

2009

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

Utah Court of Appeals

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Robert A. Echard; Attorney for Appellee.

Clark W. Sessions; Sarah L. Campbell; Clyde, Snow & Sessions; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

KENNETH E. WINWARD,

Petitioner/Appellant,

vs.

GERALDINE W. GOODLIFFE,

Respondent/Appellee.

BRIEF OF APPELLEE

Appellate Court No. 20090972-CA

BRIEF OF APPELLEE, GERALDINE W. GOODLIFFE

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

CLARK W. SESSIONS #2914
SARA L. CAMPBELL #12052
Attorney for Plaintiff/Appellant
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216
Telephone: (801) 322-2516

ROBERT A. ECHARD #00953
Attorney for Defendant/Appellee
2491 Washington Boulevard, Suite 200
Ogden, UT 84401
Telephone: (801) 393-2300
Facsimile: (801) 393-2340

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CLARK W. SESSIONS #2914
SARA L. CAMPBELL #12052
Attorney for Plaintiff/Appellant
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216
Telephone: (801) 322-2516

ROBERT A. ECHARD #00953
Attorney for Defendant/Appellee
2650 Washington Boulevard, Suite 201
Ogden, UT 84401
Telephone: (801) 393-2300
Facsimile: (801) 393-2340

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DESIGNATION OF PARTIES AND RECORD

The Petitioner/Appellant, Kenneth E. Winward will hereinafter be referred to as *Winward*. Respondent/Appellee will hereinafter be referred to as *Goodliffe*. The Court record contains two complete sets of trial transcripts. The first set was transcribed by Garcia and Love and is referred to as pages 361 and 362 of the record. The second set of transcripts was transcribed by Dean Olsen and are referred to as pages 363 and 364 of the record. There is only one transcript for the Motion for New Trial, which is identified as page 365. The two transcripts of the trial proceedings are typed in a different format and therefore the pages in the first set and the second set of transcripts do not correspond. The Appellant has cited to the first set of transcripts by referring to the record as 361 or 362, then a page of the transcript. The Appellee will follow that same process and cite to the first set of trial transcripts.

STATEMENT OF THE CASE

Richard E. Winward and Myrtle Winward created separate trust agreements on September 12, 1980. Both Richard and Myrtle executed pour-over wills which provided that any of their assets that they had not already placed into the trust would automatically go into the trust upon their death. Both trust agreements provide that upon the death of the trustor, the assets would be divided into two separate trusts. One would be a marital trust for the surviving spouse and the other would be a residual trust for the parents' two children, the Appellant ("Winward") and the Appellee ("Goodliffe"). Richard E.

Winward died on August 1, 1992. Myrtle Winward died on June 23, 1999.

The marital trust which was created for Myrtle Winward upon the death of Richard E. Winward provided that the assets in the marital trust should be distributed to Myrtle Winward upon the conditions and in the same manner as directed in Myrtle Winward's Last Will and Testament. Her Last Will and Testament transfers her assets directly into the Myrtle Winward trust. (Paragraph 4(d) of Richard and Myrtle Winward's trust, Winward's Addendum F and G.) Richard E. Winward's assets which did not go into the marital trust were to go into a residual trust to be distributed equally to the children upon the death of surviving spouse, Myrtle Winward. The assets in the Myrtle Winward trust were to be distributed to the children upon her death. Consequently, all of the assets from Richard Winward and Myrtle Winward that were not used by Myrtle Winward during her life were to be distributed to the two children equally under the death of Myrtle Winward, which was June 23, 1999. (Paragraph 5(e) of Richard and Myrtle Winward's trust, Winward Addendum F & G.)

Both the Richard E. Winward and the Myrtle Winward trusts contain the same language under the residual trust. Paragraph 5 of each trust states that the assets shall be divided into equal shares for each of the trustor's children and **". . . assets 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 distribution. . . .” (emphasis added) On the death of Richard Winward, Myrtle Winward, Goodliffe and Winward became joint trustees of the Richard E. and Myrtle Winward Trusts. (Article 8, para. 1(e)).

During their lifetime, Richard and Myrtle combined their trust and personal assets and held them jointly in various accounts. (Goodliffe, Exhibit C.) After the creation of the trusts by Richard E. and Myrtle Winward, a substantial amount of money was loaned to and provided for the use of Winward. Winward admitted in his complaint and in answer to Goodliffe’s counterclaim that he received \$228,494.79, that was used to pay off a trust deed secured against a home that belonged to the Myrtle Winward trust. In paragraph 7 of Winward’s Complaint, he acknowledges that “Defendant, Geraldine W. Goodliffe, is entitled to receive the first \$228,494.79, from the liquidation of the trust assets.”

Winward, in his Complaint, acknowledges in paragraph 5 the language which requires that assets received from the trustor by any of the children shall be taken into account in making an equal distribution between the children.

As a trustee, Winward owed a fiduciary duty to Myrtle Winward and to Goodliffe and was required to act for the benefit of Goodliffe in his handling with the assets of his father and mother. This he failed to do. He diverted a significant amount of the monies for his own personal use, he failed to repay the monies, he failed to inform Goodliffe that he had and was taking monies from the estate and he failed to keep records of the monies that he had taken for his own personal use. At all times, Goodliffe was an anticipated

beneficiary of both trusts.

In order to accomplish the purpose of the trust, Winward and Goodliffe are required to account for the value that they have received from their parents' assets prior to distribution of the trust. Those assets should be added to the assets of the trust and the total divided equally to each child. This results in Goodliffe keeping the current trust assets and Winward paying a significant amount of money to the Goodliffe to equate the receipt of assets between the children.

REPLY TO APPELLANT'S STATEMENT OF THE CASE

Winward's statement of the case consists of a number subsections beginning on page 3 through page 17 of the Appellant's brief. Winward's assertions, conclusions and statements of fact are listed at random throughout this section. They are not accurate and not supported by the record. Some, but not all of these assertions are included in the Appellee's argument. It is difficult for Goodliffe to organize Winward's random assertions. However, Goodliffe does not agree with many of the assertions and statements of fact. Each of these issues will be dealt with in the argument section of this brief.

