

2015

Andrew L. Ellsworth, Et Al., Plaintiffs/Appellants, vs. Terry Huffstatler, Et Al., Defendants/ Appellees. Terry Huffstatler, Et Al., Petitioner/ Appellant, vs. Mark L. Ellsworth, Et Al., Respondents/ Appellees. Terry Huffstatler, as Trustee of the Barbara May Ellsworth Trust, Intervenor Plaintiff/ Appellee, vs. Mark L. Ellsworth, Co-Trustee of the Ellsworth Family Trust., Intervenor Defendant/ Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREW L. ELLSWORTH, *et al.*,
Plaintiffs/Appellants,

v.

TERRY HUFFSTATLER, *et al.*,
Defendants/Appellees.

TERRY HUFFSTATLER, *et al.*,
Petitioner/Appellant,

v.

MARK L. ELLSWORTH, *et al.*,
Respondents/Appellees.

TERRY HUFFSTATLER, as Trustee of the
Barbara May Ellsworth Trust,
Intervenor Plaintiff/Appellee,

v.

MARK L. ELLSWORTH, Co-Trustee of
The Ellsworth Family Trust,

Intervenor Defendant/Appellant.

Court of Appeals No. 20150478

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, HONORABLE DAVID MORTENSEN
CIVIL NO. 130400498 AND CONSOLIDATED CASE NO. 133400333

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FILED
UTAH APPELLATE COURTS

OCT 29 2015

COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1), Utah Rules Of Appellate Procedure, the following sets forth a complete list of all parties to the trial court proceeding:

Appellants

Andrew L. Ellsworth (Plaintiff)
Mark L. Ellsworth (Plaintiff, Respondent and Intervenor Defendant)
Michelle Thomas (Plaintiff)
Ken L. Ellsworth (Plaintiff)
Tami Jasper (Plaintiff and Respondent)
Tim Ellsworth (Plaintiff)
The Ellsworth Family Trust dated May 1, 1991 (Plaintiff, Petitioner and Defendant)

Appellees

Terry Huffstatler (Defendant, Petitioner, Intervenor Plaintiff)
Jim Huffstatler (Defendant)
Karl V. Baker (Defendant)
Keith A. Baker (Defendant)
The Ellsworth Family Trust dated May 1, 1991 (Plaintiff, Petitioner and Defendant)
The Estate of Barbara Mae Ellsworth (Defendant)
Barbara May Ellsworth (now deceased) (Defendant and Petitioner)
Barbara May Ellsworth Trust date March 19, 2013 (Intervenor Plaintiff)

In accordance with Rule 24(d) the Appellants will be sometimes be referred to herein as “Mark Ellsworth Parties,” the Appellees will sometimes be referred to as “Terry Huffstatler Parties,” The Ellsworth Family Trust, dated May 1, 1991 will be referred to as the “1991 Trust,” The Barbara May Ellsworth Trust, dated March 19, 2013 will be referred to as the “2013 Trust,” Barbara May Ellsworth will be referred to as “Barbara,” and Elmer “Bud” Ellsworth will be referred to as “Elmer.”

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STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-4-103(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW (Including standards of appellate review and supporting authority.)

FIRST ISSUE ON APPEAL: DID THE TRIAL COURT ERR WHEN IT GRANTED PARTIAL SUMMARY JUDGMENT IN FAVOR OF APPELLEES BASED ON THE DETERMINATION THAT BARBARA ELLSWORTH BECAME THE OWNER OF THE PRECIOUS METALS PURSUANT TO UTAH CODE ANN. §75-3-102?

Applicable Standard of Appellate Review: Utah appellate courts review the district ~~court's decision to~~ grant summary judgment for correctness, affording the trial court no deference. *Swan Creek Vill. Homeowners Ass'n. v. Warne*, 2006 UT 22, ¶16, 134 P.3d 1122. The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. *See e.g., Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (interpretation of statute); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 9, 233 P.3d 529 (interpretation of statute); *State v. Barney*, 2008 UT App 250, ¶ 5, 189 P.3d 1277 (interpretation of statute); *State v. Rowley*, 2008 UT App 233, ¶ 8, 189 P.3d 109 (interpretation of statute). Appellants must show legal error by the trial court in its use of fixed principles and rules of law and by demonstrating that trial court incorrectly selected, interpreted and/or applied the law. *State v. Pena*, 869 P.2d 934, 936 (Utah 1994).

Preservation of Issue: The above stated issue was preserved for appeal by the following: Complaint (Verified) (R. 31); Amended Complaint (R. 114); Motion for Summary Judgment: Ownership of Precious Metals (R. 592); Amended Complaint (Second) (R. 913); Plaintiffs' Supplemental Memorandum Re Motion for Summary Judgment (R. 1033); Motion for Summary Judgment: Supplemental Brief (R. 1047); Ruling on Motion for Partial Summary Judgment (R. 1087); Stipulation to Bifurcate Precious Metals Issues (R. 1322); and Findings of Fact, Conclusions of Law and Order (R. 1685)

SECOND ISSUE ON APPEAL: DID THE TRIAL COURT ERR WHEN IT DETERMINED APPELLEES REBUTTED THE PRESUMPTION THAT BARBARA'S CREATION OF THE 2013 TRUST WAS UNFAIR?

Applicable Standard of Appellate Review: Appellants must show legal error by the trial court in its use of fixed principles and rules of law and by demonstrating that trial court incorrectly selected, interpreted and/or applied the law. *State v. Pena*, 869 P.2d 936 (Utah 1994). An appellate court will not disturb a trial court's findings of fact unless they are clearly erroneous. Findings are clearly erroneous only if they are in conflict with the clear weight of the evidence, or if an appellate court has a definite and firm conviction that a mistake has been made. The appellate court reviews the legal sufficiency of factual findings—that is, whether the trial court's factual findings are sufficient to support its legal conclusions—under a correction-of-error standard, according no particular deference to the trial court. *Brown v. Babbitt* 2015 UT App 161; 353 P.3d

1262 (Utah 2015). Appellants must show the trial court's findings are clearly erroneous by marshalling all evidence supporting the finding, then showing the evidence is legally insufficient to support the findings when viewed in a light most favorable to the trial court's findings. *Gilmor v. Family Link, LLC*, 2010 UT App 2, ¶ 19, 224 P.3d 741.

Preservation of Issue: The above stated issue was preserved for appeal by the following: Complaint (Verified) (R. 31); Amended Complaint (R. 114); Amended Complaint (Second) (R. 913); Trial Brief of Plaintiffs, Respondents and Intervenor Defendant (R. 1360); Defendants/Petitioners/Intervenor Plaintiffs Pretrial Brief (R. 1488); and Findings of Fact, Conclusions of Law and Order (R. 1685)

**RULES, STATUTES AND REGULATIONS WHOSE INTERPRETATION ARE
DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE TO
THE APPEAL**

The following cited rules, statutes and regulations are determinative of the appeal or of central importance to the appeal and are set forth in the Addendum to this brief:

Rule 56(c) Utah R. Civ. P.
Utah Code Ann. § 75-2-102
Utah Code Ann. § 75-3-102
Utah Code Ann. § 75-3-107

STATEMENT OF THE CASE

Nature of the Case, Course Of Proceedings, And Disposition Below

This case centers around the implementation of estate planning which was completed by Elmer and Barbara in 1991 as well as subsequent estate planning which was

completed by Barbara after Elmer's death. In the trial court proceeding, the parties disputed whether certain Precious Metals were properly transferred to Barbara via Utah Code Ann. § 75-3-102. Additionally, the parties contested the validity of certain transfers Barbara made from the 1991 Trust to the 2013 Trust (which Barbara created many years after Elmer's death). Appellants alleged Barbara lacked the requisite capacity to create the new trust and that she was unduly influenced when making the transfers to the 2013 Trust.

During the course of proceedings below, Appellees filed a Motion for Summary Judgment: Ownership of Precious Metals ("Motion for Summary Judgment"). The trial court granted Motion for Summary Judgment ultimately determining that the Precious Metals belonged to Barbara. Appellants filed a petition for permission to file interlocutory appeal which was denied by this Court. The case proceeded to trial on the issues relating to the creation of the 2013 Trust and transfers thereto. The trial court determined the 2013 was properly created and funded. Appellants thereafter filed this appeal.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

1. Elmer was a co-creator of the 1991 Trust and was Barbara's spouse. Elmer died on February 7, 2003. (R. 1681, 1682)¹

2. Barbara was a co-creator of the 1991 Trust and the creator of the 2013 Trust and related estate planning documents. Barbara was Elmer's spouse. She passed away on December 18, 2013. (R. 1681, 1682)

¹ Many of the facts set forth herein are supported by the trial court's Findings of Fact, Conclusions of Law, & Order (R. 1644-1685). This document is contained in the Addendum.

3. Appellants Andrew L. Ellsworth, Mark L. Ellsworth, Michelle Thomas, Ken L. Ellsworth, Tami Jasper and Tim Ellsworth are Elmer's biological children, Barbara's step-children, and are beneficiaries of the 1991 Trust. Mark Ellsworth was also a co-successor trustee of the 1991 Trust. (R. 1681)

4. Appellees Terry Huffstatler ("Terry"), Karl V. Baker and Keith A. Baker are Barbara's biological children, Elmer's step-children, and beneficiaries of the 1991 Trust and 2013 Trust. Additionally, Terry was a named co-successor trustee of the 1991 Trust, and is the court appointed personal representative of the Estate of Barbara Ellsworth. She is also the acting trustee of the 2013 Trust. Defendant Jim Huffstatler is Terry's husband. (R. 1681)

5. At the same time Elmer prepared the 1991 Trust, on May 1, 1991, Elmer executed a Last Will and Testament ("Will"). (Trial Exhibit 1 at pages 9-16)²

6. Elmer owned certain gold, silver and platinum coins and bars (collectively referred to herein as "Precious Metals") prior to his marriage to Barbara. (R. 1086)

7. The Fourth and Fifth paragraphs of Elmer's Will state in relevant part as follows:

FOURTH: Personal Property

If my spouse survives me, I give to her all items of Personal Property (as hereinafter defined). If my spouse does not survive me, I give those items of Personal Property (but not money, notes, documents of title, stock certificates or business property) to the individuals named in my Memorandum of Disposition of Personal Property. This memorandum shall be signed by me, shall describe each item and shall indicate the recipient thereof. If the named recipient of a particular item does not survive me, then

² Trial Exhibit 1 includes Elmer's Will. The Will is included in the Addendum.

that item shall pass as provided in Paragraph FIFTH; and if, after reasonable search among my personal effects, such a list cannot be found, my Personal Representative shall disregard the preceding language of this Paragraph.

FIFTH: Disposition of Residuary Estate

“My residuary estate” means all my interest in real or personal property, whether community or separate and wherever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by the preceding provisions of this Will.

I give my residuary estate to the Trustee then acting under that certain Trust Agreement named the ELLSWORTH FAMILY TRUST created on the 1st day of May, 1991, to be aggregated with (and held, administered, and distributed as an integral part of) said Trust Estate in the manner and subject to the terms and provisions provided for in the Trust Agreement

(Trial Exhibit 1 at pages 11-12)

8. The term “Personal Property” is not defined within the Will. (R. 1084)

9. Elmer did not prepare a Memorandum of Disposition of Personal Property.

(R. 1084)

10. Elmer died on February 7, 2003, at which time Barbara became the sole trustee and primary beneficiary of the 1991 Trust. (R. 1681)

11. Elmer’s Will was never probated. (R. 1067)

12. During the several years preceding Barbara's death in December 2013, she lived in various stages of ailing physical and mental health. (R. 1681)

13. Barbara suffered from diminished eyesight and hearing. She also suffered from Parkinson's disease and diminished cognitive functioning. (R. 1680)

14. In November 2012, Barbara fell and suffered serious injuries, including hip and humerus fractures. These injuries required Barbara to undergo serious surgery and to

take pain medication. The evidence indicates that, following her injuries, Barbara's physical and mental condition worsened. She became less mobile and less capable of accomplishing daily tasks of self-care. The increased stress negatively impacted the Parkinson's disease symptoms from which she suffered as well as her general cognitive functioning. (R. 1678)

15. In the process of empowering Terry as an administrator of Barbara's decisions, Terry and Barbara visited Mr. Skabelund, Barbara's estate planning attorney. Mr. Skabelund was the one to suggest that Barbara sign an updated power of attorney document that would allow Terry to act for Barbara on personal matters. Mr. Skabelund noted that appointments such as this constitute a common part of the estate planning process, especially for elderly clients. Mr. Skabelund also testified that he had had no concern over Barbara's capacity to execute such a document. Accordingly, Mr. Skabelund drafted a General Power of Attorney designed to deal only with Barbara's personal assets—not trust assets—which Barbara signed on December 17, 2012. (R. 1678-1679)

16. Shortly after Barbara signed the General Power of Attorney, Terry and Mark Ellsworth ("Mark") began to correspond in order to set up a meeting to go over the 1991 Trust documents and to discuss their probable future roles as co-trustees of that trust. Mark and Terry both testified that at this point their relationship was cordial and cooperative. (R. 1678)

17. Their meeting took place in early March 2013. During that meeting, Terry informed Mark that Barbara wished to sell Barbara's American Fork residence (which was owned by the 1991 Trust) because Barbara was no longer able to live there due to her

physical condition and because the HOA rules would not permit her to rent the house. Terry also informed Mark of the power of attorney document that Barbara had signed in December 2012. At the end of that meeting, Mark told Terry that he wanted to discuss the sale of the American Fork residence with his other siblings who were contingent beneficiaries of the 1991 Trust. (R. 1678)

18. The genesis of the dispute (as relates to the trust issues) stems from a subsequent email Mark sent to Terry on March 13, 2013. In that email Mark stated:

Dear Terry,

After we last met, I conveyed the information from our meeting to my siblings. I am writing this to summarize the consensus on how our family feels regarding the estate/trust. I would like to start by asking that you try to view this summary as if you were in our circumstances (Barbara passed away 10 years ago, and I am in your position with Bud instead of you with Barbara).

We as a family all believe caring for Barbs' needs is the top priority. In reviewing Barbs health condition, we feel that given her ongoing declining medical condition and memory as well as her chronic conditions of bipolar, DVT's and the recent diagnosis of Parkinson's and others, that she is not in a condition to manage any fiscal matters. We believe this supported in action by you, but the fact that you had Barbara sign over to you a power of attorney and are handling her fiscal affairs.

In considering this we believe that the best way to proceed is to have Barbara officially resign from the trust (she has already defaulted by signing power of attorney over to you). This will place the fiscal aspects of the estate/trust into the manner it was planned for originally when the survivor of our parents was no longer able, and put responsibility legally into a joint partnership between you and me.

After completing Barbs resignation you and I can get together to work out a joint relationship in managing the remaining assets of the estate/trust and Barbs ongoing care needs. If you do not have any objections to this direction, I would suggest we both meet with Barbara to discuss this and have her sign a resignation.

If you have reservations or disagreements, I would appreciate hearing them, so we can try to find an agreeable solution and continue our relationship in the affable fashion that currently exists.

Sincerely,

Mark Ellsworth

(R. 1677-1678 and Trial Exhibit 8)³

19. Terry understood this email as a threat and a demand that Barbara resign as trustee. (R. 1677)

20. Terry only explained the email to Barbara, but did not show it to her. (R. 1912 at page 49)

21. The trial court found that Terry “overreacted to Mark’s initial suggestion that Barbara step down as trustee” (R. 1651)

22. After receiving this email, Terry contacted Mr. Skabelund, Barbara’s estate planning attorney and arranged a meeting for the very next day, March 14, 2013. Terry and Mr. Skabelund both testified that Barbara requested the meeting because she took offense to Mark’s assertions that she should resign as trustee and that she had already forfeited that position. Barbara was also offended by the Ellsworth children’s efforts to block the sale of the American Fork residence. Mr. Skabelund testified that these were Barbara’s stated motivations for wanting to create the 2013 Trust documents. (R. 1677)

23. Based on his consultations with Barbara, Mr. Skabelund drafted a new set of estate planning documents, including a will, another updated power of attorney document,

³ Trial Exhibit 8 is contained in the Addendum.

and the 2013 Trust. These new documents transferred 50% of the property from the 1991 Trust to the 2013 Trust and named only Barbara's biological children as beneficiaries. (R. 1676-1677)

22. The new estate plan was executed on March 19, 2013. The effect of the new trust was to diminish the Ellsworth siblings' interest in the property of the 1991 Trust. (R. 1676)

SUMMARY OF ARGUMENT

The Mark Ellsworth Parties contend two errors occurred at the trial level. First, Appellants claim the trial court erred when it determined, "A plain reading of the Will explains that Barbara is to receive Elmer's personal property which was not transferred to someone else or to the family trust." (R. at 1070.) The trial court concluded that because the Will clearly transferred personal property to Barbara, and because Barbara possessed that personal property after Elmer's death, the statutory presumption of intestacy did not apply due to an exception found in Utah Code Ann. §75-3-102 which trumped the intestacy presumption. The Mark Ellsworth parties however contend that the trial court misinterpreted that Will and there is no "plain meaning" transferring the Precious Metals to Barbara upon which the trial court could rely upon to allow application of Section 102. Consequently, the trial court erred in finding that (1) the presumption of intestacy was rebutted and (2) by transferring ownership of all of the personal property to Barbara.

