

2016

Sharon Smith Appellee/Cross-Appellant v. Keith Smith Appellant/ Cross-Appellee

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

SHARON SMITH,
Appellee/Cross-Appellant,

v.

KEITH SMITH,
Appellant/Cross-Appellee.

BRIEF OF APPELLEE AND CROSS-APPELLANT

On appeal from the Third Judicial District Court, Tooele County,
Honorable Robert W. Adkins, District Court No. 134300466 DA

Michael D. Black
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111

*Attorneys for Appellant/Cross-
Appellee*

Troy L. Booher (9419)
Julie J. Nelson (9943)
ZIMMERMAN JONES BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111
tbooher@zjbappeals.com
jnelson@zjbappeals.com
(801) 924-0200

*Attorneys for Appellee/Cross-
Appellant*

FILED
UTAH APPELLATE COURTS

ORAL ARGUMENT REQUESTED

MAR 04 2016

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Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111
tbooher@zjbappeals.com
jnelson@zjbappeals.com
(801) 924-0200

*Attorneys for Appellee/Cross-
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Table of Contents

Jurisdictional Statement	1
Introduction.....	1
Statement of the Issues	2
Determinative Provisions.....	2
Statement of the Case.....	3
1. Nature of the Case and Course of Proceedings.....	3
2. Statement of Facts	4
2.1 Background.....	4
2.2 Sharon and Keith draft the Smith Family Trust.....	5
2.3 The 2012 inheritance distribution.....	6
2.4 Separation and Divorce.....	7
2.5 Keith's appeal	8
Summary of the Argument.....	9
Argument.....	11
1. The trial court's interpretation of the Family Trust was correct.....	12
1.1 Under the language of the Family Trust as a whole, Sharon's inheritance was assigned exclusively to the Sharon L. Smith Trust.....	14
1.1.1 Subsection 2 of Schedule A does not convert all new accounts into marital property	16
1.1.2 Subsection 4 assigns sole ownership of the inheritance distribution to Sharon.....	20

1.2	The trial court did not err as a matter of law when it interpreted the Family Trust such that the 2012 distribution remained Sharon's separate property	21
1.2.1	Keith's interpretation renders subsection 4 invalid because it is impractical – or impossible – to make use of a \$750,000 check without at least temporarily depositing it in an account	23
1.2.2	Keith's interpretation improperly favors a general provision over a specific provision, contrary to the rules of trust construction	25
1.2.3	The trial court's interpretation is consistent with the intent of the settlors.....	27
1.3	Keith's argument is beside the point because Sharon created a new trust that amended, modified, or revoked that crucial portion of the Family Trust.....	28
2.	The trial court equitably divided the marital estate pursuant to customary rules regarding dividing inheritance upon divorce.....	29
2.1	The trial court was within its discretion when it divided the parties' property such that Sharon retained her separate property	30
2.2	The trial court determined that the 2012 distribution was Sharon's separate property	32
2.3	The trial court's conclusion is also consistent with policy regarding Sharon's mother's intentions	34
	Conclusion.....	34
	Conditional Cross-Appeal	35
	Statement of the Case.....	35
	Summary of Argument.....	35
	Argument.....	36

Relief Sought	37
---------------------	----

Addenda

- A Decree of Divorce (R.162-68.)
- B Findings of Fact and Conclusions of Law (R.154-161.)
- C Determinative Provisions
- D The Smith Family Trust (R.78-107.)