STATEMENT OF FACTS

1. Winward and Goodliffe are siblings, and the children of Richard E. Winward and Myrtle Winward. (Findings of Fact, ¶1, Winward's Addendum D.)
2. Richard E. Winward and Myrtle Winward created separate trust agreements on September 12, 1980. Richard and Myrtle Winward executed pour-over wills, which provided that any of their assets that they had not already placed into the trust would automatically go into the trust upon their death. Both trust agreements provided upon the death of the trustor, the assets would be divided into two separate trusts. One trust would be a marital trust for the surviving spouse, and the other would be a residual trust for the parties' two children. (Findings of Fact, ¶2, Winward's Addendum D.)
3. Richard E. Winward died on August 1, 1992. Myrtle Winward died on June 23, 1999. (Findings of Fact, ¶3, Winward's Addendum D.)
4. Richard Winward's assets, which did not go into the marital trust for the benefit of his spouse who survived him were to go into a residual trust to be distributed equally to the children. The assets in the residual trust created by Richard Winward were to be distributed to the children upon the death of the surviving spouse, Myrtle Winward. The assets in the

Myrtle Winward trust were to be distributed to the children upon her death. Consequently, 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. (Findings of Fact, ¶4, Winward's Addendum D.)

5. Paragraph 5 of both the Richard Winward and Myrtle Winward trusts states in part as follows, "Assets received from the trustor by any of the trustee's children, by means other than the expressed conditions of this instrument, such as through life insurance, beneficiary arrangements, joint tenancy survivorship, or expressed advancements, shall be taken into account in making such equal distribution..."

(Findings of Fact, ¶5, Winward's Addendum D.)

6. On the death of Richard E. Winward, Myrtle Winward, Goodliffe, and Winward became joint trustees. On the death of Myrtle Winward, Goodliffe and Winward were the joint trustees. (Findings of Fact, ¶7, Winward's Addendum D.)

7. Between May 5, 1994 and December 29, 1998, Winward received \$228,494.79 associated with Myrtle Winward's home. Winward, in his pleadings, admitted that he received \$228,494.79 on Myrtle Winward's

home and was obligated to pay it to the trust. (Findings of Fact, ¶10, Winward's Addendum D.)

8. One of the trust assets was 6.5 acres of real estate located in North Ogden, Weber County, State of Utah. This property was appraised at a value of \$196,000. (Findings of Fact, ¶15, Winward's Addendum D.)
9. Goodliffe, as a trustee, incurred administrative fees for the trust of \$25,400. These fees were not contested. (Findings of Fact, ¶19, Winward's Addendum D.)
10. After the death of Myrtle Winward, both Winward and Goodliffe received miscellaneous personal property from the trust. During the course of the trial, both the Winward and Goodliffe stipulated that they would each keep the miscellaneous personal property without requiring an accounting or contribution from the other.
11. Between August 1987 and June 1998, Winward received the assets listed on the schedule attached to Judge West's decision of November 3, 2008. Judge West did not award damages for the entry of 1992 in the sum of \$69,000 or the entry number 16 of August 23, 1998 in the sum of \$2,516. Judge West also reduced the sum listed under Myrtle Winward's home from \$235,000 to \$22,8494.78. (Record 0192 and 0198, Winward's Addendum E.)

SUMMARY OF ARGUMENT

POINT ONE: Terms and Application of the Richard E. Winward and Myrtle

Winward Trust: The terms of the Richard E. Winward and Myrtle Winward Trusts required that all assets they received from their parents be taken into account in making an equal distribution of the trust assets.

POINT TWO: The Trial Court did not Abuse its Discretion in Admitting and

Relying on Evidence Presented by Goodliffe. During the trial, Winward only objected to evidence because of its relevancy. The Court ruled that the evidence was relevant. No other objections were made as to any of the testimony or exhibits received during the trial. Specifically, Winward did not object to the lack of foundation, hearsay or lack of authentication. Objections may not be made for the first time on appeal.

POINT THREE: Statute of Frauds: The Statute of Frauds is an affirmative defense.

Winward did not assert the Statute of Frauds as a defense in his pleadings or during the course of the trial and may not raise it for the first time on appeal. The Statute of Frauds does not apply to the issues in this case.

POINT FOUR: Payments Made to or for Winward on the Club Manhattan.

Winward obtained monies from his parents to invest in the Club Manhattan. Winward's former wife, Beth Winward was asked to act as a figurehead for the company. The company belonged to Winward and he is required to account for the monies he received

from his parents to invest in the club.

POINT FIVE: Division of Personal Property: Winward and Goodliffe stipulated during the trial that each would keep the personal property they had received from their parents' estate without being required to account for it.

POINT SIX: Advancements: A legal advancement, as defined in the Utah Code is a gift that is documented in writing. Winward testified that he did not receive any gifts from either of his parents. Judge West found that the assets received by Winward were not gifts, but were loans or assets which Winward was required to repay. Judge West did use the word, "advancements" in his Findings and Ruling. However, Judge West's comments clearly demonstrate that he was not talking about an advancement in the legal sense, but merely referring to assets that had been received by Winward from the trust.

POINT SEVEN: Pre-Judgment Interest: The judgment against Winward was measurable by facts and figures, was fixed as of a particular time and was complete. Therefore, the legal pre-judgment interest of 10% per annum applied to Winward's obligation to the trust.