Second, Appellants contend the trial court erred when it determined that the creation of the 2013 Trust was fair and therefore the presumption of undue influence did not apply. The trial court found that, "Barbara had her own personal motivations to create the estate

plan because she was upset with Mark and others of the Ellsworth children.” The evidence at trial, however, as well as the trial court’s own findings, establish that Barbara was upset from what she heard from Terry. The trial court determined that, “Terry overreacted to Mark’s initial suggestion that Barbara step down as trustee” If the reason for Barbara to change her estate plan was based on Terry’s overreaction to what Mark had suggested, then Barbara’s changes were not based on accurate information. Accordingly, the estate planning changes were fundamentally unfair because Barbara was unduly influenced by Terry’s overreaction.

ARGUMENT

POINT I: THE TRIAL COURT ERRED WHEN IT GRANTED PARTIAL SUMMARY JUDGMENT IN FAVOR OF APPELLEES BASED ON THE DETERMINATION THAT BARBARA BECAME THE OWNER OF THE PRECIOUS METALS PURSUANT TO UTAH CODE ANN. § 75-3-102

Section 75-3-107 of the Uniform Utah Probate Code (“UUPC”) states in relevant part that, “No informal probate proceeding or formal testacy proceeding ... may be commenced more than three years after the decedent's death” unless certain limited exceptions apply. None of the referenced exceptions to extend the three year period apply to the facts of this case. The three year limitations period, however, does not apply to proceedings to determine the heirs of an intestate. *Id.* Subpart (3) of § 75-3-107 indicates:

If no will is probated within three years from death, the presumption of intestacy is final and the court shall upon filing a proper petition enter an order to that effect. The court also has continuing jurisdiction to:

- (a) determine what property was owned by the decedent at the time of death, and

- (b) appoint a personal representative or special administrator to administer the decedent's estate.

Based on the above, the presumption that Elmer died intestate should have become final three years after his death when no probate proceeding was filed. Also, at the time Elmer's death, he had a surviving spouse and surviving descendants who were not surviving descendants of his surviving spouse. Section 75-2-102(1)(b) governs how estate assets should be distributed in this circumstance: "(a) The intestate share of decedent's surviving spouse is ... (b) the first \$50,000.00⁴ plus ½ of the balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse." The remaining balance would pass by intestacy to Elmer's children. At the time the presumption of intestacy became final, Barbara would have been entitled to receive the first \$50,000 of any estate assets (subject to offsets set forth in the UUPC) plus one-half of the remaining balance, and the Mark Ellsworth Parties should have received the other half. In summary, because Elmer's Will has never been probated, there is a conclusive legal presumption that that Elmer died intestate and the property owned by Elmer at the time of his death, as a matter of law, should be passed to his heirs via Utah's intestacy statute.

The trial court, however, found that § 75-3-102 provided an exception to the final presumption of intestacy. This section provides:

Except as provided in Section 75-3-1201, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court, except that a duly executed and

⁴ The 2010 amendment to this provision, effective May 11, 2010, substituted "\$75,000" for "\$50,000" in (1)(b). The \$50,000.00 amount was the operative amount at the time Elmer passed away.

unrevoked will which has not been probated may be admitted as evidence of a devise if both:

(1) no court proceeding concerning the succession or administration of the estate has occurred; and

(2) either the devisee or the devisee's successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

After construing this section, the trial court determined, "The restrictions that Utah Code Ann. § 75-3-1201 places on wills that have not been declared valid through an order of informal probate do not apply to Elmer's will. Barbara had all the precious metals because (1) there was no probate, (2) she possessed the property, i.e. the precious metals when Elmer died." (R. 1087) To reach this conclusion, the trial court determined that Elmer's statement, "If my spouse survives me, I give to her all items of Personal Property (as hereinafter defined)" clearly and unambiguously conveyed the Precious Metals to Barbara. The district court substantiated this position by making the following statements:

Elmer's will leaves the reader anticipating a list of personal property that will specifically be transfer [sic] to Barbara upon Elmer's death. Elmer never made that list. He did convey property to the trust, but he did not convey all of his personal property to the trust. Even though Elmer does not define the words "Personal Property," the term is susceptible to construing it by its plain meaning. As a result, it can be assumed that Elmer's intent concerning the distribution of his personal property is the same as the conclusion a plain meaning of the Will communicates.

A plain reading of the Will explains that Barbara is to receive Elmer's personal property which was not transferred to someone else or to the family trust. Elmer's exclusion, purposeful or not, of precious metals or possibly other items of personal property that was to be transferred to the trust does not authorize the court to make a new will to conform to what the court thinks that testator may have intended, but the intent of the testator must be

ascertained from the Will as it stands. This, even if the Will were effective, it would not transfer the precious metals into the trust.

(R. 1069-1070)

From its Ruling, the trial court appears to have determined that the Precious Metals passed to Barbara because "[a] plain reading of the Will explains that Barbara is to receive Elmer's personal property" and "[Barbara] possessed the property, i.e. the precious metals when Elmer died."

It is not disputed that Barbara possessed the Precious Metals after Elmer died. Appellants, however, contend the trial court erred, as a matter of law, when it determined that the Will plainly devised the Precious Metals to Barbara. The Mark Ellsworth parties believe the trial court did not give appropriate weight to the "as hereinafter defined" language which is contained in the Will.

There are at least two reasonable interpretations that can be gleaned from the "as hereinafter defined" language. First, there is the trial court's interpretation that the reference to "Personal Property" means all personal property owned by Elmer at this death would be passed to Barbara.

Appellants believe there is another reasonable interpretation. Given the fact that Elmer used this specific language in his Will, there must be some meaning applied to it. The term "Personal Property" is capitalized and the context of the language of the Will can reasonably be read to mean that "Personal Property" means something narrower or different than the standard meaning of personal property, otherwise including this language would be redundant.

It can reasonably be interpreted that Paragraph Fourth contemplates a writing that would define or designate what is meant by the term "Personal Property." A reasonable person could interpret paragraphs Fourth and Fifth of the Will as follows: (1) If Barbara survives Elmer, then Elmer will give Barbara all items of "Personal Property" which are specifically defined by Elmer; (2) Since no items of "Personal Property" were ever defined by Elmer, he must have intended that no specific items of "Personal Property" would pass directly to Barbara; and (3) Since no items of Personal Property passed directly to Barbara, the non-defined personal property would pass to the 1991 Trust pursuant to paragraph Fifth which indicates, "I give my residuary estate to the Trustee of then acting under that certain Trust Agreement named THE ELLSWORTH FAMILY TRUST created on the 1st day of May, 1991...." Notably, the term "My residuary estate" is defined in the Will to include all of Elmer's interest in "personal property." (Trial Exhibit 1 at page 11)

Based on competing reasonable interpretations of the Will, the question becomes whether it was Elmer's intent to convey all of his traditionally defined "personal property" to Barbara, or was it his intent that any "Personal Property" he did not specifically designate would pass to the 1991 Trust via the pour over provisions of Paragraph Fifth. This distinction is important because if the Will can reasonably be construed as devising the Precious Metals to the 1991 Trust, rather than Barbara, then the condition relied upon the trial court in Utah Code Ann. § 75-3-102 (devisee possessed the property devised in accordance with the provisions of the will) has not been met. If the conditions in § 75-3-102 have not been met, then the final presumption of intestacy is complete, and Elmer's property should pass to his heirs via the law of intestate succession.

The Comment to § 3-102 of the Uniform Probate Code states in relevant part, "If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, *with reference to the estate they claim*, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any." This Comment serves to confirm the position that Barbara was only entitled to the benefit of § 75-3-102 if she was the specific devisee of the Precious Metals under the terms of the Will.

If it cannot be determined who was the properly named devisee by a plain reading of the Will, then an ambiguity exists. If an ambiguity exists, the trial court should have resorted to extrinsic evidence to determine Elmer's intent regarding who he desired to receive the Precious Metals.

Appellants contend the question (which is a question of law) is whether this language in the Will is ambiguous. In *DCH Holdings, LLC v. Nielsen*, 220 P.3d 178 (Utah Ct App. 2009), this Court stated:

A contract is "ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Daines*, 2008 UT 51, ¶ 25 (internal quotation marks omitted). "[B]efore permitting recourse to parol evidence, a court must make a determination of facial ambiguity" within the contractual language. *Id.* "[If the language of the contract is ambiguous such that the intentions of the parties cannot be determined by the plain language of the agreement, extrinsic evidence must be" considered to determine the parties' intentions. *Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768 (internal quotation marks omitted); see also *Tangren*, 2008 UT 20, ¶ 16 n.19 (stating that where a contract is "obviously incomplete on its face parol evidence is necessary for filling of gaps" (internal quotation marks omitted)). Ambiguity may be found when a contract is missing an essential term. *See Daines*, 2008 UT 51, ¶ 29 (stating that finding ambiguity is not limited to express contractual terms but may also be found "where there are missing terms in a

contract" (citing *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 14, 78 P.3d 600)). "[W]hen determining whether a contract is ambiguous, any relevant evidence must be considered." Id. ¶ 26. But parol evidence may not be used "to obscure otherwise plain contractual terms," for determining what a contract means "begins and ends with the language of the contract." Id. ¶ 30. Therefore, all interpretations inferred from extrinsic evidence must be "reasonably supported by the language of the contract.'" Id. ¶ 26 (quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995)).

Appellants contest the trial court's legal conclusion that the Will plainly indicates it was Elmer's intent to devise the Precious Metals to Barbara, and that as a consequence thereof, that Barbara became the owner of the Precious Metals pursuant to Utah Code Ann. § 75-3-102. Given that more than one reasonable interpretation of the Will is available, the Court erred when it relied on § 75-3-102 in determining Barbara owned the Precious Metals. The granting of summary judgment when a question of material fact about Elmer's intent was still in question was inappropriate. Rule 56, Utah R. Civ. P. The decision of the trial court on this issue should be reversed and lower court should hear parol evidence on Elmer's intent regarding the proper devisee of the Will.

POINT II: THE TRIAL COURT ERRED WHEN IT DETERMINED APPELLEES REBUTTED THE PRESUMPTION THAT BARBARA'S CREATION OF THE 2013 TRUST WAS UNFAIR

At trial, the Mark Ellsworth parties asserted a claim that Barbara was unduly influenced to create the 2013 Trust. Under Utah law, undue influence is *presumed* when a "confidential relationship" exists between the trust or will creator and the beneficiary of the will or trust. *Estate of Ioupe v. Carter*, 878 P.2d 1168 (Utah App. 1994). The existence of a confidential relationship is generally a question of fact. *In re Estate of Jones*, 759 P.2d

345, 347 (Utah App. 1988). In this case, the trial court expressly found a confidential relationship existed between Barbara and Terry. (R. 1659)

Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983) (finding of undue influence in execution of trust shifted burden to defendant to prove absence of undue influence in a subsequent alleged ratification of the trust); *Johnson v. Johnson*, 9 Utah.2d 40, 337 P.2d 420, 422 (1959). Moreover, when a confidential relationship exists, and a transaction occurs that benefits the one in whom the confidence is placed, a presumption arises that the transaction is unfair. *See, e.g. Bradbury v. Rasmussen*, 16 Utah.2d 378, 383, 401 P.2d 710, 713 (1965). This shifts to the benefitting party the burden to persuade the court that there was no fraud or undue influence exercised toward the other. *In re Swan's Estate*, 4 Utah.2d 277, 293, 293 P.2d 682, 693 (1956).

The Utah Supreme Court has recognized in a case of this sort it is not usually possible to procure direct evidence of the statements and conduct which one accused of undue influence has used on the deceased person. One of the two is dead; the other cannot be expected to give evidence against herself. The usual way to prove this type of case is to provide the surrounding circumstances from which deductions may be made. *In re Hanson's Estate*, 87 Utah 580, 52 P.2d 1103, 1110 (Utah 1935). The Utah Supreme Court has also stated, "... undue influence is seldom the subject of direct proof, but, as a general rule, must be established by inferences and circumstances..." *In re Hanson's Will*, 50 Utah 207, 167 P. 256, 261 (Utah 1917).

The trial court expressly found a confidential relationship existed between Terry and Barbara. Based on this finding, the burden then shifted to the Appellees to show that Barbara's transfer from the 1991 Trust to the 2013 Trust was fair.

The trial court found that Appellees rebutted the presumption of undue influence by showing, "Barbara had her own personal motivations to create the estate plan because she was upset with Mark and others of the Ellsworth children." (R. 1658) The trial court apparently founded its determination of Barbara's motivations on the testimony of Terry and Mr. Skabelund. (R. 1677) The lower court found that Barbara took offense to Mark's assertions that she should resign as trustee and that she had already forfeited that position. Additionally, the trial court determined that Barbara was also offended by the Ellsworth children's efforts to block the sale of the American Fork residence. Mr. Skabelund testified that these were Barbara's stated motivations for wanting to create the 2013 Trust documents. *Id.*

The evidence presented at trial established there was a very limited window between the time when Barbara became upset and when she completed the 2013 Trust. It is undisputed that the March 13, 2013 email was the event which triggered the 2013 Trust to be created on March 19, 2013.

While its possible different conclusions regarding the intent of the March 13, 2013 could be made by different readers, the trial court expressly found that Terry overreacted to that email. Terry's perception regarding that email is important. Terry believed the email contained a "threat" and "demand that Barbara resign as Trustee." It is highly significant that Terry did not show the email to Barbara, but Terry presumably conveyed to Barbara

her understanding that Mark had made a threat and demand that Barbara resign. From this point forward, Barbara was acting on what Terry had told her. Consequently, it must be shown that what Terry was telling Barbara was accurate. Where Barbara only received information about the email from Terry, and given the trial court's conclusion that Terry overreacted to the email, it must follow that Barbara based her decision to create the 2013 Trust was founded on Terry's overreaction. It is fundamentally unfair that Barbara made decisions based upon an overreaction from Terry. This is especially true where Terry had much to gain and the Ellsworth children had much to lose.

With regard to the claim that Barbara was upset that the Mark Ellsworth Parties tried to stop the sale of her residence, it is significant that nowhere in the email (or in the record) is there evidence that the Mark Ellsworth parties sought to stop the sale of the Barbara's home prior to the time 2013 Trust was created. There is no basis for such a finding in the record.

In order to rebut the presumption of unfairness, it was incumbent that the Appellees establish that Terry accurately conveyed the content of the email to Barbara. A fair reading of the March 13, 2013 email shows that Mark was simply exploring solutions. He was not making threats or demands. In fact, the very last paragraph of the email clearly establishes that Mark was exploring options. The last paragraph states, "If you have reservations or disagreements, I would appreciate hearing them, so we can try to find an agreeable solution and continue our relationship in the affable fashion that currently exists." What Barbara heard, however, was Terry's understanding of a threat and demand.

The evidence at trial establishes that Barbara was relying on what Terry told her, and not the March 13, 2013 email itself. Thus, to rebut the presumption of unfairness, there must be some showing that Barbara was not acting on Terry's overreaction to the email. Because that evidence does not exist in the record, the only conclusion that can be reached is Barbara was acting on Terry's overreaction. Accordingly, the estate planning changes were fundamentally unfair because Barbara was unduly influenced by Terry's overreaction.

CONCLUSION


Based upon the foregoing, Appellants request that this Court reverse the trial court's summary judgment determination that the Precious Metals were properly Barbara's pursuant to § 75-3-102. It is not clear from a reading of the Will whether Elmer intended that Barbara or the 1991 Trust should receive the Precious Metals. Because of that lack of clarity, it cannot properly be concluded that Barbara was the devisee of the Precious Metals. If Barbara was not devisee of the Precious Metals, then the Court improperly relied on § 75-2-102 in concluding that Barbara was the owner of the Precious Metals.