Table of Authorities

Cases

<i>Dahl v. Dahl</i> , 2015 UT 79, --- P.3d ---	passim
<i>Dunn v. Dunn</i> , 802 P.2d 1314 (Utah Ct. App. 1990)	31
<i>Glenn v. Reese</i> , 2009 UT 80, 225 P.3d 185	25
<i>Hull v. Wilcock</i> , 2012 UT App 223, 285 P.3d 815	27
<i>Keyes v. Keyes</i> , 2015 UT App 114, 351 P.3d 90	30
<i>Kidd v. Kidd</i> , 2014 UT App 26, 321 P.3d 200	11
<i>Klein v. Klein</i> , 544 P.2d 472 (Utah 1975).....	11
<i>McPherson v. McPherson</i> , 2011 UT App 382, 265 P.3d 839	2, 37
<i>Mortensen v. Mortensen</i> , 760 P.2d 304 (Utah 1988).....	31, 32, 33, 34
<i>Nolin v. S & S Const., Inc.</i> , 2013 UT App 94, 301 P.3d 1026	23, 24
<i>Okelberry v. West Daniels Land Ass'n</i> , 2005 UT App 327, 120 P.3d 34	25
<i>Osguthorpe v. Wolf Mountain Resorts, L.C.</i> , 2013 UT 12, 322 P.3d 620	24
<i>Patterson v. Patterson</i> , 2011 UT 68, 266 P.3d 828	29

<i>Poll v. Poll</i> , 2011 UT App 307, 263 P.3d 534	32
<i>Selvig v. Blockbuster Enters., LC</i> , 2011 UT 39, 266 P.3d 691	25
<i>Stonehocker v. Stonehocker</i> , 2008 UT App 11, 176 P.3d 476	2, 30, 31

Statutes

Utah Code § 30-3-5	passim
Utah Code § 75-7-605	29
Utah Code § 75-7-814	16

Other

90 C.J.S. Trusts.....	25
Restatement (Third) of Trusts (2003)	27, 29

Jurisdictional Statement

This court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(h).

Introduction

This appeal concerns whether Keith Smith is entitled to half of the inheritance that his ex-wife, Sharon Smith, received from her mother, even though the trial court found that the inheritance money was not marital property. Keith admits that the family's trust document, the Smith Family Trust ("Family Trust"), which governs the ownership of the inheritance, gave Sharon the inheritance as her separate property. But Keith asserts that once Sharon deposited her \$750,000 inheritance check into her own, separate bank account instead of cashing it—assuming one can cash a check that large—the inheritance that under the Family Trust was Sharon's separate property thereby became the property of both Keith and Sharon. Keith's interpretation finds no support in the plain language of the Family Trust, violates principles of contract interpretation, and, if correct, would require the court to enforce an absurd result.

Apart from advancing a rather implausible interpretation of the Family Trust, Keith fails to mention that after the trial court found that the inheritance was not marital property and belonged to Sharon alone, the trial court awarded Keith alimony based upon Sharon's ability to pay alimony, an ability she has only because of the inheritance. Keith is therefore receiving part of the inheritance anyway. For that reason, if this court reverses the trial court's finding that the inheritance is marital property, it should vacate the alimony award.

Statement of the Issues

Issue 1: Whether the trial court abused its discretion when it determined that the 2012 distribution of inheritance Sharon Smith received from her mother's estate was her separate property.

Standard of Review: "'Trial courts have considerable discretion in determining property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.'" *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶8, 176 P.3d 476 (alteration omitted).

Conditional Cross-Appeal: If this court reverses the trial court's decision below and instead holds that the 2012 distribution is marital property, then the issue becomes whether to vacate an alimony award based upon Sharon's ability to pay with the inheritance as her separate property where that ability no longer exists.

Standard of Review: Where a trial court's basis for alimony no longer exists, this court will consider the issue itself and reverse and remand for a reconsideration of alimony. *McPherson v. McPherson*, 2011 UT App 382, ¶16, 265 P.3d 839.

Determinative Provisions

The following provisions and cases are set forth at Addendum C:

Utah Code § 30-3-5

Statement of the Case

1. Nature of the Case and Course of Proceedings

This case concerns the distribution of property and awarding of alimony in a divorce case. For years, Sharon Smith received a trickle of money from her mother. But in 2012, after her mother died, Sharon received a \$750,000 distribution ("the 2012 distribution") from her mother's estate. She received this in the form of a check, as she had received other money from her mother. Sharon opened a new, separate account and deposited the inheritance check into it.