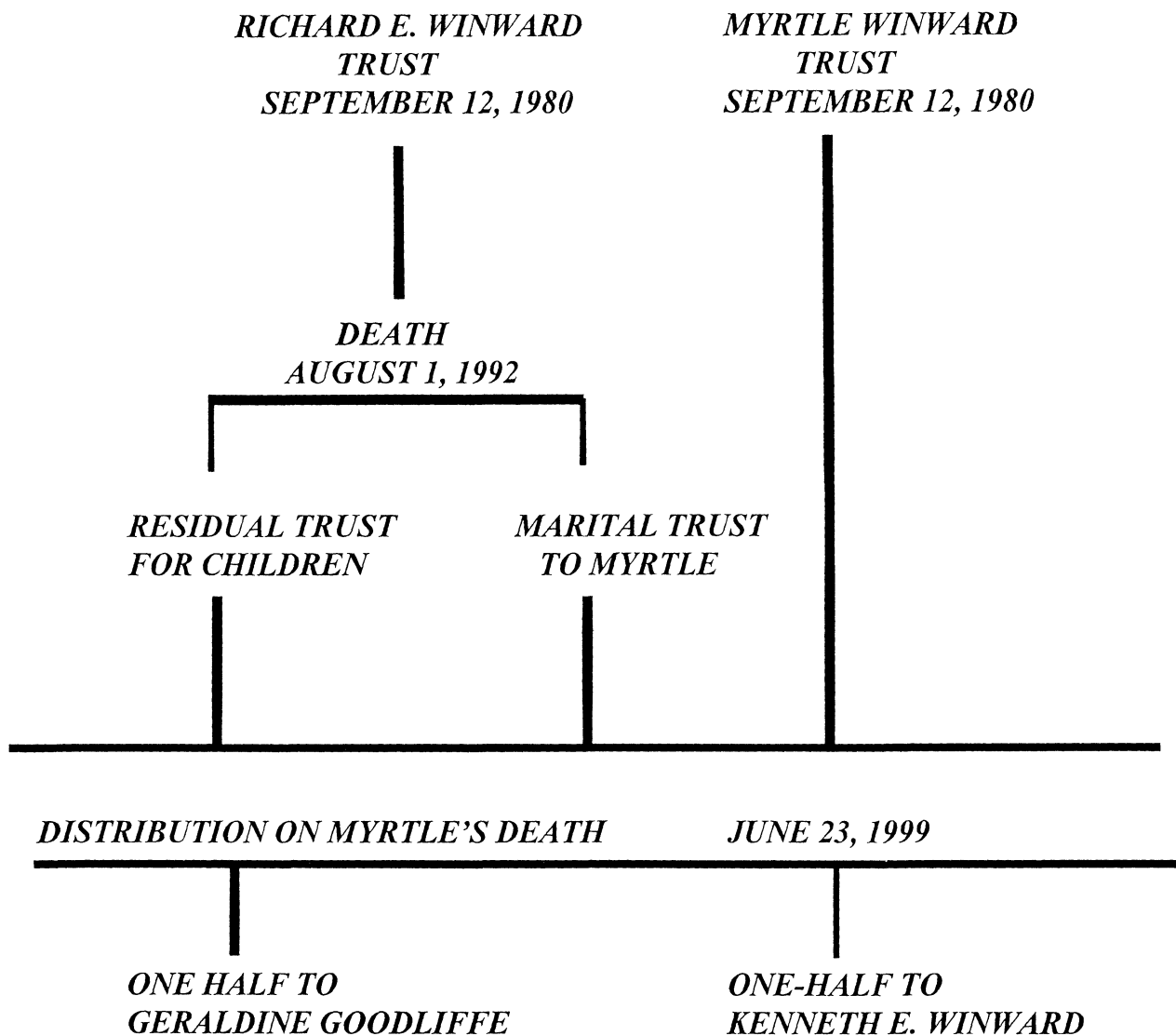
POINT EIGHT: Failure to Marshal Evidence: Winward failed to marshal the evidence in support of Judge West's Findings, therefore, this Court should reject Winward's claim that the Court's Findings are clearly erroneous.

ARGUMENT

POINT ONE

TERMS AND APPLICATION OF THE RICHARD E. WINWARD AND MYRTLE WINWARD TRUST

Richard E. Winward and Myrtle Winward were the parents of Kenneth E. Winward, (Winward) and Geraldine Goodliffe (Goodliffe) Richard E. Winward and Myrtle Winward created separate trust agreements on September 12, 1980. (Winward's Addendum F & G.) The trust agreements were identical. Both trust agreements provided that upon the death of the trustor, the assets would be divided into two separate trusts. One would be a marital trust for the surviving spouse and the other would be a residual trust for the parents' two children, Winward and Goodliffe. Both Richard and Myrtle executed pour-over wills that provided that any of their assets that had not been placed in the trust would automatically go into the trust upon their death. Richard E. Winard died on August 1, 1992 and Myrtle Winward died on June 23, 1999. Both the Richard E. Winward and the Myrtle Winward trust, provided that the parties' assets, whether placed in the trust, or poured over from their wills would be distributed to the parties' children upon the death of the last survivor. In this case, upon the death of Myrtle Winward. See the following chart:



Myrtle Winward's Last Will and Testament transferred her assets directly into the Myrtle Winward trust. (Paragraph 4(d) of Richard E. Winward's trust, Winward's Addendum F & G). Richard E. Winward's assets which did not go into the marital trust, including the assets covered by the pour-over will, were to go into his residual trust which would be distributed equally to the children upon the death of Myrtle Winward. Consequently, all of the assets of Richard Winward and Myrtle Winward, that were not

used by Myrtle Winward during her life, were to be distributed to the children equally upon Myrtle Winward's death, which was on June 23, 1999. (Paragraph 5(e) of Richard E. Winward and Myrtle Winward's trust, Winward's Addendum F & G).

Paragraph 5, entitled *Death of Trustee-Residuary Trust* of both Richard E. Winward and Myrtle Winward trust contained the same language. It provided that the assets should be distributed equally between Winward and Goodliffe and states “. . . assets received from the trust or by any of the trustor's children, by means other than the express condition 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 distribution. . . .” (Richard E. and Myrtle Winward trusts, paragraph 5, page 5, Winward's Addendum F & G). The methods of transfer given in the clause in the above quoted section of the trust that begins with “such as” were merely examples and not a complete list of “assets received” referred to in the trust. (Record 362, Transcript, page 316). Consequently, the trustor's intent is more accurately set forth by eliminating the clause beginning with “such as”, so that it would read as follows: “Assets received from the trust by any of the trustor's children by means other than the express conditions of this trust . . . shall be taken into account in making such equal distribution. . . .”

It is important to note that the term used by the trustors is “assets.” The term is all-inclusive and with no exceptions based on the form of the asset or the manner in which the beneficiary received the asset. Consequently, it would make no difference whether the

asset was in the form of a loan, a gift or any other designation of the asset.

Richard E. Winward and Myrtle Winward were the trustees of the Richard E. Winward trust and also the trustees of the Myrtle Winard trust during the time that the trustors were alive. When the first trustor died, the trust provided that the trustees would be the other spouse, in this case Myrtle Winward, and the two children Winward and Goodliffe. Winward and Goodliffe automatically became trustees of the Myrtle Winward trust and the Richard E. Winward trust upon Richard's death on August 1, 1992, pursuant to the terms of the trust documents. (Article VIII(1)(2) Winward's Addendum, F & G). They remained joint trustees with Myrtle Winward until her death.

Upon the death of Myrtle Winward, on June 23, 1999, Winward and Goodliffe were to equally receive all of the assets of Richard E. Winward and Myrtle Winward, whether placed in the trust by Richard or Myrtle, conveyed by the pour-over wills or received by other means from either of the trustors. Since the date of distribution for both the assets of Richard E. Winward and Myrtle Winward was date of the death of the surviving spouse, in this case Myrtle Winward, which occurred on June 23, 1999; all of the assets received by Winward from his mother or father had to be accounted for by Winward upon his mother's death.

Winward contended during the trial that assets distributed by his father were not relevant to the accounting prior to his death or the claims of Goodliffe for those assets. This position is not supported by the terms of the trust agreements as set forth above.