Additionally, the trial court erred when it determined Appellees rebutted the presumption of unfairness of Barbara creating the 2013 Trust. While the evidence at trial established Barbara created the 2013 Trust because she was angry at one or more of the Ellsworth children, the evidence and findings of the trial court also establishes that Barbara was only acting on information she received from Terry. The trial court found Terry had overreacted. Where Barbara did not see the actual email, but only received Terry's understanding that it contained a "threat" and a "demand," the record can only support a

finding that Barbara acted on Terry's overreaction and not on independent review of the email itself.

Appellants respectfully request that the Court reverse the summary judgment decision and remand this matter for further proceeding to determine Elmer's intent regarding the beneficiary of his Will. Additionally, Appellants request that this Court reverse the trial court's determination that Appellees appropriately rebutted the presumption of unfairness and direct the trial court to enter a finding that presumption of undue influence was not rebutted by the Appellees.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.



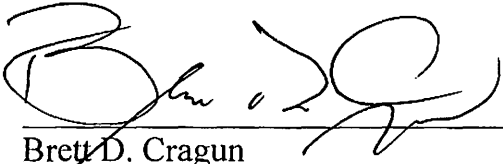
Brett D. Cragun
Attorney for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains no more than 8,613 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in font size 13 and Times New Roman type font.

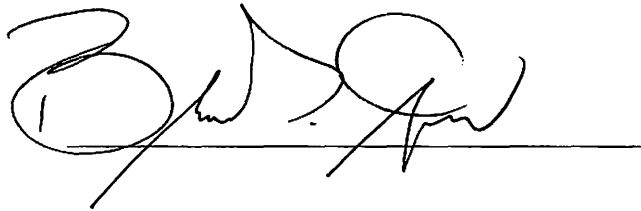
DATED this 29th day of October, 2015.


Brett D. Cragun
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing Brief Of Appellant was served upon the following individuals, by mail, postage prepaid, at the addresses shown below this 29th day of October, 2015.

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A handwritten signature in black ink, appearing to read "Douglas B. Thayer", is written over a horizontal line.

ADDENDUM

ADDENDUM A

Rule 56, Utah R. Civ. P.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 21 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts

essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah Code Ann. § 75-2-102. Intestate share of spouse.

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

(a) the entire intestate estate if:

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

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

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

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

Utah Code Ann. § 75-3-102. Necessity of order of probate for will.

Except as provided in Section 75-3-1201, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if both:

(1) no court proceeding concerning the succession or administration of the estate has occurred; and

(2) either the devisee or the devisee's successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

Utah Code Ann. § 75-3-107. Probate, testacy, and appointment proceedings -- Ultimate time limit -- Presumption and order of intestacy.

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's

domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(a) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding.

(b) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person.

(c) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.

(2) The limitations provided in Subsection (1) do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under Subsection (1)(a) or (b), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this title which relate to the date of death.

(3) If no will is probated within three years from death, the presumption of intestacy is final and the court shall enter an order to that effect and provide for the distribution of the decedent's property in accordance with the laws of intestacy under Title 75, Chapter 2, Part 1. The court has continuing jurisdiction to handle all matters necessary to distribute the decedent's property, including jurisdiction to determine what property was owned by the decedent at the time of death.

Uniform Probate Code § 3-102. Necessity of Order of Probate for Will.

Except as provided in Section 3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the court.

Comment

The basic idea of this section follows Section 85 of the Model Probate Code (1946). The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than \$5,000.

Section 3-107 and various sections in Parts 3 and 4 of this article make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in Section 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, *with reference to the estate they claim*, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

In 1993, a technical amendment removed a two-pronged exception formerly occupying about 8 lines of text in the official text. The removed language permitted unprobated wills to be admitted in evidence in two limited categories of cases in which failure to probate a will within three years of the testator's death were deemed to be justified. The 1993 technical amendment to Section 3-108 so limits the three year time bar on probate and appointment proceedings as to make the Section 3-102 exception unnecessary.

ADDENDUM B

FILED *W*

DEC - 3 2014

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ANDREW L. ELLSWORTH, et al., Plaintiffs v. TERRY HUFFSTATLER, et al., Defendants	FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER Case No: 130400498 Judge David N. Mortensen
TERRY HUFFSTATLER, et al., Petitioner, v. MARK L. ELLSWORTH, et al., Respondents	
TERRY HUFFSTATLER, as Trustee of the Barbara May Ellsworth Trust, Intervenor Plaintiff, v. MARK L. ELLSWORTH, Co-Trustee of the Ellsworth Family Trust, Intervenor Defendant	

This matter came before the Court for trial on September 3, 4, 5, and 18, 2014. The Court received evidence and testimony, along with dozens of received exhibits which include deposition transcripts, financial records, correspondence between the parties, medical reports, legally operative documents such as estate planning documents and related documents, and other evidence. The Court also heard the arguments of counsel through opening statements as well as opening and closing trial briefs. Based upon the consideration of all of the evidence, the Court now makes the following findings of fact and conclusions of law. The parties stipulated to file proposed findings and conclusions and/or closing arguments in writing by October 6, 2014, after which the matter would be submitted for decision.

Introduction

The primary issue in this case is the proper ownership of certain assets, including a six-plex, a residence located in American Fork, and an investment account located at Wedbush Securities. On April 1, 2014, the Court ruled on a partial motion for summary judgment regarding the ownership of certain precious metals. This Order also resolves any remaining dispute surrounding these precious metals.

A secondary issue of this litigation concerns who should act as trustee of the 1991 Trust and whether Mark Ellsworth or Terry Huffstatler have breached any duties in their capacities as trustees.

The Mark Ellsworth parties¹ seek to show that Barbara Ellsworth lacked legal capacity on March 19, 2013 when she executed documents which created the 2013 Trust, transferring 50% of the 1991 Trust's ownership in the six-plex, the American Fork residence, and the Wedbush account to the 2013 Trust. The Mark Ellsworth parties also seek to show that the March 2013 trust documents are invalid as being procured by the undue influence of Barbara's children. It is also the position of the Mark Ellsworth parties that the transfers were void due to Terry's conflict of interest. The Mark Ellsworth parties also want Terry removed as co-trustee of the 1991 Trust. Finally, they seek attorney fees and costs.

The Terry Huffstatler parties² dispute the contentions that Barbara lacked capacity to execute the 2013 Trust, that the transfer documents were procured by undue influence, and that the transfers were void due to any conflict of interest. The Terry Huffstatler parties want Mark removed as co-trustee of the 1991 Trust due to mismanagement of trust assets. They seek an order enforcing Barbara's 2013 estate planning documents. They also seek attorney fees and costs.

¹ The "Mark Ellsworth parties" include Mark Ellsworth, individually and as a Co-Trustee, Andrew Ellsworth, Michelle Thomas, Ken Ellsworth, Tami Jasper, and Tim Ellsworth.

² The "Terry Huffstatler parties" include Terry Huffstatler, individually and as Personal Representative of the Estate of Barbara Ellsworth and as Co-Trustee, Terry Huffstatler, Jim Huffstatler, Karl Baker, and Kieth Baker.

Findings of Fact³

1. **Events surrounding the dispute.** All of the issues in this case arise from the implementation and administration of two trusts: The Ellworth Family Trust created in May 1991 ("1991 Trust") and the Barbara May Ellsworth Trust created in March 2013 ("2013 Trust"). The Court notes that no party has alleged ambiguity in either trust instrument. Upon review of the language of the trusts, found in Exhibits 1 and 21, the Court has confirmed that, to the extent it is relevant to any present issues, the trusts' language is unambiguous and therefore their provisions can be interpreted and applied as a matter of law.

2. On May 1, 1991, Elmer and Barbara Ellsworth executed a Trust Agreement that created the 1991 Trust, with the assistance of attorney Steve Skabelund. The 1991 Trust was notarized contemporaneously with its execution. (Exhibit 1.)

3. Elmer and Barbara executed a Warranty Deed that transferred two parcels of property—the marital home and a six plex—to the 1991 Trust. After Elmer's death, an investment account at Wedbush Securities, Inc. was created to be held by Barbara as the trustee of the 1991 Trust.⁴

4. Sections 9.1 and 9.2 of the 1991 Trust provide for the appointment of successor trustees upon the death of one or both of the Ellsworths:

9.1 Appointment. The Trustors hereby nominate and appoint ELMER A. ELLSWORTH and BARBARA MAY ELLSWORTH, as Trustees of this Trust. If either of them resigns

³ To the extent that the Court's findings of fact are more properly characterized as conclusions of law, they should be deemed as such. To the extent that the Court's conclusions of law are more properly characterized as findings of fact, they should be deemed as such.

⁴ The parties stipulated as to the balance of the Wedbush account, which was \$53,331.72 as of September 2, 2014.

or fails to serve for any reason, the remaining initial Trustee shall serve as the sole Trustee hereunder.

9.2 Appointment of Successor. (a) Upon the death, incapacity, resignation or discharge of both Trustees, then the following individuals shall serve as Successor Co-Trustees: TERRY ANN BAKER HUFFSTATLER and MARK L. ELLSWORTH. (b) Any Trustee or Successor Trustee may resign by instrument in writing.

5. When Elmer passed away on February 7, 2003, Barbara became the sole trustee and primary beneficiary of the 1991 Trust. As the primary beneficiary, she became entitled to the entire net income and as much of the trust principal as was necessary for her support and maintenance:

7.1 Family Trust: Lifetime Distributions. (a) During the lifetime of the surviving Trustor, the Trustee shall pay to or apply for the benefit of the Surviving Trustor the entire net income of the Family Trust, in quarterly or more frequent installments. In addition, if the Trustee deems the net income to be insufficient for the reasonable support and maintenance of the Surviving Trustor, the Trustee shall pay to or apply for his or her benefit as much of the principal of the Family Trust as the Trustee, in the Trustee's discretion, deems necessary for such limited purposes.

(b) In any calendar year the Trustee shall also pay over to the Surviving Trustor from the principal of this Family Trust such amounts as the Surviving Trustor shall request in writing [subject to specific limitations set forth within this section].

6. The 1991 Trust named seven of Elmer's biological children and three of Barbara's biological children as contingent beneficiaries, all of whom are parties to this action with the exception of one of Elmer's children who passed away before Barbara's death.

7. During the several years preceding Barbara's death in December 2013, she lived in various stages of ailing physical and mental health.

8. Following Elmer's death, Terry Huffstatler, Barbara's daughter, took on the role of caring for and assisting her mother with the daily tasks of living.

9. As Barbara's years advanced, Terry's role required an increasing amount of attention and effort. At trial Terry testified that she had almost daily contact with Barbara. For the 3 years preceding Barbara's death, Terry attended most if not all of Barbara's doctor appointments.

10. Barbara suffered from diminished eyesight and hearing. She also suffered from Parkinson's disease and diminished cognitive functioning.

11. While she was trustee, Barbara did not have any complex or detailed management responsibilities. She did not manage the Wedbush account, and her step-son, Mark Ellsworth, managed the six-plex.⁵ Barbara lived in the American Fork residence and paid her personal and house-related bills.⁶ Per the terms of the trust, she received a payment every month from the net income that the six-plex generated and deposited that money into her personal checking account. Barbara used an accountant every year to reconcile the trust's assets and to file taxes. Her trustee

⁵ Mark has acted as manager of the six-plex for several years. His responsibilities have included renting the property, collecting rents, and providing maintenance. He receives \$400.00 per month for the services he provides. Until May 2013, Mark paid Barbara a monthly amount from the six-plex proceeds. Per the terms of the trust, Barbara set the amount, the most recent of which was \$1,800.00 per month. He stopped making payments to Barbara in May 2013, and he testified that he used the income from the six-plex to pay for repairs to that property.

⁶ The parties agree that there is an unresolved title history issue with the American Fork residence, but that, in the interests of efficiency and finality, the American Fork residence should be included in the corpus of the 1991 Trust. This will allow the Court to consider the disputed validity of Barbara Ellsworth's transfer of her beneficial interest in the American Fork residence without reference to its clouded title history. For the purposes of this trial, the parties and the Court will consider the residence to have been viably transferred many years before this litigation began. The parties agree that the Court should enter whatever quiet title orders will be necessary to effectuate its ultimate determination of ownership of this property.

responsibilities were associated with her routine tasks of day-to-day living and did not require her to possess any special expertise.

12. In November 2012, Barbara fell and suffered serious injuries, including hip and humerus fractures. These injuries required Barbara to undergo serious surgery and to take pain medication. The evidence indicates that, following her injuries, Barbara's physical and mental condition worsened. She became less mobile and less capable of accomplishing daily tasks of self-care. The increased stress negatively impacted the Parkinson's disease symptoms from which she suffered as well as her general cognitive functioning.

13. Terry's responsibilities in her role as her mother's caretaker increased substantially during this time. As a result, Barbara empowered Terry to administer and execute tasks on her behalf, including writing checks and other financial management activities. The Court notes that both Mark and Marilyn Ellsworth acknowledged that they knew that Barbara relied greatly on Terry; until March 2013, the Ellsworth siblings seem to have welcomed or at least accepted Terry's access to and daily collaboration with Barbara.

14. In the process of empowering Terry as an administrator of Barbara's decisions, Terry and Barbara visited Mr. Skabelund, Barbara's estate planning attorney. The unrebutted testimony at trial was that Mr. Skabelund was the one to suggest that Barbara sign an updated power of attorney document that would allow Terry to act for Barbara on personal matters.⁷ During his

⁷ Barbara's 1991 estate planning documents had also appointed Terry as Barbara's attorney-in-fact.

trial testimony, Mr. Skabelund⁸ noted that appointments such as this constitute a common part of the estate planning process, especially for elderly clients. Mr. Skabelund also testified that he had had no concern over Barbara's capacity to execute such a document. Accordingly, Mr. Skabelund drafted a General Power of Attorney designed to deal only with Barbara's personal assets—not trust assets—which Barbara signed on December 17, 2012.

15. Shortly after Barbara signed the General Power of Attorney, Terry and Mark began to correspond in order to set up a meeting to go over the 1991 Trust documents and to discuss their probable future roles as co-trustees of that trust. Mark and Terry both testified that at this point their relationship was cordial and cooperative.

16. Their meeting took place in early March 2013. During that meeting, Terry informed Mark that Barbara wished to sell the American Fork residence because she was no longer able to live there due to her physical condition and because the HOA rules would not permit her to rent the house. Terry also informed Mark of the power of attorney document that Barbara had signed in December 2012. At the end of that meeting, Mark told Terry that he wanted to discuss the sale of the American Fork residence with his other siblings who were contingent beneficiaries of the 1991 Trust.

17. The genesis of the present dispute stems from a subsequent email Mark sent to Terry on March 13, 2013, wherein he requested that Barbara resign as trustee of the 1991 Trust. In that email Mark stated,

⁸ This court only considered Mr. Skabelund's testimony as a fact witness. As to Mr. Skabelund's assertions as to the legal effect of any document, including those he prepared, such legal conclusions are solely for the Court to determine.

We as a family all believe caring for [Barbara's] needs is the top priority. In reviewing [Barbara's] health condition, we feel that given her ongoing declining medical condition and memory as well as her chronic conditions of bipolar, DVT's and the recent diagnosis of Parkinson's that she is not in a condition to manage the fiscal affairs of the trust. We believe this is supported in action by you, by the fact that you had Barbara sign over to you a power of attorney and are handling her fiscal affairs.

(Exhibit 8.)⁹

18. Terry understood this email as a threat and a demand that Barbara resign as trustee.

19. After receiving this email, Terry contacted Mr. Skabelund and arranged a meeting for the very next day, March 14, 2013. Terry and Mr. Skabelund both testified that Barbara requested the meeting because she took offense to Mark's assertions that she should resign as trustee and that she had already forfeited that position. Barbara was also offended by the Ellsworth children's efforts to block the sale of the American Fork residence. Mr. Skabelund testified that these were Barbara's stated motivations for wanting to create the 2013 Trust documents.

20. Based on his consultations with Barbara, Mr. Skabelund drafted a new set of estate planning documents, including a will, another updated power of attorney document, and the Barbara May Ellsworth Trust ("2013 Trust"). These new documents transferred 50% of the

⁹ Elsewhere in that same March 13, 2013 email, Mark asserts that Barbara "defaulted" her position as trustee by granting Terry a power of attorney. The Court finds that this assertion is without legal merit as there exists no trust provision supporting that proposition. Indeed, the 1991 Trust actually includes a power of attorney designation. This indicates that the Trustors contemplated the possibility that an individual could serve as trustee despite such a designation. Further, Section 11.1 of the 1991 Trust provides a mechanism for a determination of trustee capacity. The reasons why the Ellsworth parties failed to rely on this mechanism to determine Barbara's capacity to serve as trustee remain unclear to the Court.

property from the 1991 Trust to the 2013 Trust and named only Barbara's biological children as beneficiaries.