At trial, Keith asserted that he was entitled to half of the 2012 distribution, not because he was entitled to half of the inheritance, but that he became entitled to half of the 2012 distribution when Sharon deposited the check into her separate account instead of cashing the check. Keith based his argument on his reading of the Smith Family Trust documents ("Family Trust").

The trial court rejected Keith's arguments on two grounds. First, the court found that the Family Trust declares that Sharon's inheritance is her separate property and not part of the marital estate. Second, when dividing the marital estate, the court found that it was most equitable to award Sharon her entire non-commingled inheritance. Thus, in the Decree of Divorce, entered March 26, 2015, the trial court found that the 2012 distribution is not marital property.

But the trial court did award Keith alimony that Sharon must pay using her inheritance. Sharon therefore conditionally cross-appeals the alimony award if she no longer retains her full inheritance.

2. Statement of Facts

The critical facts concern the creation of the Smith Family Trust, described below in section 2.2, and the distribution that Sharon received from her mother's estate in 2012, described below in section 2.4. To provide this court with a more complete understanding of the trial court's decision, Sharon also provides the following information.

2.1 Background

Sharon Smith and Keith Smith married in 1979. (R.181:11.) They had five children, who were born between 1980 and 1993. (R.181:11-12.) Finances were always tight. (R.181:15,16.)

Sharon's mother had a significant amount of money from a family farm. (R.181:19.) In 1978, before Sharon married Keith, Sharon's mother set up a partnership to distribute her wealth to her children. (R.181:19.) The name of the partnership was the Luveda Fincher Family Limited Partnership. (R.181:20; Pet. Ex. 1.) Sharon's mother transferred part of her interest to each of her children every year while she was alive. (R.181:19.) In 1999, Sharon received approximately \$60,000. (R.181:52-53.) Sharon deposited that money in a joint account and the parties used that money to pay their family expenses. (R.181:53.)

Sharon and Keith frequently had to accept money from Sharon's mother. (R.181:14,18.) In 2002, when finances were extremely tight for Sharon and Keith, Sharon's mother decided to give Sharon and her siblings each approximately \$3,000 to 5,000 of their inheritance on a monthly basis. (R.181:18,53.) Sharon's

portion was deposited in a joint account and Sharon and Keith lived almost exclusively on that money. (R.181:21-22,53-54.) Keith also began collecting Social Security Disability Income. (R.181:25.)

Sharon and Keith had joint checking accounts, into which they deposited distributions from the partnership and disability payments. (R.181:58.)

2.2 Sharon and Keith draft the Smith Family Trust

After a dispute over finances that almost ended in divorce in 2005, Sharon and Keith hired a lawyer to draft a family trust document ("Family Trust"). (R.78-107;181:25,80 (attached at Addendum D).) The parties signed the Family Trust on September 22, 2006. (R.103.) Keith thought a trust was a good idea because it would shield the house and inheritance from bankruptcy. (R.181:26.) Sharon testified that, when discussing the inheritance, Keith told Sharon that he understood that the money was hers. (R.181:24-25, 89.) Keith testified that he did not understand the meaning of the Family Trust. (R.181:80.)

The Family Trust creates The Smith Family Trust and divides it into two separate trusts: the Keith L. Smith Trust ("KLS Trust"), and the Sharon L. Smith Trust ("SLS Trust"). (R.78-107.) Attached to the Family Trust was "Schedule A," which listed the assets of the trust. (R.105-06; attached to Family Trust at Addendum D and copied in full at Argument 1.1.) Subsection 2 states that the Family Trust includes "[t]he following accounts in the following institutions, together with all future additions, interest or accumulations therein and also

including all new accounts and the accumulations and the future additions, interest or accumulation in any and all other financial institutions in which new accounts are opened in the future: . . . [identifying specific bank accounts].”