After the trusts were created on September 12, 1980, both Richard E. Winward and Myrtle Winward held their assets and the trust assets jointly. This was demonstrated by the testimony presented during the course of the trial and by the inscription on the checks of the Merrill Lynch Cash Management account, which listed Richard E. Winward and Myrtle Winward as trustees. (Goodliffe's Exhibit 13, Tab 2.) Richard and Winward maintained a joint account with United Savings Bank as demonstrated in many Exhibits, including those contained in Goodliffe's Exhibit 13, Tab 4. Richard E. and Myrtle Winward also maintained a joint account at the Bank of Utah. (Goodliffe's Exhibit 13, Tab 24)

During the course of the trial, Winward's attorney raised the issue that many of the transactions were between 1998 and 1990 and were very old. In response the Court states,

“I agree, but no one raised the Statute of Limitations and most advancements against the will or trust don't trigger until the decedent dies, so . . . you're point is well taken. Any other questions for her?”
(Record 361, Transcript page 107 , line 19-23.)

Even if the Statute of Limitations had been raised, a beneficiary may commence a proceeding against a trustee for breach of a trust within six months after a trustee has sent a report adequately disclosing the existence of a potential claim. Winward did not at any time, notify Goodliffe or send her a report of a potential claim. Therefore, the six-month statute of limitations did not begin to run.

During the trial, Winward's attorney objected to Goodliffe's Exhibit number 3, stating that it was not material. (Record 361, Transcript, page 106.) The Court in

responding to that objection, stated,

“Well, drawing your attention to Exhibit 13, money was deposited as trustee. There’s three checks in Exhibit number 5 that says that they were drawn as trustee, there’s a deposit slip that says that they were taken from an account from Merrill Lynch as a trustee.

And I haven’t gone through all of them, but I have been making notes as we go along. There’s other checks that are dated and itemized; all said that they were taken as trustee. So I agree, we may have an argument as to which ones were taken directly, but they have made sufficient showing that these monies were taken out of some sort an account that was listed as trustee.”

Overruled, its relevant. They can proceed.” (Record 361, Transcript page 110)

After the creation of the trust instruments, both Richard E. Winward and Myrtle Winward held their assets jointly and designated themselves as trustees of those assets. Consequently, assets received by Winward from either Richard E. Winward or Myrtle Winward were trust assets for which Winward was required to account for from the date of the receipt of the assets until the death of Myrtle Winward on June 23, 1999.

POINT TWO

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AND RELYING ON EVIDENCE PRESENTED BY GOODLIFFE.

Throughout Winward’s brief, he asserts that Exhibits and evidence accepted by the Court were inappropriately admitted by the Court because of a lack of foundation, heresay and lack of authentication. The only objections made by Winward as to any of the

evidence presented during the trial was that it was not material or relevant. Objections to the introduction of evidence or exhibits cannot be raised for the first time on appeal.

Winward acknowledges this in Point Two of his Memorandum, Section B, first paragraph, page 29. In that paragraph, Winward cites the case of *State v. Schreuder*, 726 P.2d, 1215, 1222, (Utah 1986). The Court in that case stated that in order to preserve an error in admission of evidence, a party must raise a timely objection to the trial court in clear and specific terms. No such objections were made at the time of the trial and therefore they cannot be introduced at this time.

The records of Richard E. Winward and Myrtle Winward, which were introduced by Goodliffe as Exhibits were located in their filing cabinet. Goodliffe stated that she recognized the handwriting of Richard E. and Myrtle Winward on the documents. (Record 361, Transcript Page 94 and 95). Had Winward raised the objections of lack of foundation, hearsay and lack of authentication, which are now asserted for the first time in the Appeal Brief, Goodliffe would have addressed and dealt with then at the trial level. Since the objections were not raised, Goodliffe was denied that opportunity.

Winward in Point II of his argument claims that Goodliffe's Exhibits 3, 4 and 13 were not legally admissible. Winward, in page 11 of his Memorandum, under "Admission of Inadmissible Evidence" acknowledges that the objection made to Exhibit 3 was on the grounds of relevance. Winward then argues that some of the notes were not dated, that no testimony was given as to when the notes were made, and he questions the authenticity of

the Exhibit. The defendant, Geri Goodliffe presented testimony related to her Exhibit number 3, which was part of the Goodliffe's first book of Exhibits. (Record 361, Transcript page 97). She reviewed each one of the pages and the information in her Exhibit number 3. That testimony continued from page 95 to page 106 of the transcript. (Record 361). No objections were raised to the testimony of Goodliffe as she testified and read from those pages. At the end of the testimony concerning Exhibit 3, Goodliffe's attorney offered Goodliffe's Exhibit number 3. Winward's attorney, Mr. Richards, objected and stated, "We would object. It is not material. May I ask her a question at this point? . . ." (Record 361, Transcript page 106). Counsel for the Plaintiff was allowed to voir dire the witness. (Record 361, Transcript page 110). The Court received arguments from counsel for Goodliffe and counsel for Winward before making its rulings. (Record 361, Transcript page 108-110). The Court then overruled Winward's objection, stating, "Overruled, its relevant. They can proceed. Mr. Richards, thank you." (Record 361, Transcript page 110).

The only objection made to Exhibit 3 was that the material was not material or relevant. Winward made no objection to the fact that the notes were not dated, to the time the notes were made to the authenticity of the checks or notes, or that the evidence was not legally admissible.

The testimony relevant to Goodliffe's Exhibit 4, which was in Goodliffe's First Book of Exhibits begins on page 110 and continues through 118 of the transcript. (Record

361). At the end of the testimony, Exhibit 4 was offered into evidence. (Record 361, Transcript page 118, line 13). Winward's counsel asked a question or two, but did not make any objections to the introduction of Exhibit 4. The Court took a lunch break without ruling on the introduction of Exhibit number 4. After the lunch, the Court went through whether or not a number of the Exhibit's had been offered and accepted. Goodliffe then, again, offered Exhibit number 4. No objection was made by Winward's counsel. The Court then stated, "Subject to their objection on relevance it is admitted." (Record 361, Transcript page 122, line 1.)

Winward claims that a second continuing objection was made as to monies that were in gifts or loans that were not documented in the trust, which objection the trial court sustained. That representation is not completely accurate. Winward's counsel did state, "May we make a continuing objection as to any money that was in gifts or loans that were not documented in the trust?" The Court responded, "You may." The Court did not sustain the objection. (Record 361, Transcript page 92) Objecting to testimony about any money that was in gifts or loans that were not documented in the trust, does not constitute an objection to the foundation for or the authentication of documents introduced as evidence.

Goodliffe offered Exhibit 13, Tabs 2 through 8, 13, 14 and Tab 16 through 24 without any objections of any kind from Winward. (Record 361, Transcript, Tab 2 page 60, Tab 3 page 61, Tab 4 page 168, Tab 5 page 62 and 168, Tab 6 page 176, Tab 7 page 64

and 175, Tab 8 page 174, Tab 13 page 187, Tab 14 page 188, Tab 16 page 195, Tab 17 page 192, Tab 18 page 193, Tab 19 page 196, Tab 20 page 197, Tab 23 page 200, Tab 24 page 201.)