21. At that March 14, 2013 meeting, Barbara signed a new power of attorney designation which named Terry as her agent. In contrast to the power of attorney designation signed by Barbara three months earlier, this power of attorney also gave Terry the authority to withdraw assets from the 1991 Trust in accordance with the terms of the 1991 Trust. (Exhibit 16.)

22. The new estate plan was executed on March 19, 2013. The effect of the new trust was to diminish the Ellsworth siblings' interest in the property of the 1991 Trust. All of this was done without consulting the Ellsworth children and without their knowledge. Irrespective of the validity of these transfers, the Court finds that these actions served to exacerbate the existing tensions between Barbara's children and Elmer's children.

23. What follows is a series of escalations from each set of siblings which would eventually culminate in long, arduous, and expensive litigation. On the evening of March 19, after the new estate planning documents had been executed, Terry responded to Mark's March 13 email:

I have had time to review your email that you sent on March 13th.

In response, my brothers and I discussed this matter with our Mother and she stated that she will not resign from the family trust. She also requested that the keys to the safe deposit boxes be returned to me, along with the [six-plex] tax information for the year 2012 within 5 days.

(Exhibit 40.)

24. At trial, Mark's wife Marilyn Ellsworth testified that, in reaction to this email, Mark feared that Terry would use her power of attorney to improperly manage assets of the 1991 Trust and damage the Ellsworth siblings' interest in the trust property.¹⁰

25. On the morning of March 21, 2013, Mark and his sister Tami Jasper visited Barbara in her home. Mark and Tami both described the interaction during their trial testimony. Mark stated that he and Tami decided to go visit Barbara to gauge whether she was open to the idea of resigning. Tami and Mark both testified that the visit was cordial. During the course of that visit, Mark and Tami presented Barbara with a written resignation document that Mark's attorney, John Buckley, had prepared.

26. At trial Tami described Barbara as being "on a teeter-totter" about signing the document, but that Barbara finally decided to sign the document once Tami walked over to a picture of Jesus Christ in Barbara's room and asked Barbara to consider what Jesus would do if he were in Barbara's situation.

27. Having passed away, Barbara could not testify. Tami and Mark's testimony conflicts with the testimony offered by Terry and her daughter, Tina Miller, who testified that Barbara indicated that the meeting was much more confrontational than Mark and Tami describe. Their

¹⁰ The evidence and testimony presented at trial lead the Court to conclude that from this time forward, all parties in this matter acted primarily in their own self-interest and not in the interests of Barbara and of family unity, with the exception of the time and effort that Terry and others expended in caring for Barbara during the last months of her life, which the Court regrets have been marred by the quarreling of her children and step-children over the disposition of her earthly assets. The Court has considered the credibility of the testimony of all parties to this case in light of the fact that each of these individuals has something to gain monetarily as beneficiaries of Barbara's estate.

testimony conveyed a sense that Mark and Tami coerced Barbara's signature through the use of subtle threats and hostility.

28. It is not necessary for the Court to determine what actually happened at this meeting in order to decide the issues at trial. Each side has villianized the other, and the Court cannot, and need not, determine the credibility of each competing version of events. However, all of this does serve to illustrate the combative, manipulative nature of the circumstances surrounding this litigation.

29. Within hours of securing the resignation of trustee document, Mark presented it to Terry, to his attorney, and to the administrator of the Wedbush investment account, Kim Hodges.

30. When Mark brought Kim Hodges a copy of the resignation of trustee document and asked to change the named trustees on the Wedbush account, Mr. Hodges did change the names on the account.

31. Due to the competing documents that Mr. Hodges received on March 19 and March 21, Mr. Hodges talked to Wedbush legal counsel and Wedbush decided to freeze the account.

32. Since that time, the only withdrawals from the Wedbush account have been two separate withdrawals for the purpose of paying attorney fees. Plaintiffs dispute the validity of the June 2013 withdrawal and the parties agreed to the January 14 withdrawal, wherein Wedbush distributed \$49,200 (1/2 to each side) for the intended use of paying attorney fees

33. Shortly thereafter, Mark and Andrew created warning notices that they posted in numerous places on the premises of the American Fork residence which warned potential purchasers not to buy the house.

34. Michelle Thomas, one of the Ellsworth siblings, further escalated the mounting conflict by sending a series of hostile email communications to Terry. These emails, sent on March 21, called Terry "evil" and stated that a Utah County prosecutor was in the process of prosecuting Terry for elder abuse. (Exhibit 14.) Through these emails Michelle also told Terry, "I will visit your work, your house, your childrens [sic] or have you monitored by a private investigator until I get there, that is already in the works." *Id.* During the discovery process, however, Michelle conceded that the threats of prosecution and private monitoring were baseless. The Court finds that Michelle's testimony at trial that the emails do not accurately reflect what she typed is not credible and that she was one of many players in these events that served to escalate the conflict rather than act to resolve it.

35. Subsequent to these events, Barbara again met with Mr. Skabelund on March 22, 2013, and she expressed to him that she did not want to resign as trustee of the 1991 Trust and that she wanted to complete the sale of the American Fork residence.

36. Barbara dictated a withdrawal of her resignation to Mr. Skebelund, which they both then signed and which states that Barbara wished to sell the American Fork residence. (Exhibit 19.) It is not necessary to rule on the legal efficacy of this document, but the Court notes that it tends to demonstrate Barbara's ability to understand what her property is and to formulate a plan for its disposal.

37. However, both Mark and Andrew Ellsworth testified that when they met with Barbara on that same day, she seemed feeble, confused, and thought that Andrew was his deceased brother Daniel.

38. On May 30, 2013 Barbara resigned as trustee and filed a petition to remove Mark as co-trustee of the 1991 Trust. (Exhibit 57.) Among her chief complaints was Mark's failure to pay her any of the trust income from the six-plex to which she was entitled during the month of May 2013. After this point, Mark ceased making payments to Barbara from the six-plex income. The Court finds that Mark's failure to properly distribute 1991 Trust income to the 1991 Trust beneficiary constitutes a breach of his duties as co-trustee.

39. The parties stipulate that Mark and Terry were co-trustees of the 1991 Trust no later than May 30, 2013.

40. In June 2013, Terry assisted Barbara in using 1991 Trust funds to pay Mr. Skabelund's bill. (Exhibit 20.)

41. On June 13, 2013, Mark sent Terry an email which reads, "Terry, It is now my understanding that you and I are co trustees of the trust. Are you willing to discuss trust issues with me?" (Exhibit 39.) At trial, Terry testified that she did not respond to this email or attempt to coordinate trust administration with Mark.

42. On November 15, 2013, a Warranty Deed conveying an interest in the six-plex and residence from the 1991 Trust to the 2013 Trust was recorded. (Exhibit 34.)

43. On December 16, 2013, Terry, in her capacity as agent and attorney-in-fact for Barbara, issued a Demand for Withdrawal wherein she demanded that 50% the American Fork residence, the six-plex, the Wedbush account, and 50% of all cash on hand be transferred from the 1991 Trust to the 2013 Trust. (Exhibit 27.) The Court finds that this constitutes a breach of Terry's duties as co-trustee of the 1991 Trust.

44. On that same day, Terry executed a Bill of Assignment which purports to transfer the contents contained in safe deposit boxes at the Bank of Amerian Fork to the 2013 Trust. (Exhibit 24.) This does not constitute a breach of Terry's duties as co-trustee because the precious metals were not property of the 1991 Trust.

45. Barbara passed away on December 18, 2013. The parties have stipulated that, at the time she died, Barbara suffered from advanced dementia and Parkinson's disease. Fact Stip. ¶ 4.

46. At least one time after Barbara's death, Terry attempted to transfer funds from the Wedbush account to the 2013 Trust. (Exhibit 62.)

47. Since Barbara's death, Terry has managed and overseen the American Fork residence. She testified that she spent 3-4 hours per month overseeing the property, and seeks \$400.00 per month as compensation. The Court will grant the request, but because it lacks any factual evidence supporting \$400.00 as compensation, it will award her \$200.00 per month.

48. On January 14, 2014, Wedbush distributed \$49,200 (1/2 to each side) for the intended use of paying attorney fees.

49. **Evidence Relevant to determining Barbara Ellsworth's capacity to execute the 2013 Trust.** The evidence clearly established that as early as 2011 Barbara suffered from some level of cognitive decline and that shortly before her death, Barbara lived in a state of incoherent unresponsiveness.

50. The parties have stipulated that Dr. Matthew Shellenberg:

a. was competent to offer a statement about Barbara Ellsworth based on his personal knowledge, his years of medical training expertise and experience, and his experience with Barbara;

b. was Barbara's primary physician as of November 13, 2013;

c. had been caring for Barbara since May 2, 2013 when Barbara was put in hospice care;

d. determined that as of November 13, 2013 Barbara had advanced dementia associated with her Parkinson's disease;

e. indicated that, as of November 13, 2013, Barbara was unable to appropriately respond to questions and had only the minimal ability to communicate anything;

f. Stated that as of November 13, 2013, he could not understand Barbara's responses to even his most basic questions. It appeared to him that Barbara had almost no ability to perceive or understand what was being asked. Barbara had almost zero ability to make her perceptions known to others. He could not even get her to answer simple questions about whether Barbara was in pain, what complaints she had, etc.

g. Stated that, as of November 13, 2013, most of what Barbara said was a "word salad," which meant her words were simply jumbled up with no coherent meaning or structure to them. Barbara was also in an extremely weak condition; and

h. Opined that because Barbara suffered from Parkinson's disease and severe dementia that, on November 13, 2013, her being subjected to questions from lawyers would create a great deal of stress and anxiety; no matter how politely the questions were

asked, which in turn, would exacerbate her already serious symptoms, such as her disorientation, jumbled speech, anxiety, etc. Even if Barbara could perceive the intent of the lawyers' questions, which he believed Barbara would not be able to do, Barbara would have likely become very frustrated, confused, and possibly agitated by her inability to make her perceptions known, if Barbara had any such perceptions.

51. On August 17, 2011, a Preadmission Screening Resident Review (PASRR) was completed for Barbara. It was completed by Pat Parkinson, LCSW, who is employed by Wasatch Mental Health. Ms. Parkinson determined, among other things, that Barbara had some past symptoms of mania, depression, and memory loss. Barbara made some errors on a clock-drawing test and scored below average on a test requiring her to name letters beginning with the letter F. The report also noted that Barbara had a diminished ability to perform many activities of daily living, including the "handling of money." (Exhibit 45.) Ms. Parkinson also testified at trial that Terry provided information about an incident where Barbara became confused while driving a vehicle.

52. Tim McGaughy, MD reviewed and approved this PASRR assessment. *Id.*

53. At trial, the Ellsworth siblings, particularly Mark and Marilyn, testified that Barbara believed her home was infested with bugs that were really pieces of lint, transferred a significant amount of money to local artist Janice Kapp Perry, gave a health care worker access to her bank accounts, collected her own stool sample and placed it on her stove to heat and preserve it, was forgetful and oft confused about picking up medications from the pharmacy, purchased a

\$3,000.00 vacuum, fell victim to an online credit card scam, and purchased items from TV infomercials of which she had no conceivable use.

54. On October 4, 2012, Barbara and Terry visited Dr. Sean Curzon, D.O., who had previously treated Barbara. Dr. Curzon's note from this visit states: "Barbara Ellsworth is a 78 year old female here for concerns about several items. Her daughter is also worried about several items. Has noted more confusion recently more absentmindedness. Inability to remember names and how to do certain things." (Exhibit 46.)

55. As a result of the October 4, 2012 visit, Dr. Curzon assessed Barbara as having "confusion" (among other things) and also prescribed the drug Namenda. Namenda is a medication used to treat dementia.

56. In November 2012, Barbara was admitted to American Fork Hospital as the result of a fall she had sustained. Upon admission, Dr. Michael B. Jolley, M.D., interviewed Terry. Terry had noticed that Barbara had a bit of confusion during the previous three days that was more than her baseline cognitive impairment. Terry was planning to take Barbara in to be evaluated, but the fall kept her from doing so. (Exhibit 48.)

57. On November 16, 2012, a second PASRR assessment was completed for Barbara, again by Pat Parkinson. This assessment indicated that Barbara suffered from day/night confusion, showed symptoms of depression, was unable to manage her money or medications independently, and had recently suffered a noticeable general increase in confusion. (Exhibit 47.)

58. Ms. Parkinson concluded that Barbara's dementia had progressed, that she should no longer live alone, and that her condition was not likely to improve. *Id.*

59. The November 19, 2012 medical records note a history and symptoms of dementia, bipolar disorder, and Parkinson's disease. (Exhibit 48.)

60. On November 20, 2012, Dr. Walstri Fonseca ordered "cognitive retaining," noting that Barbara had dementia. The notes also indicate that Barbara was pleasant, but confused. *Id.*

61. The November 21, 2012 notes indicate that Barbara was alert and pleasant but confused and disoriented as to time and place. *Id.*

62. The November 25, 2012 notes indicate that Barbara was forgetful. *Id.*

63. Barbara's medical records contain similar entries throughout the month of December 2012. *Id.*

64. On January 16, 2013, Barbara met with Dr. Fonseca, who indicated that Barbara still suffered from dementia and memory loss, but was otherwise doing well. (Exhibit 50.)

65. On January 21, 2013, Barbara met with Dr. Curzon as a result of reported delusions.

66. On February 6, 2013, nursing notes indicate that Barbara was confused intermittently, forgetful, incontinent, and dependent on others for activities of daily living. On February 13, 2013, the nursing notes indicate that Barbara was forgetful, incontinent, and dependent on others for activities of daily living. (Exhibit 51.)

67. The March 18, 2013 medical notes indicate that Barbara was slightly confused and forgetful. It was also noted that the Parkinson's seemed to be worsening. (Exhibit 52.)

68. On the morning of March 19, 2013—the day the 2013 Trust documents were executed—Terry accompanied Barbara to the office of Dr. Sean Curzon, D.O., for an examination. Terry testified that the purpose of the visit was to follow up on Barbara's hip fracture and to see if

Barbara was "able to make self-care directives, and participate in an overall understanding of surroundings, and ability to participate in decision making process." (Exhibit 32.) All three of Barbara's children were present for the March 19 appointment.

69. Dr. Curzon's report indicates that Barbara suffered from confusion but that "at this point she should be able to still manage her legal affairs but would have family available if needed should there be any changes." *Id.*

70. During that visit, Dr. Curzon completed a Mini Mental Status Exam (MMSE), and Barbara scored a 20/30, which typically indicates that a patient is on the borderline between mild and moderate cognitive impairment. Dr. Curzon noted that despite this MMSE score, "[Barbara] is overall still able to understand conversations and being [sic] an active participant in her care." *Id.*

71. Dr. Checketts, an expert witness called by the Ellsworth siblings, testified that Barbara's progressive mental illness probably affected her ability to understand legal documents and put her at greater risk of being influenced by others.

72. Nursing notes from March 28, 2013 indicate that Barbara was confused intermittently, forgetful, lethargic, incontinent, and dependent on others for activities of daily living. (Exhibit 52.)

73. On April 12, 2013, attorney Scott Walsh sent an email to Plaintiff's counsel Brett Cragun which states that Mr. Skabelund indicated that he believed Barbara did not have capacity to act as trustee. The email does not discuss Barbara's *testamentary* capacity as it existed in March 2013. (Exhibit 104.)

74. Ultimately, the Court finds that on March 19, 2013, at the time and place she executed the documents, Barbara suffered from a long-standing dementia and some confusion. However, the court also finds that the level of impairment by dementia waxed and waned, often being exacerbated when she was hospitalized for other physical conditions, and that even in light of dementia and confusion Barbara knew who her children and step-children were, knew the objects of her bounty, and knew how she wanted to dispose of her bounty. Further, the Court finds that even where Barbara may have had confusion (such as what a particular date) the evidence clearly established that she knew she had a house, that she owned the six-plex, and knew of the existence of the investment account.

Analysis

One important function of our court system is its role as ultimate decider in situations where estate beneficiaries fail to work together in unity for the good of the family as a whole. This Court must now step in and play that role for this family that has failed to work together to reach a beneficial solution by themselves.