(R.105.) Subsection 4 states that the SLS Trust retains “[a]ll right, title and interest in and to the following: All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership.” (R.106.)

2.3 The 2012 inheritance distribution

In January 2011, Sharon’s mother died. (R.181:30.) At that time, Sharon received approximately \$10,000 from her mother’s insurance and additional money from the sale of her mother’s house. (R.181:30-31.) Sharon and Keith lived on that money. (R.181:31.) Beginning in about February 2012, Sharon and Keith began living on different floors of the same house. (R.181:38.)

In October 2012, Sharon received a distribution from her mother’s trust (“2012 distribution”). (R.181:33.) She received a check in the mail for \$750,000. (R.181:7,8,32,33-34,119,147.) She opened two money market accounts in her own name at Zion’s Bank and deposited the check into them. (R.181:33-34.)

She testified that, in her understanding, cashing the check — i.e., walking out of the bank with \$750,000 in cash — was not an option, because “no one would cash that big of a check. It had to be . . . deposited.” (R.181:34.)

She also testified that, in order to protect her 2012 distribution, she hired an attorney to draft a new trust (“new trust”) and then she placed the money

from the 2012 distribution into accounts owned by the new trust. (R.181:35-69-71.) She paid taxes and tithing and invested the remainder. (R.181:34,36,52.)

2.4 Separation and Divorce

In March 2013, Sharon and Keith separated their joint accounts. (R.181:37.) After that, Keith did not help pay for the mortgage, utilities, or living expenses. (R.181:38-39.) In October 2013, Sharon filed for divorce. (R.181:39.) In May 2014, she moved out of the marital home but continued to pay its mortgage. (R.181:38, 42.) In August 2014, a court commissioner ordered Keith to start paying \$200 per month toward the mortgage but he did not do so. (R.181:43.)

In February 2015, the parties went to trial to resolve outstanding issues related to the divorce, many of which are not at issue in this appeal. (R.138-139.) Relevant here, Keith argued that he was entitled to half of Sharon's inheritance and, if the court disagreed, that he needed alimony. (R.181:5-6.)

As to Sharon's inheritance, the trial court found that it was Sharon's separate property for two separate reasons. (R. 65-66, Divorce Decree, attached at Addendum A; 157-59, Findings of Fact, attached at Addendum B.) The trial court found that under subsection 4 of the Family Trust's Schedule A, all distributions belonged to Sharon alone, regardless of whether she placed them into a separate "account," and that subsection 2 of Schedule A did not include the inheritance. (R.158-59.) The trial court also determined that the inheritance was Sharon's separate property under traditional Utah law regarding inheritance upon

divorce. (R.158-59.) The trial court concluded that she had commingled the pre-2012 distributions but not the 2012 distribution. The trial court therefore concluded that the 2012 distribution was hers alone. (R.158-59.)

Finally, regarding alimony, Sharon testified that she still needed to work six more quarters before she would be eligible for Social Security. (R.181:36.) At that time, she will receive \$162 per month. (R.181:36.) Other than his Social Security Disability Income, Keith has no retirement income. (R.181:36,84.) The trial court found that Keith had unmet needs and that Sharon could afford to meet them with her inheritance. The trial court ordered Sharon to pay Keith \$502 per month for 35 years, which is the length of the marriage, terminating upon Keith's death, remarriage, or cohabitation. (R.160, 167.)

2.5 Keith's appeal

Keith appeals. He does not directly challenge the Divorce Decree. He also does not challenge the trial court's conclusion that, under traditional rules regarding inheritance upon divorce, the 2012 distribution is Sharon's separate property. Instead, he challenges the trial court's interpretation of the Family Trust. Specifically, he challenges the trial court's conclusion that the 2012 distribution remained Sharon's alone after she opened a new checking account and deposited the 2012 distribution in it.