Winward, under Point II (c) on page 31 of his Brief, complains that the Court's judgment is based on nothing more than Goodliffe's self-serving testimony and evidence that should have been excluded. No objection was made to exclude self-serving evidence. There is no rule of evidence that prohibits the introduction of self-serving evidence.

Winward, under Point Two C, page 31 of his Brief, claims that the Court relied upon Exhibits which it did not receive at trial to arrive at the amount of its judgments against Winward. That statement is not correct. Goodliffe did not offer into evidence Exhibit 13, Tabs 9, 10, 11, 12 and 22. Tabs 9, 10, 11 and 12 all dealt with the title to the real property on which Winward obtained a loan. Winward admitted in his pleadings and at the time of the trial that he owed the trust \$228,494.79, which he acquired by a loan on the real property. Consequently, these exhibits were not needed and were not relied upon by the Court. Goodliffe's Exhibit 13, Tab 22 was a duplicate of other exhibits and therefore was not offered into evidence.

Winward refers to a Motion in Limine filed prior to the trial. That Motion was not granted by the Court and no appeal was taken from the failure to grant the Motion. The fact that Winward filed a Motion in Limine that was not granted does not relieve Winward from making the appropriate objections when evidence is presented at the time of trial.

POINT THREE

STATUTE OF FRAUDS

Winward, in Point II(c) refers to the Statute of Frauds. Winward cites Utah Code Section 25-5-4(11). Rule 8 of the Utah Rules of Civil Procedure (C) requires that the issue of Statute of Frauds be set forth in the pleadings as an affirmative defense. Winward did not raise the Statute of Frauds in any of the pleadings filed before this Court or during the course of the trial. Even if the Statute of Frauds had been pled, it is not applicable to the circumstances of this case. Winward claims that a written agreement is necessary for Winward to answer for the debt of another or for him to be responsible for an agreement that was not in writing. (Utah Code Ann. §25-1-4(1)(2009). The issues in this case did not deal with the assumption of a debt of another, nor the enforcement of an agreement. The issue was whether or not Winward had received any assets of his parents' which had to be accounted for in the ultimate distribution of his parents' trust.

The trial court did not receive an objection, argument or evidence relating to the Statute of Frauds and its application to the facts in this case. The Statute of Frauds cannot be raised for the first time on appeal. Winward cites the case of *Finlayson v. Finlayson*, 874 P.2d, 843, 848, (Utah App. 1994) to support his argument of the application of the Statute of Frauds. The *Finlayson* case was a divorce action. The language cited by Winward from that case refers to whether or not monies received from a close family member represented a gift or a marital debt. The Statute of Frauds is not referred to in the

Finlayson case. The Court did hold because the trial court had made adequate findings supported by sufficient evidence the trial court's decision was affirmed. The Court did rule that

“ . . . Moreover, appellate courts of this state do not consider new evidence on appeal. *Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990). Thus ‘issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.’ ” *LeBaron & Associates. V. Rebel Enters., Inc.*, 823P.2d 479, 483 (Utah App.1991) (quoting *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah App. 1989)).

Even if the Statute of Frauds was applicable, Utah case law recognizes an equitable defense or constructive trust to prevent Winward from unjustly profiting from fraud or the violation of a duty imposed under a fiduciary or confident relationship. In *Haws v. Jensen*, 116 Utah 212, 209 P.2d 229 (Utah 1949), the Court stated:

“ . . . It is sufficient that there is a family relationship . . . of such character that the transferor is justified in believing that the transferee will act in his interest. *Hawkins v. Perry*, 253 P.2d 372.”

As a trustee of the Myrtle Winward Trust and the Richard E. Winward and Myrtle Winward Marital Trust and Residual Trust, Winward had a fiduciary duty to Goodliffe: a duty of loyalty. (Utah Code Ann. 75-7-802.) Section 75-7-1001 of the Utah Code Annotated provides the remedies for a breach of trust. Subsection (2)(c) states that the trustee can be compelled to restore the property by paying money. Subparagraph (a)(2)(j) provides that the court can grant any other appropriate relief. Subsection 75-7-1002(1)

provides that a trustee can be required to restore the value of the trust property to what it would have been had the breach not occurred. Section 75-7-1004 provides for the awarding of attorney's fees and costs under appropriate circumstances.

POINT FOUR

PAYMENTS MADE TO OR FOR WINWARD ON THE CLUB MANHATTAN

On August 24, 1987, \$50,000 was received from Richard and Myrtle Winward to invest in The Club Manhattan. In addition, expenses for the Club Manhattan were paid by Richard and Myrtle Winward. (Record 361, Transcript Page 58-62, Goodliffe's Exhibits 13, Tabs 1-5.) Richard and Myrtle Winward also paid back payments to Job Services for The Club Manhattan. (Record 361, Transcript, Page 64, Goodliffe's Exhibit 13, Tab 7.)

Winward, under Point I(a)(4) of his Brief on page 24 claims that Winward cannot be responsible for payments made to Club Manhattan or on the club's behalf because he was not an owner or officer of the corporation. Winward's former wife, Beth Winward testified that she was asked by Winward to assist in creating Club Manhattan and that Winward's name could not be used on the Club because of his bankruptcy. (Record 361, Transcript, page 56). She also testified that Winward operated the Club with her assistance. Beth Winward testified that she did not have an ownership in the Manhattan Club, but was asked to act as a figurehead in the company. (Record 361, Transcript, Page 86.) Winward told Beth Winward that the monies were loans from his father and mother to maintain the Manhattan Club and had to be paid back. (Record 361, Transcript, Page

90.) The Manhattan Club was sold for \$69,000. Beth Winward did not receive any of the money and the money was ultimately invested in Winward's electric building. (Record 361, Transcript, Page 88). Goodliffe's Exhibit 13, Tab 6 contains a document entitled, *Offer to Purchase Club Manhattan* on which Winward and Beth Winward are listed as the sellers of the club. (Goodliffe's Exhibit 13, Tab 6, Goodliffe's Addendum A.) The testimony and Exhibits presented to the trial court clearly demonstrated that monies came from funds of Richard and Myrtle Winward which they held jointly and which they held as trustees to acquire and maintain the Manhattan Club. The evidence clearly shows that Winward had an ownership interest in the club and received \$69,000 from the sale of the club.

Winward's assertion that the club was a corporate entity and that he was never an owner or officer of the club does not relieve him of the obligation of accounting for the money which he received from the joint funds of Richard and Myrtle Winward and from their funds as trustees. Winward stated that Beth Winward should not receive any money from the sale of the club, because,

“ . . . my little old mother and dad fed that club. They put out hundreds of thousands of dollars to maintain that club and they should get the \$69,000.” (Record 361, Transcript, Page 90.)