Barbara did not lack testamentary capacity to execute the 2013 Trust documents on March 19, 2013. The law provides a wide variety of standards for competency, each to be applied and understood in the context of a particular legal question. Each legal question is dependent upon the factual underpinnings that the case presents. In this case, the first question the Court must answer is whether Barbara had capacity to execute the 2013 Trust documents on March 19, 2013. The Court finds and concludes that she did have testamentary capacity.

The classic test of general testamentary capacity has three elements: to make a will, one must be able to (1) identify the natural objects of one's bounty and recognize one's

relationship to them, (2) recall the nature and extent of one's property, and (3) dispose of one's property understandingly, according to a plan formed in one's mind.

In re Kesler, 702 P.2d 86 (Utah 1985). Whenever an individual's testamentary capacity is at issue, "[c]ontestants of a will have the burden of establishing lack of testamentary intent due to capacity." Utah Code Ann. § 75-3-407. This same burden applies when a party challenges the testamentary intent required to create or fund a trust. Utah Code Ann. § 75-7-402(1)(a); Utah Code Ann. § 75-7-604. To carry this burden of proof, the contestant must show by a preponderance of the evidence that the trustor lacked testamentary capacity. *Kesler*, 702 P.2d at 88. An individual need not be particularly alert, nor need the person have any special acumen in order to execute a will or trust. *Estate of Loupe v. Carter*, 878 P.2d 1168, 1173 (Utah Ct. App. 1994). Finally, the contestant must show that the person lacked testamentary capacity at the time the will or trust was made, and the inquiry should be limited to a period of time not too remote from that event. *Kesler*, 702 P.2d at 93.

The Court must be careful not to conflate the indicators an average person might use to gauge a person's ability to make important life decisions with the actual legal standard for testamentary capacity. Indeed, sometimes people are surprised to learn that case law has established that a finding of mental retardation does not preclude a finding of testamentary capacity. *In re Estate of Teel*, 483 P.2d 603 (Ariz. Ct. App. 1971). In *Teel*, the court was faced with a factual scenario where a testator functioned on the level of a twelve year old. Mr. Teel was mentally retarded. Nevertheless, evidence showed he could drive a car and complete simple manual tasks. He could assume the responsibility for running errands, care for flower gardens, and complete other assignments. He did not get along with his brother and ultimately

disinherited him. The brother challenged the will on the basis of capacity. The brother argued that because the decedent had been declared incompetent and had had a guardian placed over him he did not possess testamentary capacity. The court found otherwise. Again, the question is whether testamentary capacity exists, which by law can exist when a person is placed under guardianship and when a person is mentally retarded or demented. *See accord, Jackson c. Schrader*, 676 N.W.2d 599, 606 (Iowa 2003).

Dementia can also exist at the same time as testamentary capacity. A great number of Utah courts have found testamentary capacity even in the face of a finding of dementia or indications of dementia. *See, e.g., In re Chonga's Estate*, 202 P.2d 711 (Utah 1949); *In re Hansen's Will*, 177 P. 982 (Utah 1918); *In re Swan's Estate*, 170 P. 452 (Utah 1918).¹¹

Upon review of the evidence, the Court concludes that the contesting parties have demonstrated by a preponderance of the evidence that Barbara suffered from dementia and other conditions which may have hampered her mental condition. However, this Court heard very

¹¹ In their briefs, the Ellsworth siblings rely heavily on *In re Astill's Estate*, 381 P.2d 95 (Utah 1963). In that case, the decedent was found to lack testamentary capacity based on a doctor's testimony that the decedent was a "confused elderly gentleman whose speech was incoherent... had poor muscle coordination; was not able to care for himself physically or dress himself adequately. He could not answer questions in a coherent manner... was emotionally very labile [unstable] and difficult to manage, easily agitated." *Id.* at 97. The doctor also concluded that the decedent "exhibited an organic confusional state in which he was not aware of the time, place and had difficulty in remembering things. He acted impulsively and was irrational." *Id.* The Court notes that, while some of the above symptoms may have certainly applied to Barbara in March 2013, in contrast to the decedent in *Astill*, the testimony and evidence at trial has not demonstrated that Barbara lived in such an organic confusional state in which she was unable to answer questions coherently or understand her surroundings. In this way, Barbara presents a very different case than the decedent in *Astill*.

little, if any, credible evidence that Barbara did not understand her relationship to her children and step-children, the nature of her property, and her ability to form a plan to dispose of that property through the 2013 Trust.

The only evidence that has been offered that Barbara did not recognize the objects of her bounty and her relationship to them was the assertion that she mistook Andrew for his deceased brother Daniel. However, the Court must consider the fact that both Andrew and Mark (who made this assertion) both have something to gain from a finding that Barbara lacked capacity. This, in conjunction with the fact that their assertion lacks corroboration from other independent sources, leads the Court to conclude that this assertion does not outweigh other evidence, discussed below, which tends to show that Barbara did not lack capacity. Again, as stated, the Court finds that Barbara knew who her children and step-children were, knew she had a house, that she owned the six-plex, and knew of the existence of the investment account, and knew how she wanted to dispose of those particular assets, which are the assets at issue in this case.

The medical evidence and expert testimony tend to demonstrate that Barbara was sometimes confused and often required assistance to complete the tasks of daily living. The Court has reviewed Barbara's various medical records which often refer to difficulties in her ability to care for herself and to make decisions on her own behalf. The records also note that she was sometimes confused and forgetful. While these considerations are not irrelevant to a determination of testamentary capacity, they tend to provide little guidance in regards to her ability to understand what her property is and to whom she wants it to go. Such evidence is certainly important to determining whether Barbara possessed the mental capacity to serve as

trustee or to manage her own financial affairs. However, those standards are different than the one the Court must follow for testamentary capacity.

The Ellsworth siblings have not met their burden to show by a preponderance of the evidence that Barbara lacked testamentary capacity during the relevant time period. The Court does not doubt Dr. Checketts's conclusion that Barbara probably was unable to understand legal documents. Many parties who sign legal documents do not understand the intricacies and nuance of the language in the documents they sign. However, that is not the standard for testamentary capacity or even normal capacity to enter a contract. Accordingly, Dr. Checketts's testimony carries little substantive weight. In contrast, the withdrawal of resignation document dated March 22, 2013 that Barbara prepared with the assistance of Mr. Skabelund tends to demonstrate that she was able to understand, for example, that she owned the American Fork residence and that she wanted to sell that residence to a particular family. This speaks directly to her ability to know what her property is and to formulate a plan for its disposition. Furthermore, Mr. Skabelund, a professional who regularly practices in the areas of trusts and estate planning, testified that he did not believe that Barbara lacked testamentary capacity at the time she executed the 2013 Trust. Mr. Skabelund's position as her estate planning attorney required him to discuss with Barbara her normal estate planning issues: her property, her heirs, and her plan. In this role he is uniquely qualified to understand Barbara's capacity. Barbara also was examined by a medical doctor on the day the trust was executed. Although Dr. Curzon noted some level of impairment on the day the 2013 Trust was executed and in his deposition testimony, he also expressed his opinion that

Barbara was able to generally understand what was going on and make decisions concerning her assets.

Considering the relevant standard for testamentary capacity, the Court concludes that the evidence tends to preponderate against a finding that Barbara lacked capacity to execute her 2013 estate planning documents, including the 2013 Trust.

The 2013 Trust documents were not procured through undue influence. Before a court can declare a will invalid for undue influence,

There must be an exhibition of more than influence or suggestion, there must be substantial proof of an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising the influence rather than that of the testator.

Iuope, 878 P.2d at 1174, quoting *In re Lavelle's Estate*, 248 P.2d 632 (Utah 1952). It is significant to note, however, that undue influence is presumed where a confidential relationship exists between the trust or will creator and the beneficiary of the will or trust. *Id.* The existence of a confidential relationship is generally a question of fact. *In re Estate of Jones*, 759 P.2d 345, 347 (Utah Ct. App. 1988) *rev'd on other grounds*, 858 P.2d 983 (Utah 1993). "While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to the kinship, [of] a reposal of confidence by one party and the resulting superiority and influence on the other party... Mere confidence in one person by another is not sufficient alone to establish such a relationship." *Id.* at 347-48, quoting *Bradbury v. Rasmussen*, 401 P.2d 710, 713 (Utah 1965).

However, even where a confidential relationship exists, the presumption of unfairness may be overcome by countervailing evidence if the defending party proves the absence of unfairness by a preponderance of the evidence. *Robertson v. Campbell*, 674 P.2d 1226 (Utah 1983) (finding of confidential relationship in execution of trust shifted burden to defendant to prove absence of unfairness by a preponderance of the evidence).

In the present matter, it is clear that a confidential relationship existed between Barbara and Terry. This relationship arises not simply because of their mother-daughter relationship, but because of the confidence Barbara reposed in Terry in giving her power as her agent, her attorney-in-fact, and in depending on Terry for other aspects of day-to-day living. Terry apparently expended time and effort in caring for Barbara during the final years of Barbara's life. Such a relationship has only become a problem to the extent that Terry has used her position to facilitate transfers of funds that significantly benefit her and where Terry may have been in a position to exert undue influence over the changes in her mother's estate plan.

However, as the case law indicates, the Court need not make a finding of undue influence even if a confidential relationship exists, as long as there is adequate evidence showing that the transaction was not unfair. While the Court recognizes that the Defendants bear the burden to prove fairness, it also notes that very little evidence has been shown to prove undue influence. The fact that Barbara was close to Terry and her other children does not necessarily lead to the conclusion that undue influence existed. In the present matter, there is simply no showing of undue influence, and while a close relationship existed between Barbara and Terry, there has been no showing that that relationship overcame Barbara's own wishes as to her plans for

distribution of her estate or in any way interfered with her appreciation of the property she owned or to whom she might give it upon her death. To the contrary, the trial testimony and evidence has dispelled the presumption of undue influence. The Defendants have met their burden by showing that that Barbara's trust documents were prepared with the assistance of her attorney Mr. Skabelund, that the new estate plan reflected Barbara's own wishes, and that Barbara had her own personal motivations to create the estate plan because she was upset with Mark and others of the Ellsworth children.

Plaintiffs rely in part on a case out of Florida, another UPC state, in support of their assertion that Terry exerted undue influence over Barbara. Many important facts of that case, *Williamson v. Kirby*, 379 So.2d 693 (Fla. Dist. Ct. App. 1980), bear uncanny similarity to the one at bar. In *Williamson*, the decedent conveyed an interest in her home to her next door neighbor, who had aided the decedent in caring for day-to-day physical needs. *Id.* at 696. The neighbor testified that she had been the one to take the decedent to the lawyer to change the decedent's estate plan, but that she had done so at the request of the decedent. *Id.* The decedent had given the neighbor a power of attorney. *Id.* Shortly before her death, the decedent suffered a debilitating health condition, and as a result, the neighbor took on the responsibilities of caretaker. *Id.*

The trial court found a presumption of undue influence due to the confidential relationship existing between the decedent and her neighbor. *Id.* at 695. Relying on this presumption, the trial court found that the conveyance of assets was procured by undue influence. *Id.* On appeal, the District Court of Appeal of Florida reversed the trial court, finding

that although a confidential relationship existed, the neighbor's testimony that she played an active role in altering the decedent's estate plan at the decedent's request due to the neighbor's ongoing role in caring for the decedent "provided the credible explanation required by [case law] to dispel the presumption of undue influence." *Id.* at 696.

In the present matter, Terry, much like the neighbor in *Williamson*, had a close personal relationship with the decedent and assisted her with many tasks of day-to-day living. Terry, like the neighbor in *Williamson*, played an active role in altering the decedent's estate plan by arranging meetings with an attorney and by driving her to the appointment. Also like the *Williamson* neighbor, Terry has a credible explanation to dispel the presumption of undue influence: she acted at Barbara's request and already assisted Barbara with daily tasks before the events of this litigation took place.

Even though a confidential relationship existed between Barbara and Terry, the evidence preponderates against a finding of unfairness. Therefore, the Court finds that the 2013 estate planning documents are not the result of undue influence.

The transfers to the 2013 Trust are valid and enforceable. In their trial brief, the Ellsworth siblings allege that "Terry had a conflict of interest in transferring assets to the 2013 Trust via Barbara's power of attorney and consequently the 2013 Transfer to the 2013 Trust should be declared void by the Court pursuant to Utah Code Ann. § 75-5-504," which states,

Any loan, sale, or encumbrance on behalf of a principal with his attorney-in-fact, or with the attorney-in-fact's spouse, agent, or attorney, or any entity or trust in which the attorney-in-fact has a substantial beneficial interest, or any transaction involving the attorney-in-fact which is affected by a substantial conflict of interest, is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

To the Court's knowledge, no transactions in this matter received prior court approval. Plaintiffs have alleged that Exhibits 20 (Bank of American bank records showing checks written to Steve Skabelund), 21 (Barbara's 2013 estate planning documents prepared by Mr. Skabelund), 34 (Ellsworth home title documents), 27 (Demand for Withdrawal signed by Terry), and 24 (Bill of Assignment transferring Barbara's personal assets to the 2013 Trust) elucidate Terry's conflict of interest in acting as attorney-in-fact for Barbara while simultaneously a trust beneficiary. The Court does find that a substantial conflict of interest did exist with respect to some of these transfers. However, none of the transfers falls within the statute cited above. The Court will address each exhibit in turn.

Exhibit 20 contains bank records of Barbara's personal account, including deposit slips and copies of checks payable to Mr. Skabelund. Terry's trial testimony was that Barbara directed the transfers and signed the checks. Terry assisted Barbara in writing the checks but did not invoke her power as agent and attorney-in-fact to do so. No evidence has been presented to the Court that payment of legal fees constituted an improper use of these funds. The Court finds that the evidence shows that Barbara, not Terry, effectuated the transfers shown in Exhibit 20. For this reason, the Exhibit 20 transfers are not voidable under Utah Code Ann. § 75-5-504.

Exhibit 21 contains the entirety of Barbara's 2013 estate planning documents prepared by Mr. Skabelund, which include documents that transfer property to the 2013 Trust. Barbara, not Terry, executed these documents, therefore, Utah Code Ann. § 75-5-504 is not implicated with respect to these transfers.

Exhibit 34 contains title documents to the American Fork residence. Again, because Barbara acted as signatory on these documents and not Terry, Utah Code Ann. § 75-5-504 is not implicated with respect to these transfers.

Exhibit 27 includes correspondence from Barbara to the co-trustees of the 1991 Trust entitled "Demand for Withdrawal." This document directs the co-trustees to transfer 50% of all trust property to the 2013 Trust and is signed by Terry in her capacity as Barbara's agent and attorney-in-fact. The Court finds that Utah Code Ann. § 75-5-504 is not implicated in this instance because no transfers of property actually occurred because of this document. However, this does demonstrate impropriety because Terry sits on both sides of the table with respect to this demand, acting both as agent for Barbara, trustee of the 1991 Trust, and contingent beneficiary of the 2013 Trust. Terry's trial testimony and the estate planning documents in Exhibits 1 and 21 demonstrate that Terry has more to gain as a beneficiary of the 2013 Trust than she does as a beneficiary of the 1991 Trust. The Court finds that this constitutes a substantial conflict of interest and will order Terry's removal as co-trustee of the 1991 Trust.

Exhibit 24 is a Bill of Assignment signed by Terry in her capacity as attorney-in-fact for Barbara and which directs the transfer of precious metals to the 2013 Trust. The Court has already ruled in its April 1, 2014 Ruling on Motion for Partial Summary judgment that these metals were not the property of the 1991 Trust. As a result, the Plaintiffs have no legal interest in this property which would allow them to exercise any right under Utah Code Ann. § 75-5-504 to void these transfers. Moreover, these transfers would have taken place anyway through Barbara's pour-over will.

Terry also attempted to transfer funds from the Wedbush account to the 2013 Trust after Barbara's death. (Exhibit 62.) The Court finds that the statute is not implicated because the transfers have not yet taken place. However, the Court does find that Terry had a conflict of interest in attempting to effectuate these transfers.

Therefore, for all the reasons stated in this section, the Court does not find that any transfers of assets to the 2013 are voidable under Utah Code Ann. § 75-5-504. The Court will issue orders for quiet title on the six-plex and the American Fork residence contemporaneously with this Order. Below, it will also order that 50% of the Wedbush account be transferred to the 2013 Trust.