Summary of the Argument

This appeal concerns whether a \$750,000 inheritance that Sharon received from her mother's estate ("2012 distribution") belongs to Sharon alone or is marital property. The trial court found the 2012 distribution belonged to Sharon alone because (i) the Family Trust unambiguously specifies that it belonged to Sharon alone, and (ii) it was her separate property that she deposited into a separate account and did not commingle with the marital estate. The Divorce Decree states that the 2012 distribution is not marital property.

Keith does not challenge directly on appeal the Divorce Decree, which is the operative document that divides the parties' property and declares that the 2012 distribution is not marital property. The trial court was within its discretion when it found that the 2012 distribution was Sharon's separate property, and Keith does not challenge directly that finding reflected in the Divorce Decree.

Instead, Keith takes an indirect approach. Keith asserts that, without regard to principles that divide marital property, the trial court erred as a matter of law when it interpreted the Family Trust. Under Keith's interpretation of the Family Trust, he was entitled to half of the 2012 distribution when Sharon deposited her \$750,000 check from her mother's estate into her own separate money market account.

The trial court rejected Keith's novel interpretation and found that the Family Trust separated Sharon's interest in her mother's estate from all other

“accounts” owned by the parties, even after Sharon deposited her \$750,000 check into a new, separate account that she opened for that purpose. The trial court’s interpretation is consistent with the plain language of the Family Trust and the intent of the settlors. Under that language, the 2012 distribution belongs to Sharon alone. And under the language concerning “accounts,” only monies deposited into the parties’ established joint accounts became marital property. The trial court correctly concluded that when Sharon deposited her separate property into her separate account, it did not morph into marital property.

Keith’s interpretation also leads to absurd results and renders a subsection of the Family Trust meaningless. Under Keith’s interpretation, had Sharon spent the 2012 distribution or kept it under her mattress, Keith would not have been entitled to any of it. But as long as she deposited it in an “account,” he was entitled to half. Keith provides no explanation of why Sharon, or any reasonable person, would have intended that result. There is no explanation.

Keith also fails to mention the alimony award. In awarding alimony to Keith, the trial court determined that Sharon should use her inheritance to pay alimony to Keith. The court awarded Keith \$502 per month in alimony, for the length of the marriage (35 years). Should that entire sum be paid out, Keith would eventually receive $(502 \times 12 \times 35) = \$210,840$. In other words, by looking to Sharon’s separate property in setting the alimony award, the court effectively awarded Keith an enormous portion of Sharon’s net inheritance.

Argument

The trial court found that Sharon's 2012 distribution from her mother's estate was her separate property, not marital property. Keith does not directly attack that finding reflected in the Divorce Decree, but instead argues only that the Family Trust signed by Keith and Sharon entitles him to half of Sharon's 2012 distribution after she deposited it into a separate "new account."

Examining the Family Trust alone, the trial court's finding was correct. Keith's interpretation is inconsistent with the plain language of the Family Trust, with the settlors' intent, and with common sense. Keith's interpretation leads to an absurd result, wherein Sharon's inheritance remains her separate property as long as the \$750,000 check is cashed, but somehow becomes marital property once she deposits that cash into her own, separate bank account.

Keith appears to believe that the issue does not hinge on the trial court's discretionary distribution of property, but instead hinges only on the interpretation of the Family Trust. But even if the Family Trust were interpreted as Keith argues, trial courts have discretion to make equitable orders regarding the division of property, even in the face of an agreement by the parties. Utah Code § 30-3-5; *Klein v. Klein*, 544 P.2d 472, 476 (Utah 1975); *Kidd v. Kidd*, 2014 UT App 26, ¶39, 321 P.3d 200. Keith has not challenged the trial court's property division. If the court agrees with Sharon on this point, which is discussed in detail in Argument 2, *infra*, there is no reason to read further, as this court may affirm the trial court's finding on that ground alone.

As described below, in addition to exercising its discretion to find that Sharon's inheritance was her separate property, the trial court correctly interpreted the Family Trust to reach the same result.