Winward did not present any testimony during the course of the trial to contradict the testimony given by Beth Winward in this regard.

Winward asserts that because the monies were given to him prior to the time he

became a trustee of the Richard Winward Residual and Marital Trust and the Myrtle Winward Trust, that he should not be held responsible for the monies. The trust documents clearly state that upon the death of Richard Winward, Myrtle Winward and the two children, Winward and Goodliffe would be the joint trustees. (Article VIII (1)(e) of Richard and Myrtle Trust, Winward's Addendum F & G.) That occurred on August 1, 1992. The assets held in the Richard E. Winward Residual and Marital Trust were not distributed until the death of Myrtle Winward, which occurred on June 23, 1999. It is at that time that Winward and Goodliffe had to account for assets that either of them received in order to make an equal distribution between them. Therefore, as has been previously argued in Point One of this Brief, it makes no difference whether Winward received assets after the creation of the Richard E. Winward and Myrtle Winward Trust. but before the death of Richard Winward. The time for the accounting of both trusts was upon Myrtle Winward's death on June 23, 1999.

POINT FIVE

DIVISION OF PERSONAL PROPERTY

The parties agreed during the course of the trial that each would keep those items that they had received and that they would be "a wash." The Court approved this stipulation. (Record 361, Transcript page 131 through 134).

POINT SIX

ADVANCEMENTS

Winward's argument regarding advancements is contained under Point I beginning on Page 17 of his Brief. Winward's entire argument relating to advancements is based on his conclusion that the Richard E. Winward and Myrtle Winward Trust each included a provision allowing for express advancements to be taken into account when dividing the assets among the beneficiaries. Winward then argues that there are specific requirements for advancements that were not met, and therefore, it was inappropriate for the Court to offset the assets received by Winward in the distribution of the trust assets to Winward and Goodliffe.

Winward mis-characterizes the terms of the Richard E. and Myrtle Winward Trust. Paragraph 5, Page 5 of those Trusts contains language which states, "Assets received from the trust by any of the trustees' children by means other than the express condition of this instrument, such as, through life insurance beneficiary arrangements, joint tenancy survivorship or express advancements, shall be taken into account when making such equal distributions. . ." Advancements are merely one example of a receipt of assets that must be accounted for. The language requires that all assets received from the trust, other than by the express condition of the instrument, must be considered.

There was no evidence, nor any claim during the course of the trial that Winward or Goodliffe received any assets by the express condition of the instrument (trust). The only

express condition of the trusts is under Article 4, relating to policies of insurances. There was no testimony by either party that insurance proceeds existed or were an issue in this case. Consequently, any assets received by either one of the children must be accounted for. Winward's premise that Winward did not have to account for any of the assets received, unless Goodliffe could prove that they were advancements as defined by the law cited by Winward, is incorrect according to the plain language and intent of the trust instrument.

Judge West did use the word "advancements" in his Findings and Ruling. However, an examination of the Judge's comments clearly demonstrates that he was not talking about an advancement in the legal sense, but merely referring to assets that had been received by Winward prior to the distribution of the Trusts.

Judge West, at the conclusion of the bench trial, heard argument from both parties' counsel. In the process of the argument, Judge West stated that the words, "such as" meant that the language following it was an example and was not exclusive. (Record 362, Transcript, Page 316). Judge West also stated that the evidence was clear to him that the money given to Winward was not an express advance. In this regard, the Court stated, "Second of all, they never wrote it off. They didn't do it as an express advance, but they also didn't write it as gifts, in saying, "We forgive Mr. Winward for doing this." (Record 362, Transcript Page 317.) The Court concluded that the best evidence before him was that the money was not intended as a gift, but was a loan. (Record 362, Transcript 318-

322.)

The Court's conclusions and findings were supported by the evidence received by the Court. Winward's deposition was taken on June 6, 2006 and introduced at the time of trial. (Record 361, Transcript 237-238.) Winward, in his deposition testified that he was not gifted any property by his mother prior to her death. He also testified that he was not given any property by his father in the form of joint tenancy gifts or anything else. (Page 52 and 53 of Winward's deposition, Winward's Addendum B.) Winward's testimony during the trial was very limited. He did not testify during the trial that he had received any gifts or any advancements from the trust or from his parents. (Record 361, Transcript Page 236). Under cross-examination by Winward's attorney, Beth Winward testified that Kenneth Winward never used the term "gift" but always referred to the monies as "loans." (Record 361, Transcript 84.) Beth Winward also testified that Winward said that the monies were loans and that it had to be paid back. (Record 361, Transcript 88.) Under cross-examination, Winward's attorney asked Goodliffe, "Do you have knowledge whether they just considered these gifts or loans-I want to know if you have any first-hand knowledge of that?" Answer, "What I have is that my parents-my father-my father told me that these were loans and that he was sick about loaning the money to Ken and losing it. I do know that first hand." (Record 361, Transcript, page 210.)

During Winward's post-trial motions, Judge West commented on his view of the evidence given during the trial. He stated that he did not find Winward's testimony

credible and that the monies given to him by his father and mother were clearly not gifts. He also found, that The Club Manhattan was a sham and that the reason they put the license in Beth Winward's name was because of Ken Winward's bankruptcy or criminal record. (Record 365, Transcript Pages 12-13). Judge West stated, "... I have read your brief, its eloquent, but you wanna argue a case that I didn't try." (Record 365, Transcript Page 13 Line 24-Page 14, Line 1).

Winward's attorney argued the legal requirements of an advancement in his post-trial motions. Judge West indicated that the language referring to advancements and the trust language was not all-inclusive or exclusive, but merely examples. Judge West stated that the issue before him were the assets that was given to Winward, regardless of how they were characterized. The Court stated:

"... Asset is a broad term. So the issue became what assets were given to him, either inside or outside the trust, when the trust – when this document says you have to consider all of those assets, total them up, how much money did he receive, how much money did she receive. And that was the issue. So you keep saying, well, if it's not – if it is not an advancement, what is it, didn't matter to me. The evidence was overwhelming that your client received it from his parents, and this provision to me and the prior ruling seemed to say that went on his side of the ledger. So you're right, I didn't spend a whole lot of time determining whether it was a gift or whether it was an advancement or whatever it was because the terms said any asset given to him should be included. That was the initial ruling." (Record 365, Transcript, page 31 L-10-24)

The trial court did not make a finding that Winward had received an advancement on his inheritance. The Court specifically found that the monies that he received were

loans, not gifts or advancements. It is true that the Court stated that monies had been advanced to Winward. However, “Advancement” was not used as term of art, but merely as another way of saying that Winward had received assets which were not gifts. A “legal” advancement as defined in the Utah Code is a gift that is documented in writing. Since the Court has ruled that the assets which were received by Winward were not gifts, it is not relevant whether the written requirements for advancements were met in this case.