Terry breached fiduciary duties as co-trustee of the 1991 Trust. Plaintiffs have petitioned the Court to remove Terry Huffstatler as co-trustee of the 1991 Trust, citing each subparagraph of Utah Code Ann. § 75-7-706(2), which reads:

- (2) The court may remove a trustee if:
 - (a) the trustee has committed a serious breach of trust;
 - (b) lack of cooperation among cotrustees substantially impairs the administration of the trust
 - (c) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
 - (d) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Trustees have a duty to avoid self-dealing and conflicts of interest in carrying out the provisions of a trust. As discussed in the preceding section, the Court finds that Terry breached her duties as trustee of the 1991 Trust when she attempted to use her power as attorney-in-fact

for Barbara to transfer funds from the 1991 Trust to the 2013 Trust. This is most particularly evident through the December 16, 2013 "Demand for Withdrawal" wherein she acted as signatory in her capacity as Barbara Ellsworth's agent and attorney-in-fact.¹² As a co-trustee of the 1991 Trust and a contingent beneficiary of the 2013 Trust, Terry sat on both sides of the table while facilitating this transaction. This alone constitutes grounds for removal of Terry as trustee because she should have either sought prior court approval or recused herself from acting as Barbara's agent with respect to transactions that would substantially benefit her. Terry's attempts to withdraw funds from the Wedbush account after Barbara's death also constitute grounds for her removal.

However, the Court will also order Terry's removal as co-trustee of the 1991 Trust because her refusal to cooperate with Mark has impaired the administration of the trust. Neither Mark nor Terry comes before the Court with clean hands, and the Court finds that at multiple junctures since March 2013, either party could have acted to de-escalate the conflict rather than exacerbate it. On June 13, 2013, Shortly after Barbara's resignation as trustee of the 1991 Trust, Mark attempted to communicate with Terry, asking, "Are you willing to discuss trust issues with me?" (Exhibit 39.) Terry testified at trial that she did not respond to this correspondence or attempt to work with Mark to resolve trust issues.

¹² The Court has noted above, for reasons unrelated to Terry's conduct, that this conflict of interest has not acted to invalidate any of the transfers between the 1991 Trust and the 2013 Trust.

Mark breached fiduciary duties as co-trustee of the 1991 Trust. Mark, however, is not without blame himself. Defendants have also petitioned the Court to remove Mark Ellsworth as co-trustee of the 1991 Trust, also citing each subparagraph of Utah Code Ann. § 75-7-706(2).

Of paramount concern to the Court is Mark's failure to make any payments of trust income generated by the six-plex to Barbara from May 2013 until her death in December 2013. The express language found in Section 7.1 of the 1991 Trust does not allow the trustee any discretion over whether to "pay to or apply for the benefit of the Surviving Trustor the entire net income of the Family Trust, in quarterly or more frequent installments." The only discretion granted the trustee in this section concerns whether extra funds should be paid to Barbara from trust principal: "In addition, if the Trustee deems the net income to be insufficient for the reasonable support and maintenance of the Surviving Trustor, the Trustee shall pay to or apply for his or her benefit as much of the principal of the Family Trust as the Trustee, in the Trustee's discretion, deems necessary for such limited purposes." Section 7.1 also allows Barbara to apply for additional amounts, with some limitations.

"The primary intent of a court, in construing the provisions of a trust, is to carry out the intent of the trustor or trustors." *In re Gerber*, 652 P.2d 937, 939 (Utah 1982). The Court finds that Barbara and Elmer, the trustors of the 1991 Trust, intended to create the Marital Trust to provide for the support, maintenance, and happiness of the Surviving Trustor, Barbara.

One of the primary concerns expressed in Barbara's May 30, 2013 Petition for Removal of Co-Trustee was Mark's withholding of mandatory payments of trust income. (Exhibit 57.) At trial Mark testified that he did not make payments to Barbara because he needed the trust income

to repair the roof of the six-plex and there were no funds left over to pay to Barbara. The Court believes that it is no coincidence that the payments stopped around the same time that the present dispute came to a head. Furthermore, the unambiguous language of the trust instrument does not allow Mark discretion to decide whether to make payments of trust income to Barbara. For this reason the Court will order Mark's removal as co-trustee of the 1991 Trust.

Mark's failure to work with Terry to effectively administer the trust also constitutes grounds for his removal. The Court finds an inconsistency in Mark's logic. He has testified that since the beginning of the events underlying this litigation he believed that Barbara lacked capacity to effectuate legal documents, yet, he attempted to circumvent the procedure outlined in Section 11.1 of the 1991 Trust for determining trustee capacity by having her sign the resignation of trustee document prepared by his attorney. Mark cannot have it both ways; Barbara either had capacity in March of 2013 or she did not. Even though the Court believes that Terry overreacted to Mark's initial suggestion that Barbara step down as trustee, the Court also finds that Mark and Tami's confrontation with Barbara served only to alienate and estrange members of a family already precipitously close to self-destruction.

Accordingly, the Court will order the removal of Mark Ellsworth as co-trustee of the 1991 Trust.

Neither party is awarded attorney fees. Both parties seek attorney fees. "In general, Utah follows the traditional American rule that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Hughes v. Cafferty*, 89 P.3d 148, 152 (Utah 2004). Each party relies on Utah Code Ann. § 75-7-1004, which states, "In a judicial

proceeding involving the administration of a trust, the court may, as justice and equity require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." The Utah Supreme Court has construed the phrase "justice and equity" as including the following factors in considering whether to award attorney's fees:

- (a) reasonableness of the parties' claims;
- (b) unnecessarily prolonging litigation;
- (c) relative ability to bear the financial burden;
- (d) result obtained by the litigation and prevailing party concepts; and
- (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.

Shurtleff v. United Effort Plan Trust, 289 P.3d 408, 415-16 (Utah 2012) (quoting *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. Civ. App. 2001)).

In considering these factors, the Court notes that both sides of this case bear some degree of fault in escalating the conflict and in failing to resolve the issues amicably. At multiple junctures during the year 2013 the Court believes that either side could have acted to de-escalate the conflict but rather chose to exacerbate the existing familial tensions. The fact that both parties bear some fault is evidenced by the fact that both Terry and Mark must be removed as co-trustees.

Although the Court has expressed its disappointment that the parties needed to resort to this litigation to resolve the dispute, neither side's claims can be correctly characterized as frivolous or baseless. The Court does note, however, that the actions of certain parties might be correctly characterized as having acted vexatiously, especially in regards to the string of vicious emails that Michelle sent to Terry. However, Michelle is by no means the only party to have

acted wrongly. Such is the wrath of individuals who feel they are being wrongly disinherited. In any case, the Court does not believe it necessary to enumerate and entertain additional rancorous lists of grievances between these step-siblings, for in the end, the Court simply does not find that justice and equity require an award of attorney fees to either side.

Conclusions of Law

The Court finds, concludes, and orders as follows:

1. The Court finds that, on March 19, 2013, Barbara May Ellsworth did not lack testamentary capacity to create, sign, and execute her 2013 estate planning documents, including the 2013 Barbara May Ellsworth Trust. These documents are enforceable and represent Barbara's own wishes and intent for the distribution of her assets. The Court also finds that Barbara's 2013 estate planning documents were not procured through any undue influence on the part of her children.

2. The Court declares that the transfers of assets effectuated by Barbara's 2013 estate planning documents are enforceable, including all documents found in Exhibit 21 which transfer Barbara's beneficial interest in the property of the 1991 Trust, including but not limited to the six-plex, the American Fork residence, the Wedbush account and any of Barbara's other personal property not owned by the 1991 Trust.

3. Barbara's signed March 19, 2013 letter to Wedbush Morgan is an effective transfer of her beneficial interest in the stock account 30361712; therefore, the trustee of the Barbara May Ellsworth Trust is entitled to receive \$26,665.86. According to Exhibit 66, this sum equals one half of the total account balance as of September 2, 2014. This ruling is a final ruling upon which

Wedbush Morgan is to rely. To the extent that Wedbush Morgan has not honored the March 19, 2013 request for withdrawal due to uncertainty surrounding the ultimate ownership of the account, this ruling removes that uncertainty and establishes the right of the successor trustee of the Barbara May Ellsworth Trust to receive 50% of that account.

4. The March 19, 2013 Warranty Deed signed by Barbara Ellsworth that transferred 50% beneficial interest in the six-plex and the American Fork residence to the trustees of the Barbara May Ellsworth Trust is an enforceable transfer. Pursuant to the Court's Quiet Title Order, jointly issued with this ruling, whatever portion of the American Fork residence did not transfer to the 2013 Trust on March 19, 2013 due to any deficiencies in the title history of that property are now resolved under the after-acquired title doctrine. *See F.D.I.C. v. Taylor*, 267 P.3d 949 (Utah Ct. App. 2011); Utah Code Ann. § 57-1-10.

5. Because 50% of the beneficial interest of the American Fork residence was transferred to the Barbara May Ellsworth Trust as of March 19, 2013, all of the management, maintenance, and other expenses incurred are to be equally attributed to the two different trusts which each own a 50% interest in that property. Because the Ellsworth Family Trust has not incurred any of the \$8,069.27 in costs as set forth in Exhibit 35, the Court orders that half of those expenses in the amount of \$4,035 be paid from the Ellsworth Family Trust.¹³ No evidence of any income

¹³ Neither the 1991 Trust nor the 2013 Trust specifically provide for trustee compensation for management of real property. The Court grants Terry Huffstatler's request to be compensated for managing the American Fork property at the rate of \$200.00 per month, rather than \$400.00 per month.

produced by the American Fork residence has been presented to the Court; however, the Court orders that the income, if any, produced by this property be shared between the two trust entities.

6. Likewise, the Court orders that half of all of the six-plex property expenses and income that have accrued since March 19, 2013 be shared between the 1991 Trust and the 2013 Trust. Based upon Exhibit 4b, the six-plex has generated \$48,487.00 between March 19, 2013 and July 31, 2014.¹⁴ Therefore, the Court orders the 1991 Trust to pay half this amount less \$200.00 per month of the \$400.00 monthly management fee paid to Mark Ellsworth, for a total of \$19,843.00. The trustee of the 1991 Trust may credit to this amount 50% of the property maintenance expenses it has incurred since March 19, 2013, including the roof and stair repair expenses.

7. In conjunction with the prior order, the Court orders Mark Ellsworth to provide an accounting of the expenses incurred in the management and maintenance of the six-plex since March 19, 2013, including the roof and stair repair expenses. Mark shall provide an accounting within 20 days of this Order. The trustee of the 2013 Trust has the right to file an objection with the Court if she believes Mark has incurred unreasonable expenses since March 19, 2013 and the parties are unable to agree upon a fair amount amongst themselves. If an objection is made in regards to a particular expense, the Court will determine whether that expense was reasonably incurred in the ordinary course of business. Unless any objections to specific expenses are raised, payment is due within 10 days of the date that Mark provides an accounting to the trustee of the 2013 Trust.

¹⁴ To establish this amount, the Court did not include the first \$2,500.00 deposited as it was earned prior to March 19, 2013.

8. Pursuant to the Assignment of Beneficial Interest Under Trust Deed signed by Barbara Ellsworth on March 19, 2013, the successor trustee of the Barbara May Ellsworth Trust owns 50% of the beneficial interest in the trust Deed that secured the payment of a note dated May 9, 2002.

9. The Court previously established through a partial summary judgment order that the precious metals at issue in this case were not transferred to the 1991 Trust. The Court also ruled that Barbara possessed the precious metals when Elmer died and that they were her personal property and not trust property. Because Barbara possessed the testamentary capacity to execute her 2013 estate planning documents, those documents control the disposition of Barbara's personal property; Plaintiffs' claim to any portion of the precious metals is extinguished.

10. For attempting to facilitate transfers wherein she had a significant conflict of interest and for failing to cooperate with co-trustees to effectively administer the 1991 Trust, the Court now orders that Terry Huffstatler be removed as co-trustee of the Family Trust.

11. For breaching the trust agreement and for failing to cooperate with co-trustees to effectively administer the 1991 Trust, the Court now orders that Mark Ellsworth be removed as co-trustee of the Family Trust.

12. Both parties have requested that, in the event the Court removes both Mark and Terry as co-trustees of the 1991 Trust, an independent trustee be appointed by the Court. Neither party has yet suggested an individual to fill this appointment. The Court now orders both parties to meet and confer to decide upon an independent professional or non-professional trustee to administer the 1991 Trust. After the parties have decided, the Court orders the parties to submit a

proposed stipulated order which includes the name of the agreed-upon party for the Court to appoint as trustee.

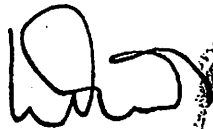
13. Neither side to these proceedings comes before the Court without some degree of fault. Nevertheless, neither side's claims may be characterized as wholly frivolous. For these reasons, the Court hereby denies all claims for attorney fees and orders that each party be responsible for its own attorney fees incurred throughout this litigation.


14. Through these orders, the Court has addressed and resolved all claims and counterclaims asserted in this case, except for Plaintiffs' claims for conversion and tortious interference with prospective economic relations. These two claims are dismissed with prejudice.

15. The Court directs Defendants' counsel to prepare an order consistent with this ruling.

Signed this 3rd day of December, 2014.

BY THE COURT:


Judge David Mortensen
Fourth Judicial District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130400498 by the method and on the date specified.

EMAIL: BRETT D CRAGUN Brett@BrettCragun.com

EMAIL: AARON R HARRIS aharris@djplaw.com

EMAIL: DOUGLAS B THAYER dthayer@djplaw.com

EMAIL: SCOTT V WALSH swalsh@skousenpenney.com

12/04/2014

/s/ KIM OSTLER

Date: _____

Deputy Court Clerk

ADDENDUM C

LAST WILL AND TESTAMENT OF

ELMER A. ELLSWORTH

I, ELMER A. ELLSWORTH, a resident of Utah County, Utah, make, publish and declare this to be my Last Will and Testament and hereby revoke all of my prior Wills and Codicils.

FIRST: Marital Status and Family.

I am married to BARBARA MAY ELLSWORTH. I have seven (7) children from a previous marriage: KENNETH L. ELLSWORTH, DANIEL L. ELLSWORTH, TAMI L. ELLSWORTH JASPER, MARK L. ELLSWORTH, TIMOTHY L. ELLSWORTH, ANDREW L. ELLSWORTH and MICHELLE L. ELLSWORTH. My wife, BARBARA MAY ELLSWORTH has three (3) children from a previous marriage: TERRY ANN BAKER HUFFSTATLER, KARL VERNON BAKER and KEITH ALAN BAKER. All references in this Will to my "children" are to them. I do not intend to provide in this Will for anyone, except as may be specifically set forth in this Will and that certain Trust described below.

SECOND: Appointment of Personal Representative and Waiver of Bond.

I nominate the following to act, in the priority and sequence named, as Personal Representative of this Will and of my estate:

1. My spouse, BARBARA MAY ELLSWORTH; and then
2. MARK L. ELLSWORTH; and then
3. Whomsoever my surviving, competent children shall unanimously appoint in writing.

If my Personal Representative is unable, unwilling, or ceases to act, the next named nominee shall act instead.

My Personal Representative shall receive no compensation for services rendered hereunder consistent with compensation being paid for services rendered under similar circumstances by other similar Personal Representatives; he or she shall not be liable for any loss to my estate or to any beneficiary resulting from good faith decisions in executing the powers herein granted.

No bond or other security shall be required in any jurisdiction by my Personal Representative. But, if a bond is required by law, I direct that no surety be required on such bond and such bond be in the lowest amount possible.

THIRD: Debts, Taxes and Expenses.

My Personal Representative (after conferring with the Trustee named hereafter) shall have the authority to pay, settle or compromise in its absolute discretion, all just debts and claims against my estate, including but not limited to, my unsecured debts, administration, last illness, and funeral expenses, and all taxes payable by reason of my death at such time or times as it may determine shall be to the advantage of my estate and my family.

FOURTH: Personal Property.

If my spouse survives me, I give to her all items of Personal Property (as hereinafter defined). If my spouse does not survive me, I give those items of Personal Property (but not money, notes, documents of title, stock certificates or business property) to the individuals named in my Memorandum of Disposition of Personal Property. This memorandum shall be signed by me, shall describe each item and shall indicate the recipient thereof. If the named recipient of a particular item does not survive me, then that item shall pass as provided in Paragraph FIFTH; and if, after a reasonable search among my personal effects, such a list cannot be found, my Personal Representative shall disregard the preceding language of this Paragraph.

FIFTH: Disposition of Residuary Estate.

"My residuary estate" means all my interest in real and personal property, whether community or separate and wherever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by the preceding provisions of this Will.

