlayson v. Finlayson*, 874 P.2d 843, 848 (Utah Ct. App. 1994) (stating that trial court's conclusion that certain money represented a loan was based on the existence of a signed and dated note as well as testimony from the debtor).

Without any documentation (i.e. loan papers, mortgage or trust deeds, cancelled checks, etc.) too many questions remain. Were any funds actually delivered? If so, were the funds a loan, advance on an inheritance, or a gift? What was the amount? What were the terms of the repayment and was an interest rate agreed upon?

Godfrey v. Godfrey, 854 P.2d 585, 588 (Utah Ct. App. 1993) (vacating the finding of a lien obligation, which was not supported by a party's bare assertion that an advancement was loaned to him).

Under the law, Mr. Winward cannot be liable for loans purportedly made on his behalf if the only evidence is an isolated dollar amount or mention of his name. In spite of Ms. Goodliffe's identification of her mother's and father's handwriting, it was error

for the court to receive evidence of payments related to the Club Manhattan when such are irrelevant to the share of trust proceeds to which Mr. Winward is entitled. It was additional error for the court to admit into evidence various handwritten notes supposedly made by Richard and Myrtle and then rely on those notes to arrive at its judgment

In sum, had the trial court properly excluded certain exhibits, Mr. Winward would not have been charged with the receipt of hundreds of thousands of dollars plus interest and attorney's fees. The evidentiary rulings in the instant case directly and adversely affected the outcome of this case. To correct the obvious prejudice to Mr. Winward, it is necessary for those rulings to be reversed.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING PREJUDGMENT INTEREST ON THE AWARD GRANTED TO MS. GOODLIFFE.

Prejudgment interest is recoverable only when “the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures.” *In re Fisher Family Inter Vivos Revocable Trust*, 2009 UT App 305, ¶ 25 (quoting *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 28, 133 P.3d 428) (reversing prejudgment interest award because the trial court could not determine a precise date on which loss to the trust occurred). Thus, it must be possible to calculate loss “with mathematical accuracy in accordance with well-established rules of damages.” *Stevensen 3rd East, LC v. Watts*, 2009 UT App 137, ¶ 55, 210 P.3d 977 (quoting *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 51, 210 P.3d 263).

In this case, it was inappropriate to award prejudgment interest because the amount of loss to the trust and/or Ms. Goodliffe could not be calculated with reasonable

certainty. The evidence fails to confirm that Mr. Winward received advancements in the amount charged him. Further, the trial court did not determine what, if any, amounts Mr. Winward actually received from the trust. (R. 192-98, attached as Addendum C; R. 213-24, attached as Addendum D; R. 339-41, attached as Addendum E). Without such determinations, any loss calculations are speculative at best. Finally, the trial court's findings do not fix the amount of loss at a particular time; the findings give a broad stroke date range without stating specifically when certain monies were actually lost. (R. 213-24, attached as Addendum D).

The court calculated prejudgment interest from the date of December 2008; yet, its calculations were based entirely on an unreliable chart prepared by Ms. Goodliffe, which included transfers of Richard's and Myrtle's personal assets. (R. 193, 198). In fact, in overruling Mr. Winward's objection to certain evidence, the trial court acknowledged that only some of the check copies on which it relied were even tied to the trust at all. (R. 361:110). The trial court expressed its assumption that any diminishment of Myrtle's personal assets caused a direct loss to the Myrtle Winward Trust. (R. 214-15; 192-98, attached as Addendum C; R. 213-24, attached as Addendum D; R. 339-41, attached as Addendum E). However, Myrtle Winward did not die until June 23, 1999, at which time her remaining property was to pour into her trust. (R. 214). As such, transfers that Myrtle made from her personal property before her death and without a contemporaneous writing cannot and did not establish a measurable loss to her trust. Because the judgment entered against Mr. Winward in this case was without any basis in law, there can be no award of prejudgment interest.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. WINWARD'S MOTIONS FOR POST-JUDGMENT RELIEF AND A NEW TRIAL.

Under Utah Rule of Civil Procedure 59, trial courts have discretion to grant a new trial “to all or any of the parties and on all or part of the issues” for several enumerated reasons including an error of law. Utah R. Civ. P. 59(a)(7) (2009). Similarly, courts may relieve a party from a judgment for “any other reason” if it is “in the furtherance of justice.” Utah R. Civ. P. 60(b) (2009).

Here, the law and justice not only support but demand the granting of a new trial or relief from the judgment. In spite of the trial court’s repeated statements that it did not intend to award a judgment and its acknowledgement that the Myrtle Winward Trust was not a party to this case (R. 365:71-73, 75-76), the trial court did precisely what it intended not to do—affirmed its original decision wherein it charged Mr. Winward with more than \$600,000 in advancements and required the payback of interest to the trust and payment of Ms. Goodliffe’s attorney’s fees. The findings on advancements are clearly erroneous. The trial court was alerted to its error in applying the law on advancements; yet, it confidently asserted that its original findings were correct. (R. 339-41, attached as Addendum E). Because the trial court refused to grant Mr. Winward the relief to which he is entitled under the law, he now pursues this appeal to correct the trial court’s mistakes.

CONCLUSION

Based on the foregoing, the Appellant Mr. Winward respectfully requests that the judgment and orders of the trial court be reversed and vacated in every respect. Further,

because the errors committed by the trial court cannot be “fixed,” the case should be remanded for a new trial pursuant to the specific statutory and legal requirements hereinabove discussed and reviewed.

Dated this 23rd day of April 2010.

CLYDE SNOW & SESSIONS

A handwritten signature in black ink, appearing to read 'Clark W. Sessions', written over a horizontal line.

CLARK W. SESSIONS

SARAH L. CAMPBELL

Attorneys for Plaintiff/Appellant

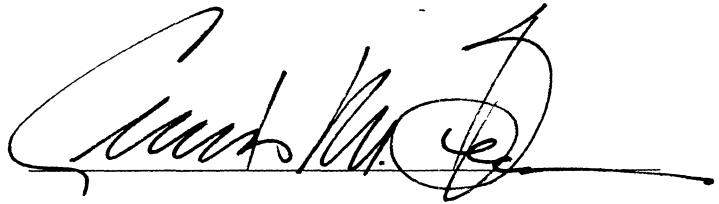
Kenneth E. Winward

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April 2010, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed via first-class U.S. mail, postage prepaid to:

Robert A. Echard
2491 Washington Blvd. #200
Ogden, UT 84401

Attorney for Defendant/Appellee

A handwritten signature in black ink, appearing to read "Robert A. Echard", with a long horizontal flourish extending to the right.