Winward cites the case of *Young v. Young*, 979 P.2d 338 (Utah 1999) in support of his argument relating to advancements. The trial court had received testimony that some of the parties had received sums which they considered as gifts and others considered the sums as advancements on their inheritance. In that case, the trial court ruled that all of the sums were advancements. (¶11, page 341). On appeal, the Court ruled in order for the sums to be considered advancements, there must be a writing declaring that the property given was an advancement. The Court also dealt with the issue of loans to one of the parties. On appeal, the Court upheld the trial court’s determination that the monies received were loans and that the loans had to be paid back, finding that the Court’s determination was adequately supported by the evidence. There was no evidence or claim before the Court that the trust instrument required that all assets received by a party be accounted for in the distribution to the heirs.

As previously indicated herein, Judge West concluded that Winward did not receive any gifts or advancements and that all of the monies he received were loans and assets

which Winward had to account for at the time of the distribution of his parents' property.

POINT SEVEN

PRE-JUDGMENT INTEREST

Section 15-1-1(2) of the Utah Code Annotated, 1953, as amended, states in part as follows, “. . .The legal rate of interest for the loan or forbearance of any monies, goods or chose in action shall be 10% per annum.” The law in Utah concerning pre-judgment interest is addressed by the Court in the case of *Saleh v. Farmer's Insurance Exchange*, 133 P.3d, 428, 436 (Utah 2006). The Court stated:

“ Prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures. *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995). Generally, a ‘decision to grant or deny prejudgment interest presents a question of law which we review for correctness.’ *Id.* However, when the trial court applies the facts of the case to the law, then the question is a mixed question of fact and law, and the factual basis underpinning the decision is subject to a clearly erroneous standard. . . .” *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

The sums which Judge West found were owing are listed on the Exhibit which is attached to his decision of November 3, 2008. (Winward's Addendum C, Record 198). The Court received precise testimony and evidence concerning the amounts Winward received and the dates on which those sums were received. The Court found that the 10% interest was to be calculated from December, 1998, on the \$216,201, which was a portion of the Goodliffe's estate. (Findings of Fact, paragraph 22, record page 218, Winward's Addendum D). Even though Winward began receiving his parents' assets as early as

August, 1987 the Court did not compute interest until December, 1998, which was the last date on which Winward received assets of his parents. The Court was very precise in setting the date of the loss. Consequently, the requirements for the application of pre-judgment interest have been met, since the damage was complete, the amount of the loss was fixed as of a particular time and the loss is measured by facts and figures.

POINT EIGHT

FAILURE TO MARSHAL EVIDENCE

Since Winward is challenging the trial court's findings, he is required to marshal the evidence in support of the Judge's findings. Many appellate court decisions have addressed this obligation. The Court in *Young v. Young*, 979 P.2d, 338, 342 (Utah 1999). Stated, "...When challenging a trial court's findings, '[a]n appellant must 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.'" *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) citation omitted). . . ."

In point I a of Winward's argument on page 20 of his brief, Winward refers to his obligation to marshal the evidence in support of the trial court's findings. However, Winward does not fulfill this obligation. Consequently, this Court should reject Winward's claim that the court's findings are clearly erroneous.

CONCLUSION

Judge West's Findings are supported by the evidence. Winward, at the trial level did not object to the testimony or evidence that was presented except on the grounds of relevance. The testimony and all of the evidence was relevant. Winward, for the first time on appeal, attempts to object on the basis of hearsay, foundation and lack of authentication. These objections may not be raised for the first time on appeal. Winward also raises the issue of Statute of Frauds for the first time on appeal and indirectly refers to the Statute of Limitations. Both of these are affirmative defenses that were not raised in Winward's pleadings and were not raised during the course of the trial.

Winward claims that the trial court inappropriately applied the law on advancements. Judge West did not find that Winward had received a legal advancement on his inheritance. Judge West found that all the monies received by Winward were loans and that under the terms of the trust agreements, all assets received by Winward were to be considered in the ultimate distribution of the assets to Winward and Goodliffe.

In addressing Winward's argument in support of his motion for new trial, Judge West stated: "I have read your brief, it is eloquent, but you wanna argue a case that I didn't try." (Record 325, Transcript pages 13-14). Winward, on appeal, also tries to argue a case

that was not tried before Judge West. Judge West's rulings should be affirmed by this Court.

DATED this 17 day of July, 2010.

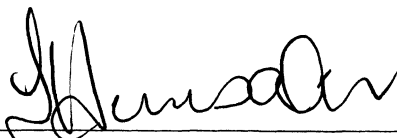


ROBERT A. ECHARD
ATTORNEY FOR DEFENDANT/APPELLEE
GERALDINE W. GOODLIFFE

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2010, two true and correct copies were mailed via first-class U.S. mail, postage pre-paid to:

CLARK W. SESSIONS #2914
SARA L. CAMPBELL #12052
Attorney for Plaintiff/Appellant
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216



Legal assistant

ADDENDUM

A: DOCUMENT SIGNED BY WINWARD AS OWNER OF CLUB	A
B: WINWARD'S DEPOSITION PAGES	B
C: CHART SHOWING DAMAGES	C

Tab A

Offer to Purchase Club Manhattan

#5 East 400 South Salt Lake City, Utah 84111

(a non-profit corporation)

Purchase Price: One Hundred Sixty Two Thousand Five Hundred (\$162,500.00)

Terms: Down Payment to be Sixty Thousand Dollars (\$60,000.00) payable as follows: Five Thousand Dollars due upon final review and written approval of all documents requested by Buyer that pertain to the operation of the club for the past two(2) years of which some of them are a complete list of equipment, fixtures, furnishings, inventory, etc., lease agreements, income tax returns, bank statements, balance sheet, etc.

Fifty Five Thousand due at closing which shall be the day that the Utah State Liquor Control Commission issues the new Private Club License to Buyer, or before, as Seller and Buyer agree with on attached addendum.

Balance of One Hundred Two Thousand Five Hundred Dollars (\$102,500.00) due as follows:

Due Dates: July 1, 1992 Twenty Seven Thousand Five Hundred Dollars (\$27,500.00) due.

July 1, 1993 Twenty Five Thousand Dollars (\$25,000.00) due.

July 1, 1994 " " " " (\$25,000.00) due.

Final Payment July 1, 1995 " " " " (\$25,000.00) due.

Buyer agrees to pay interest of 2% annually and after first year the payments are to be made semi-annually.

Possession Date: Upon review and signing of all final documents approved by Seller and Buyer and receipt of additional Fifty Five Thousand Dollars (\$55,000.00) by Seller, this to be completed on or before May 1, 1991.