I give my residuary estate to the Trustee then acting under that certain Trust Agreement named The ELLSWORTH FAMILY TRUST created on the 1st day of May, 1991, to be aggregated with (and held, administered, and distributed as an integral part of) said

Trust Estate in the manner and subject to the terms and provisions provided for in the Trust Agreement, including any and all amendments thereto made during my lifetime. It is my intention that my residuary estate be "poured-over" to The ELLSWORTH FAMILY TRUST and shall not be received by the Trustee as a testamentary trust or upon any testamentary trust, but solely in the Trustee's capacity as Trustee under that Trust Agreement as a distinct legal entity already in existence at the time of execution of this Will.

If, for any reason, the pour-over provided above is inoperative or is invalid, or if the trust referred to above has failed or has been revoked, then I give my residuary estate to the Trustee named in the present provisions of that Trust Agreement to act after my death, to be held as a testamentary trust in the same manner and upon identical terms and provisions contained in that Trust Agreement, which, for such purpose, I incorporate by reference herein. In the event that it is necessary to incorporate that Trust Agreement by reference in this Will because of its nonexistence at the time of distribution of my estate, then it is my intention that the Trust Agreement be incorporated by reference as of the date of the execution of this Will (or of the last Codicil to this Will) and that no subsequent revocation or amendment of the trust shall be incorporated by reference in this Will.

SIXTH: Powers of Personal Representative.

With respect to the administration and management of my estate, my Personal Representative shall have power and discretion as complete as I had over my property while living. And, in addition to all powers and discretions conferred hereunder and by law, my Personal Representative shall have the authority and power to take advantage of all tax savings which the law of any jurisdiction allows, without regard to conflicting interests of those interested in my estate and without making any adjustments among said persons. And to that end to take any one or more of the following actions as may appear advisable:

A. To join with my spouse in executing joint income tax returns;

B. To value my gross estate for Federal estate tax purposes as of the date of my death or as of the alternative valuation date as allowed for such purposes;

C. To claim as estate or death tax deductions, or both, expenses which would otherwise qualify as income tax deductions;

D. To elect to have gifts by my spouse treated as made one-half by me for Federal gift tax purposes;

E. To choose the methods to pay estate or death taxes;

F. To disclaim all or any portion of any interest in property passing to my estate at or after my death; and

G. To make any other elections allowed by the Internal Revenue Code or the tax law of any state.

SEVENTH: Survivorship.

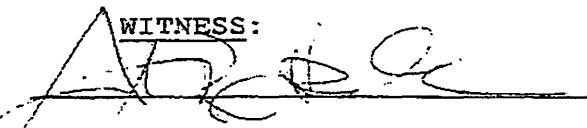
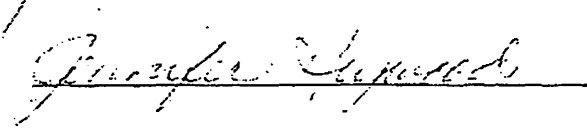
If any beneficiary hereunder should die within six months after my death, he or she shall be deemed to have predeceased me for all purposes under this Will.

I, ELMER A. ELLSWORTH, the Testator, sign my name to this instrument this 1 day of May, 1991, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.


ELMER A. ELLSWORTH, Testator

We, STEVEN R. SKABELUND and JENNIFER HEYWOOD, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the Testator signs and executes this instrument as his Last Will and that he signs it willingly, and that each of us, in the presence and hearing of the Testator and each other, hereby signs this Will as witness to the Testator's signing, and that to the best of our knowledge the Testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

WITNESS:

ADDRESS:

Residing at: 387 W. CENTER
OREM, UT 84057

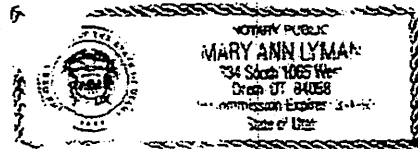
Residing at: 835 NO. 750 W.
PROVO, UT 84601

STATE OF UTAH)
 : SS.
COUNTY OF UTAH)

Subscribed, sworn to, and acknowledged before me by ELMER A. ELLSWORTH, the Testator, and subscribed and sworn to before me by STEVEN R. SKABELUND and JENNIFER HEYWOOD, witnesses, this 1 day of May, 1991.

Mary Ann Lyman

NOTARY PUBLIC



MEMORANDUM OF DISPOSITION
OF
PERSONAL PROPERTY
OF

ELMER A. ELLSWORTH

Paragraph FOURTH of my Will, executed on the _____ day of May, 1991, distributes items of my tangible personal property (not money, evidences of indebtedness, documents of title, stock certificates or business property) in accordance with this writing; I hereby make this memorandum for that purpose and to comply with the provisions of Utah Code Ann. 75-2-513 (1953, as amended).

<u>Description of Item</u>	<u>Recipient</u>
1.	
2.	
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DATED this _____ day of _____, 19____.

ELMER A. ELLSWORTH

(Fill this form out in ink; do not cross out or erase. Use a new form and destroy the prior form to make changes.)

96

ADDENDUM D

3/27/13

Read Message - SmartMail

From "Mark Ellsworth" <cmminc21@hotmail.com>
To terry@outwire.net
Subject Family Request Regarding Ellsworth family Trust

Date: Wed 3/13/2013 12:04 PM
View: HTML | Text | Header | Raw Content

Dear Terry,,

After we last met,, I conveyed the information from our meeting to my siblings. I am writing this to summarize the consensus on how our family feels regarding the estate/trust. I would like to start by asking that you try to view this summary as if you were in our circumstances (Barbara had passed away 10 years ago, and I am in your position with Bud instead of you with Barbara)..

We as a family all believe caring for Barb's needs is the top priority.. In reviewing Barbs health condition, we feel that given her ongoing declining medical condition and memory as well as her chronic conditions of bipolar, DVT's and the recent diagnosis of Parkinson's and others, that she is not in a condition to manage any fiscal matters.. We believe this is supported in action by you,, by the fact that you had Barbara sign over to you a power of attorney and are handling her fiscal affairs..

In considering this we believe that the best way to proceed is to have Barbara officially resign from the trust (she has already defaulted by signing power of attorney over to you). This will place the fiscal aspects of the estate/trust into the manner it was planned for originally when the survivor of our parents was no longer able,, and put responsibility legally into a joint partnership between you and me..

After completing Barbs resignation you and I can get together and work out a joint relationship in managing the remaining assets of the estate/trust and Barbs ongoing care needs. If you do not have any objections to this direction, I would suggest we both meet with Barbara to discuss this and have her sign a resignation..

If you have reservations or disagreements, I would appreciate hearing them, so we can try to find an agreeable solution and continue our relationship in the affable fashion that currently exists.

Sincerely,,

Mark Ellsworth

ADDENDUM E

FILED

APR 1 2014
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ANDREW L. ELLSWORTH, et al.,

Plaintiffs,

v.

TERRY HUFFSTATLER, et al.,

Defendants.

TERRY HUFFSTATLER (as Personal
Representative of the Estate of Barbara
Ellsworth, et al.

Petitioner,

v.

MARK L. ELLSWORTH, et al.,

Respondents.

TERRY HUFFSTATLER, as Trustee of the
Barbara May Ellsworth Trust,

Intervenor Plaintiff,

v.

MARK L. ELLSWORTH, Co-Trustee of The
Ellsworth Family Trust,

Intervenor Defendant.

**RULING ON MOTION FOR PARTIAL
SUMMARY JUDGMENT**

April 1, 2014

Case No. 130400498

Judge David N. Mortensen

001087

This matter comes before the court on Defendants Terry Huffstatler, Jim Huffstatler, Karl Baker, and Keith Baker's Motion for Partial Summary Judgment regarding Ownership of Precious Metals. The motion is granted.

Litigation often requires legal conclusion which are contingent upon other determinations. With the present motion defendants ask the court to answer the discrete question of whether certain precious metals are, or ever were, transferred into the Ellsworth Family Trust through the attached schedules or through Elmer Ellsworth's will.

STATEMENT OF FACTS

Statement of Relevant and Undisputed Facts

Events of 1991. On May 1, 1991, Elmer and Barbara Ellsworth ("Elmer" and "Barbara" respectively) executed a Trust Agreement that created the Ellsworth Family Trust ("EFT"). EFT was notarized contemporaneously with this execution. EFT contains the following provision:

The Trustors have transferred to the Trustees the property described in Schedules A, B, and C with [sic] are or will be attached hereto. The properties transferred, unless otherwise designated, shall be beneficially owned by the Trustors – 50% as to each Trustor for his or her separate benefit – and shall be listed on Schedule "A." Properties for which Elmer A. Ellsworth is [sic] sole beneficial owner shall be listed in Schedule "B" and properties for which Barbara May Ellsworth is the sole beneficial owner shall be listed in Schedule "C." . . . All property initially or hereafter transferred to the trust, including property passing to the trust by either of the Trustors' Wills, hereinafter is termed the "Trust Estate."

Neither Trustor ever filled out Schedule A. Elmer did not fill out a Schedule B. There is no written document that memorializes the transfer of any other property into

EFT. No schedule exists in which Elmer ever listed or identified any precious metals as his personal property.¹ Despite not listing the transferred property on Schedule A, on May 1, 1991, Elmer and Barbara executed a Warranty Deed that transferred two parcels of property – the marital home and a 6-plex – to EFT. After Elmer's death, an investment account at Wedbush Securities, Inc. was created to be held by Barbara, as the Trustee of EFT.

EFT also includes the following provision:

7.1 Family Trust: Lifetime Distributions. (a) During the lifetime of the surviving Trustor, the Trustee shall pay to or apply for the benefit of the Surviving Trustor the entire net income of the Family Trust, in quarterly or more frequent installments. In addition, if the Trustee deems the net income to be insufficient for the reasonable support and maintenance of the Surviving Trustor, the Trustee shall pay to or apply for his or her benefit as much of the principal of the Family Trust as the Trustee, in the Trustee's discretion, deems necessary for such limited purposes.

(b) In any calendar year the Trustee shall also pay over to the Surviving Trustor

¹Plaintiffs attempt to dispute whether Schedule B was ever filled out. Plaintiffs allege that Ken Ellsworth ("Ken") claims he has reviewed a trust document listing the precious metals on Elmer's schedule of the trust documents. The court concludes there is no genuine dispute concerning Schedule B because the alleged facts asserted by plaintiff is inadmissible. Therefore, summary judgement is not precluded as a result of these facts. "While rule 7 provides that '[a] party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials,' it does not change rule 56's requirement that a summary judgment motion be supported by admissible evidence, [citation omitted]. Rule 56(c); see also *Sunridge Dev. Corp. v. RB & G Eng'g, Inc.*, 2013 UT App 146, ¶ 17, 305 P.3d 171 ('[I]nadmissible evidence cannot be considered in ruling on a motion for summary judgment.'" *Winegar v. Springville City*, 2014 UT App 9, ¶ 19, 319 P.3d 1. See *infra* discussion on admissibility of Ken's statement.

from the principal of this Family Trust such amounts as the Surviving Trustor shall request in writing [subject to specific limitations set forth within this section].

On May 1, 1991, Elmer also executed a Last Will and Testament ("Will"). The Will was notarized contemporaneously with this execution. Within the Will, Elmer stated: "[i]f my spouse survives me, I give to her all items of Personal Property (as hereinafter defined)." The term "Personal Property" is not defined within the Will. There is no Memorandum of Disposition signed by Elmer that references any precious metals.

Barbara also executed a Will ("Barbara's Will") on May 1, 1991 which conveys her personal property to the 1991 Trust upon her death.²

Events of 2012 - 2013. On December 15, 2012, Terry Huffstatler prepared an inventory of the precious metals stored in the safe. Barbara Ellsworth also stored precious metals in a safety deposit box at the Bank of American Fork; the precious metals stored in this safety deposit box were not included in the December 15, 2012 Inventory.

Soon after completing the inventory on December 15, 2012, Terry Huffstatler and her husband—Jim Huffstatler—rented two safety deposit boxes at a Bank of

² Defendant did not controvert this statement of additional fact at all. This statement is not material because no party has provided a statement of fact that Barbara has died.

American Fork branch, located in Pleasant Grove, to store all of the inventoried precious metals. Upon renting the boxes, Terry Huffstatler and Mark Ellsworth removed the inventoried precious metals (other than specific junk silver) from the safe located in Barbara's home and transported them to the bank and placed the metals in the safety deposit boxes. Terry Huffstatler did this "so that we could try to cooperate with each other" and "not create any feud." Throughout Elmer's and Barbara's marriage, they also stored old silver coins that the parties called "junk silver" in the safe located in the marital home.

In January 2013, Mark Ellsworth, Andrew Ellsworth, Terry Huffstatler, Keith Baker, and Karl Baker all met at Barbara Ellsworth's residence (her marital home before Elmer Ellsworth died) and they counted all of this junk silver and divided it in equal portions, one portion of which was to be given to each of the children of Elmer or Barbara.

On December 16, 2013, Terry Huffstatler, as agent and attorney-in-fact for Barbara, signed a "Bill of Assignment" which transferred all of Barbara's rights, title and interest in all personal property owned by Barbara (including assets in the safe deposit boxes) to the Barbara May Ellsworth Trust, dated March 19, 2013 ("2013 Trust").

Despite believing that all of the precious metal and coins were Barbara's

personal property, Terry Huffstatler identified herself as the “signer” for access to the safety deposit boxes and designated Mark Ellsworth as the individual that “could hold the keys.”³

DISCUSSION AND ANALYSIS

Standard of Law on Motion for Summary Judgment. The court may grant a motion for summary judgment when “there is no genuine issue as to any material facts” (Utah R. Civ. P. 56 ©) and when “the moving party is entitled to a judgment as a matter of law.” *Id.* In reviewing a motion for summary judgment, the Utah Supreme Court has concluded that “the facts and all reasonable inferences [should be] drawn therefrom in the light most favorable to the nonmoving party.” *Orvis v. Johnson*, 2008 UT 2, ¶ 8, 177 P.3d 600 (quoting *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)). The alleged facts do not indicate that the precious metals are, or ever were, transferred into the Ellsworth Family Trust through the attached schedules or through Elmer Ellsworth’s will. Therefore, partial summary judgment is granted.

Nature of Ken Ellsworth’s Statement. Under Utah law, “[a]n original writing . . . is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute.

³This alleged fact is not consider disputed since the manner by which Terry Huffstatler treated the precious metals is not the determining factor of whether they were a part of the EFT.

Utah R. Evid. 1002.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith; (b) an original cannot be obtained by any available judicial process; (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (d) the writing, recording, or photograph is not closely related to a controlling issue.

Utah R. Evid. 1004.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines--in accordance with Rule 104(b)--any issue about whether: (a) an asserted writing, recording, or photograph ever existed

Utah R. Evid. 1008.

The purpose [the Best Evidence Rule] is primarily to prevent mistake or fraud Therefore, when the content of a document is material to the matter to be proved, the original writing must be produced unless it is unavailable due to an exception *and* its absence is not attributable to the fault of the party seeking to use it as proof of the contents therein . . . This is due to the extensive risk that the proponent might offer false or misleading secondary evidence.

Gorostieta v. Parkinson, 2000 UT 99, ¶ 37, 17 P.3d 1110.

The existence of the trust document which Ken stated that he reviewed will not be addressed by the court. Instead, the existence of the document that Ken said he reviewed will be assumed since the question of its existence would be an issue

for the jury. Utah R. Evid. 1004(a). However, the court has determined that the statement “Ken has reviewed a trust document listing the precious metals in Elmer’s schedule of the trust documents” is inadmissible to prove the contents of the document. An original writing is required in order to prove its content.

Rule 1004 provides several exceptions to the requirement that an original be provided. The exceptions to the rule do not apply in this case. As stated above, “[a]n original writing . . . is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute. Utah’s Rule 1004 which contains some of the pertinent exceptions alluded to in Rule 1002 was taken verbatim from the Federal Rule of Evidence 1004. Federal court’s have addressed the application of the pertinent exceptions in this case. Since “the federal versions of the rules cited in this opinion remain substantially the same as the Utah versions, we consider decisions interpreting the federal rules informative. *See State v. Webster*, 2001 UT App 238, ¶ 22 n. 1, 32 P.3d 976 (‘Since the advisory committee generally sought to achieve uniformity between Utah’s rules of evidence and the federal rules of evidence, this court looks to the interpretations of the federal rules by the federal courts to aid in interpreting the Utah rules.’ (brackets and internal quotation marks omitted)).” *State v. High*, 2012 UT App 180, ¶ 15 n. 10, 282 P.3d 1046.