Additional Agreement: Buyer to apply for new Private Club License on or before April 10, 1991. Upon the signing of this document by both parties this grants the exclusive Right to Buy to the Buyer and/or assigns, under the terms stated, for a period of sixty days from the date of signing.

Seller: Ken Winward 4-1-91
Ken Winward Date

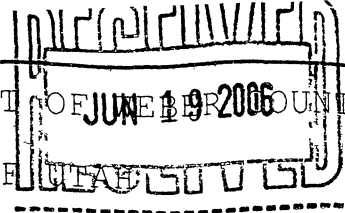
Buyer: Arrowhead Capital Corp. 4/1/91
Arrowhead Capital Corp. Date

Seller: Beth O. Winward 4-1-91
Beth Winward Date

By Kent Bangerter 4/1/91
By Kent Bangerter Date

Tab B

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH



COPY

KENNETH E. WINWARD,

Plaintiff,

vs,

GERALDINE W. GOODLIFFE,

Defendant.

Case No. 053900338

Judge: John R.
Morris

DEPOSITION UPON ORAL EXAMINATION OF:

KENNETH E. WINWARD

TAKEN AT: LAW OFFICE OF ROBERT A. ECHARD, P.C.
2491 Washington Blvd., Suite 200
Ogden, Utah 84401

DATE: June 6, 2006

REPORTED BY: Susan S. Sprouse, CSR/RPR



333 SOUTH RIO GRANDE SUITE F
SALT LAKE CITY UTAH 84101
(801) 328 1188 / 1 800 DEPOMAX
FAX 328 1189



1 property, the money in the bank, whatever, she felt
2 like it was equally owned.

3 Q So do you know why some of the property
4 would be in trust and some of it would be in joint
5 tenancy with her daughter?

6 A I suspect -- no, I can't answer that, no.

7 Q Thank you. Now, if I understood your
8 position earlier, it was that when the money in the
9 trust is divided, you had it in consideration what
10 either one of you may have received outside of the
11 trust as an adjustment on the division of the trust
12 property; is that correct? That was kind of what
13 your attorney said.

14 MR. ENGSTROM: If it was joint tenancy.

15 MR. ECHARD: Only if it was joint tenancy?
16 What if it was a gift?

17 MR. ENGSTROM: The trust does not provide
18 that gifts are to be -- there's specific provisions
19 in the trust and it deals only with joint tenancy or
20 life insurance or express advancements.

21 Q (By Mr. Echard) Okay. So I guess the
22 question is, sir, were you gifted any property during
23 -- before your mother's death by her?

24 A Negative, no.

25 Q Were you given any property by her?

1 A No.

2 Q Were you given any property by your father?

3 A No.

4 Q In any form, joint tenancy, gifts, or
5 anything else?

6 A No.

7 Q Did you have any property that belonged to
8 your mother or your father or the trust?

9 A No.

10 MR. ECHARD: Okay. I need my pile here.

11 THE WITNESS: Can we go off the record for
12 just a second, Bob, would that be okay?

13 MR. ECHARD: Sure.

14 (Discussion was held off the record.)

15 (Exhibit Nos. 4 through 10 marked for
16 identification.)

17 Q (By Mr. Echard) Sure. Let me show you
18 what's been marked as Defendant's -- let's see,
19 Deposition Exhibit No. 4, and just take these and put
20 them off to the side somewhere, if you would, so they
21 don't get confused. Do you recognize the document
22 marked as Deposition Exhibit 4?

23 A I don't.

24 Q You don't recognize it as a sales of an
25 automobile, a 1998 green --

Tab C

Group	Ref #	Date	From	Amount	Notes
Club Manhattan	1	8/25/1987	United Savings	50,000.00	Down payment for Club Manhattan
	2	1990		1,290.00	Various expenses paid by Richard for Club Manhattan
	3	12/5/1990		5,000.00	Paid for payroll for Club Manhattan
	4	1991		56,079.77	Club Manhattan expenses
	5	6/12/1991		1,603.10	Paid Utah State Tax Commission for payroll taxes for Club Manhattan for 1990 payroll taxes
	6	1991		61,500.00	Used to reimburse Kent Bangerter's down payment for Club Manhattan
	7	1991		1,331.41	Paid Job Service to Club Manhattan
	8	1992		25,000.00	Dick loaned money to Jerry Gatto to help him buy the club from Ken because Ken asked him to.
		1992		69,000.00	Ken received from the sale of Club Manhattan for his benefit.
			Total: Club Manhattan	270,804.28	
's House	9	5/5/1994	Bank of Utah	51,345.00	Loan taken out on Myrtle's house; the proceeds went to Ken
	10	12/28/1994	Great Western Thrift and Loan	38,655.00	Took out \$90,000 loan on Myrtle's house from Great Western and paid off the \$51,345 to Bank of Utah; the proceeds went to Ken.
	11	10/30/1995	First Community Bank	25,000.00	Took out \$115,000 loan on Myrtle's house from First Community and paid off the \$90,000 to Great Western; the proceeds went to Ken.
	12	3/26/1997	KeyBank	115,000.00	Took out an additional \$115,000 loan on Myrtle's house from KeyBank; proceeds went to Ken.
	13	12/29/1998	First Franklin Financial Corp	5,000.00	Took out \$235,000 loan on Myrtle's house from First Franklin and paid off the \$115K due First Community and Key Bank.
			Total: Myrtle's House	235,000.00	
ney Joe Bottom	14	11/29/1990	Merrill Lynch	4,000.00	Attorney Joe Bottom
	14	1991	United Savings Check # 106	4,315.00	Attorney Joe Bottom
			Total: Attorney	8,315.00	
aneous	15	1987		2,000.00	Line of credit on Beth's house paid by Dick.
	16	8/23/1988		2,516.00	Civil matter resolved by payment to W. Michael Hunter
	17	1989		150,000.00	3 C. D.s pledged as collateral on loan for Ken on which Ken later defaulted.
	18	1989		18,770.15	Pay off interest on Bank of Utah loan for Ken.
		7/19/1989			Ken's bankruptcy finalized
	19	1991		12,392.00	Interest paid on Ken's loan form West One Bank
	20	1991		771.77	Paid finance charges on Ken's car
	21	1991		500.00	Paid to IRS by cashiers check
	22	5/10/1991	Merrill Lynch	5,000.00	Check written to Ken Winward
	23	7/2/1991	United Savings Bank	10,710.01	Loan taken out by Richard with proceeds going to Ken.
	24	6/2/1998	Bank of Utah	10,700.00	Personal check written by Myrtle to Ken.
			Total: Miscellaneous	213,359.93	
			Total	727,479.21	