Generally, “extrinsic evidence of the content of a document is admissible

only when the original document" is lost or destroyed, unobtainable, in the possession of an opponent, "or not closely related to the matters at issue in the case." *Amin v. Loyola Univ. Chicago*, 423 F. Supp. 2d 914, 917 (W.D. Wis. 2006). If a party has not indicated that a missing "document falls into any of these categories . . . the content of the [document] is inadmissible and will not be considered." *Id.*

The "lost or destroyed" and "unobtainable" exceptions listed above will be reviewed for cautionary purposes even though the plaintiffs do not explicitly claim that the missing document in this case met its fate by those means, but they are possibilities that should be ruled out. Exceptions © and (d) are adequately determinable from the alleged facts. The proponent does not claim that the missing trust document is in the possession of an opponent. And Ken's statement that there is a schedule that lists the precious metals as a part of the trust is not only closely related, but is directly related to the matters at issue in the case. "Where the missing original writings in dispute are the very foundation of the claim, which is the situation in this case, more strictness in proof is required than where the writings are only involved collaterally." *Sylvania Elec. Products, Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965). Therefore, there is no need for the court to further analyze the possible applicability of exception © and (d), as listed above.

Rule 1004(a): All the Originals Lost or Destroyed, Not By the Proponent Acting in Bad Faith. When the original is lost or has been destroy, but not by the proponent in bad faith, oral testimony abut the “contents of a lost writing may be proved by” . . . “any kind of secondary evidence ranging from photographs and handwritten copies to oral testimony of a witness.’ ” *United States v. Walker*, 60 F. App’x 637, 638 (8th Cir. 2003) quoting *United States v. Gerhart*, 538 F.2d 807, 809 & n. 2 (8th Cir.1976). The “secondary evidence of a document may consist of . . . oral evidence of the contents by one who has seen it and knows its contents.” *Wiley v. United States*, 257 F.2d 900, 909 (8th Cir. 1958) quoting *Hartzell v. United States*, 8 Cir., 72 F.2d 569, 578. A court can “prudently rel[y] upon the generally accepted rule that if the party relying upon the writing can prove that a writing existed and has been lost or destroyed, he is relieved of the burden of producing the original and can present secondary evidence of its contents.” *Klein v. Frank*, 534 F.2d 1104, 1107-08 (5th Cir. 1976).

When production of evidence is not feasible due to loss or destruction, the proper procedure for a party to establish this is through testimony of witnesses. *United States v. Ross*, 321 F.2d 61, 70 (2d Cir. 1963). “Evidence of the content of the original is not admissible unless the proponent of the testimony shows that a reasonable and diligent search has been made for the original without success. . . . There is no universal or fixed rule that determines the sufficiency of the proof

required to show that a reasonable or diligent search has been made. Each case is governed in large measure by its own particular facts and circumstances.” *Sylvania Elec. Products, Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965). “Where an actual document is unavailable, secondary evidence of the contents of the document is admissible so long as the original [document] was not destroyed or lost in bad faith. *Paul Revere Variable Annuity Ins. Co. v. Zang*, 81 F. Supp. 2d 227, 230 (D. Mass. 2000) *aff’d*, 248 F.3d 1 (1st Cir. 2001), quoting *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1132 (5th Cir.1992). Secondary evidence is admissible when the primary evidence is unintentionally destroyed. *London v. Standard Oil Co. of California, Inc.*, 417 F.2d 820, 825 (9th Cir. 1969).

When Ken’s statement is analyzed under the sub-requirements of exception (a) (originals lost or destroyed not by the proponent acting in bad faith) under rule 1004, the statement is not admissible. Though there is secondary evidence in the form of testimony being offered by one who has possibly seen the document, the testimony here is non-specific concerning the content of the original document. More importantly, the alleged facts do not indicate, or even allege, that the original document has been lost or destroyed, accidentally or in good faith, which would relieved the proponent of the burden of producing the original. Nor has the proponent shown through a witness that the document has been lost or destroyed and that if it has been lost or destroyed that the proponent of the testimony shows that an

unfruitful reasonable and diligent search for the original has been made. The proponent does not satisfy the requirement that case law established, under rule 1004(1), for Ken's statement to be considered secondary evidence of the original that have been lost or destroyed. Therefore, the statement is inadmissible under Rule 1004(a).

Rule 1004(b) An Original Cannot be Obtained by Any Available Judicial Process. "Rule 1004(2) provides that an original writing is not required if it cannot be obtained by any available judicial process or procedure." *U.S. ex rel. El-Amin v. George Washington Univ.*, 522 F. Supp. 2d 135, 146 (D.D.C. 2007). In *U.S. v. Phillips*, the Tenth Circuit Court reasoned that a district court correctly found that "the original 'could not be obtained by any available judicial process or procedure,' making the copy admissible," because the proponent in that case "adequately established the document's authenticity" when a witness identified and testified to the document's unaltered condition. *United States v. Phillips*, 543 F.3d 1197, 1204 (10th Cir. 2008). "When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction."); *U.S. ex rel. El-Amin*, 522 F. Supp. 2d at 146, (quoting *United States v. McGaughey*, 977 F.2d 1067, 1071 (7th Cir.1992)). The rule implicitly requires knowing what the "original writing" was. *Id.* "[T]he rule requiring the production of the original as proof of contents has developed as a rule

of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible.” *Strahan v. Coxe*, 939 F. Supp. 963, 976 (D. Mass. 1996), *aff’d in part and vacated in part*, 127 F.3d 155 (1st Cir. 1997), quoting the Fed.R.Evid. 1004 advisory committee’s note.

In this case, Ken’s statement would be inadmissible under 1004, even if it was an adequate statement about the contents of the document he reviewed. First, the plaintiffs do not allege, and the alleged facts do not indicate, that an original copy of trust document Ken reviewed cannot be obtained by any available judicial process. If they did, the document would still be inadmissible because Ken has not testified to whether the copy he saw was the original or that an original document exists. Additionally, the plaintiffs have not alleged that the document is missing because it is in possession of another and cannot be obtained by any available judicial process or procedure. Finally, the statement is inadmissible because the rule requires that the proponent not only know that there is a writing, but be able to properly authenticate the contents of the writing. In this case, Ken has not adequately testified to the foundation of the alleged trust document.

Ken’s Statement is Inadmissible Hearsay as Offered by Andrew.

Hearsay is a statement that “the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement.” Utah R. Evid. 801. The nonhearsay exceptions include

“a declarant-witness’s prior statement” or an “Opposing Party’s Statement.”

Ken’s statement is not a declarant-witness’s prior statement. In order for Ken’s statement to be a declarant-witness’s prior statement it must be “inconsistent with the declarant’s testimony or the declarant [must have denied] having made the statement or has forgotten” or the statement must be “consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying” or “identifies a person as someone the declarant perceived earlier.” *Id.*

(A)(B)©. Ken’s statement is not admissible as an opposing party’s statement because the statement was not offered against the proponent plaintiff, but was made by them.

Plaintiffs offer Ken’s statement indirectly through Andrew’s deposition. Therefore, under Rule 801, Ken’s statement is inadmissible as it is offered through Andrew. It is hearsay and not admissible under any of the hearsay exceptions.

Transferring of Assets into Trust. There are several ways by which property and assets could be, and were, transferred into the EFT. The primary and only way described in the trust provisions is to list them in the schedules. Another way to transfer property into the EFT is to transfer them pursuant to a document that would legally accomplish the transfer – such as a warranty deed. This was done

when the Ellsworths transferred their marital home and 6-plex to the trust. A third way is to name the trust as owner of an account into which assets are placed. This was done when the Wedbush Securities account was created. Another way is to transfer property into the trust pursuant to the provisions of a will. Each of these will be addressed in turn.

I. Provisions of the Trust Document. In Utah, trusts are governed by the language of the document that created the them. In *Makoff v. Makoff*, the Utah Supreme Court found that the “general rule of construction of written instruments apply to the construction of trust instruments.” 528 P.2d 797 (Utah 1974). When “the trust is based on a written instrument, the intention of the settlor must be ascertained from the language thereof, and the court may not go outside of the language in an effort to give effect to what it thinks the intent was.” *Id.* “So long as a court confines its analysis to the language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of the trust is an issue of law.” *Hoggan v Hoggan*, 2007 UT 78, ¶ 7, 169 P.3d 750.

In *Warne v. Warne*, the Utah Supreme Court relied on the terms of the family trust. The parties disputed the distribution of the deceased settlor’s personal property. The Court looked to the language of the trust to determine the settlor’s intent. 2013 UT 13, ¶ 44, 275 P.3d 238. The settlor’s intent was determined by a

plain reading of the terms of the trust. The Court did not read terms into the governing document and then interpret those terms as the intent of the settlor. *Id.*

In this case, the provisions of the EFT include specific directives regarding how property was to be made a part of its corpus. Despite not listing the transferred property on Schedule A as the trust terms directed, in May of 1991, Elmer and Barbara executed a Warranty Deed that transferred two parcels of property-the marital home and a 6-plex-to EFT. After Elmer's death, an investment account at Wedbush Securities, Inc. was created to be held by Barbara, as the Trustee of EFT. Beyond this, there is no other admissible evidence that other assets were listed on the schedules or described as being transferred to the trust. The court concludes that because the trust is based on a written instrument, the intention of the settlor can be ascertained from the language thereof, and the court may not go outside of the language in an effort to give effect to what the court thinks the intent was. Without other admissible evidence for the court to consider, and so long as a court confines its analysis to the language of the trust instrument and does not resort to extrinsic evidence of intent, the interpretation of the trust is an issue of law. Therefore, because the interpretation of trust is an issue of law, it needs not be determined by a fact finder in the context of a trial.

II. Transfer by Will. [T]o be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of

informal probate by the registrar, or an adjudication of probate by the court Utah Code Ann. § 75-3-102. "A will is construed to pass all property the testator owns at death and all property acquired by the estate after the testator's death." Utah Code Ann. § 75-2-602. "The rule of construction that the intent of the testator must be carried out does not authorize courts to make a new will to conform to what they think the testator intended, but the intent of the testator must be ascertained from the will as it stands." *In re Beal's Estate*, 214 P.2d 525, 527 (Utah 1950).⁴

A. Express Devise. There are two wills that could possibly transfer personal property into the EFT: Elmer's will and Barbara's will. In the fourth section of Elmer's will it reads:

If my spouse survives me, I give all items of Personal Property (as hereinafter defined). If my spouse dose not survive me, I give those items of Personal Property (but not my money, notes, documents of title, stock certificates or business property) to the individuals named in my Memorandum of Disposition of Personal property.

⁴The disputed facts in this case, do allege that the Ellsworth's attorney Steve Skabelund provided a "Memorandum" dated May 1, 1991 to the Ellsworth's which provided a brief summary of the estate planning documents. And that Paragraph 3 of the Memorandum, and not the will, states: "Pour-Over Wills. The wills simply "pour" all assets "over" to the trustee(s) of your Family Trust." Though the actual will contains a pour-over disposition, the Memorandum is not a part of the actual Will. Therefore, it is not admissible because the Will is unambiguous and therefore extrinsic evidence is inadmissible. Additionally, Mr. Skabelund's opinion is a legal conclusion.

In the Fifth Section of Elmer's will, entitled "Disposition of Residuary Estate" it reads:

"My residuary estate" means all my interest in real and personal property, whether community or separate and whenever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by the preceding provisions of this Will.

I give my residuary estate to the Trustee then acting under that certain Trust Agreement named the ELLSWORTH FAMILY TRUST created on the 1st day of May 1991 It is my intention that the residuary of my estate be "pour-over" to the ELLSWORTH FAMILY TRUST

Elmer's will leaves the reader anticipating a list of personal property that will specifically be transfer to Barbara upon Elmer's death. Elmer never made that list. He did convey property to the trust, but he did not convey all of his personal property to the trust. Even though Elmer does not define the words "Personal Property," the term is susceptible to construing it by its ordinary meaning. As a result, it can be assumed that Elmer's intent concerning the distribution of his personal property is the same as the conclusion a plain reading of the Will communicates.

A plain reading of the Will explains that Barbara is to receive Elmer's personal property which was not transferred to someone else or to the family trust. Elmer's exclusion, purposeful or not, of precious metals or possibly other items of property that was to be transferred to the trust does not authorize the court to make a new will to conform to what the court thinks the testator may have intended, but the intent of the

testator must be ascertained from the Will as it stands. Thus, even if the Will were effective, it would not transfer precious metals into the trust.

Based on the statement of facts, Barbara's personal property has not been transferred into the EFT via her will. Whether there is effective language in her will that could potentially transfer her personal property into the EFT is not an a question that can be determined until the facts indicate that Barbara is deceased and that her will has been probated. The parties have not alleged in their statement of facts that either of these events have occurred as of January 1, 2013.⁵

A pour-over will, a "will giving money or property to an existing trust," "assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey." WILL, Black's Law Dictionary (9th ed. 2009); Utah Code Ann. § 75-7-604, cmt. Pour-over dispositions in wills are not exempt from the need of being probated. The trust into which property is being placed is, in a sense, a devisee of the will.

As a part of a will, the pour-over provision is subject to the same constraints that other parts of a will are subject to by statute. Therefore the pour-over disposition in

⁵The alleged facts indicate that, at some point before litigation, the precious metals may have been treated as if they had been transferred to the EFT. However, as stated before, transfer of property into a trust must be done in a specific way none of which include solely treating property as if it is a part of a trust.

Elmer's will is not automatically effective upon the death of the testator, but must be probated.

B. Timely Probate of a Will. According to Utah law,

Except as provided in Section 75-3-1201, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if both:

- (1) no court proceeding concerning the succession or administration of the estate was commenced during the time period for testacy proceedings; and
- (2) either the devisee or the devisee's successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

Utah Code Ann. § 75-3-102.

No informal probate proceeding or formal testacy proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death.

Utah Code Ann. § 75-3-107(1). However, the statute provides for exceptions. "If a previous proceeding was dismissed because of doubt about the fact of the decedent's death," or if the proceeding is "in relation to the estate of an absent, disappeared, or missing person," or if it is a "proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the

contest is successful . . ." then the law provides that informal probate can be commenced more than three years after the decedent's death. *Id.* (a)(b)(c). Additionally,

[i]f no will is probated within three years from death, the presumption of intestacy is final and the court shall upon filing a proper petition enter an order to that effect. The court also has continuing jurisdiction to: (a) determine what property was owned by the decedent at the time of death; and (b) appoint a personal representative or special administrator to administer the decedent's estate.

Utah Code Ann. § 75-3-107(3).

The restrictions that Utah Code Ann. § 75-3-102 places on wills that have not been declared valid through an order of informal probate do not apply to Elmer's will. Barbara had all the precious metals because (1) there was no probate, (2) she possessed the property, i.e. the precious metals when Elmer died.

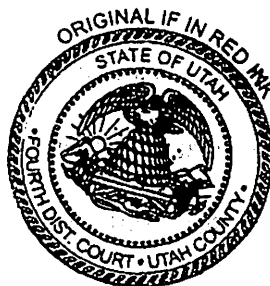
It is not asserted within the disputed or undisputed facts that Elmer's will was probated within the three years after his death. If there is a valid pour-over disposition of Elmer's will, it needed to be probated within three years of Elmer's death since the alleged facts do not indicate that any of the above stated exceptions come into play here. Furthermore, the alleged facts do not indicate whether Barbara's will has any effect on the distribution of her personal property as of January 2013. Therefore, the wills and the pour-over provision are ineffective as it pertains to transferring the precious metals into the EFT.

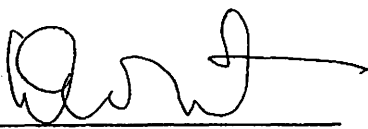
CONCLUSION

The moving party is entitled to a judgment as a matter of law. There is no genuine issue as to any material facts on the issue of whether the precious metals are or, or ever were, transferred into the Ellsworth Family Trust through the attached schedules or through Elmer Ellsworth's will. When the facts and all reasonable inferences are drawn therefrom in the light most favorable to the nonmoving party summary judgment is appropriate. For these reasons and the ones listed above, partial summary judgement is GRANTED. Defendants' counsel shall submit an order for the court's signature.

Dated this the 1st day of April 2014.

BY THE COURT:




Judge David N. Mortensen
Fourth Judicial District Court

A certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130400498 by the method and on the date specified.

EMAIL: BRETT D CRAGUN
EMAIL: AARON R HARRIS
EMAIL: DOUGLAS B THAYER
EMAIL: SCOTT V WALSH

Date: 04/02/2014 _____

/s/ GEORGIA R SNYDER _____

Deputy Court Clerk