1. The trial court's interpretation of the Family Trust was correct

Before considering the parties' arguments, it is necessary to understand the structure of the Smith Family Trust (the "Family Trust"). The Family Trust is divided into two trusts: the Keith L. Smith Trust ("KLS Trust"), and the Sharon L. Smith Trust ("SLS Trust"). (R.78-107; attached at Addendum D.) The Family Trust lays out the provisions that govern the trusts, including any additions, and the attached Schedule A lists the property that was granted to the individual trusts. Schedule A lists Sharon and Keith's assets and delineates whether the property is being placed in the KLS Trust, the SLS Trust, or is to be shared between the KLS & SLS trusts equally. (R.105-06, attached at Addendum D and repeated in full below in Argument 1.2.1.)

In this appeal, subsections 2 and 4 of Schedule A, as well as Article II, are relevant to whether Sharon's inheritance remained her separate property.

Subsection 2 refers to the parties' bank accounts. (R.105.) It states: "The following accounts in the following institutions, together with all future additions, interest or accumulations therein and also including all new accounts and the accumulations and the future additions, interest or accumulation in any and all other financial institutions in which new accounts are opened in the

future” and then lists only one account, a joint account at the Tooele Federal Credit Union belonging to both the SLS and KLS Trust. (R.105.)

Subsection 4 refers to Sharon’s interest in her mother’s estate. (R.106.) It states: “All right, title and interest in and to the following:” and then states that “All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership” belong to the SLS Trust. (R.106.)

Keith asserts that once Sharon received the 2012 distribution, described in subsection 4 as deriving from the “Luveda Fincher Family Limited Partnership,” and deposited it into “a new account” — but not the joint account listed in subsection 2 — the separate inheritance became marital property. The trial court rejected Keith’s argument, and instead found that the “interest” described in subsection 4 did not lose its character when Sharon deposited the 2012 distribution into her separate bank account, opened expressly for that purpose. In the Divorce Decree, attached at Addendum A, the trial court wrote that:

(9) As to the Luveda Fincher Family Limited Partnership, the Partnership was an inheritance.

(10) All of the monies th[at] came from the partnership and distributions out of the partnership, not including gifts from the mother that came from her personal assets, were the Petitioner’s inheritance.

(11) In trying to reconcile Exhibit (Schedule) A to the Smith Family Trust, the Court looked at number 4 on Exhibit (Schedule) A, which states “All right, title and interest in and to the following: All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership.”

(12) All interest of Sharon L. Smith in the Luveda Fincher Family Limited Partnership included distributions and they were simply part of the partnership.

(13) The Court is interpreting number 4 of Exhibit (Schedule) A to mean all the distributions belong to Petitioner.

(14) The language of number 2 of Exhibit (Schedule A) was for other assets but did not include interest in the Luveda Fincher Family Limited Partnership.

(R. 165-66.) Based upon these statements, the trial court found that “[Sharon’s] interest in the Luveda Fincher Family Limited Partnership is her separate inheritance.” (R.160; *see also* R.166.)

1.1 Under the language of the Family Trust as a whole, Sharon’s inheritance was assigned exclusively to the Sharon L. Smith Trust

Keith contends that, under subsection 2 of Schedule A of the Family Trust, the 2012 distribution became marital property when Sharon deposited it into a newly opened bank account. Keith’s argument ignores the plain language of the Family Trust and instead reads the language out of context.

To begin, it is necessary to view the Family Trust as a whole. Article II of the Family Trust, called “Additions to the Trust,” controls how “additional property” was to be integrated into the two trusts set up under the Smith Family Trust. Article II states that any new property acquired by any “Trustee”¹ becomes part of the trust into which it is transferred.

¹ The “Trustees” are defined in Article XXVII:

1. Keith L. Smith and Sharon L. Smith, Trustors, as Co-Trustees of The Smith Family Trust.
2. Keith L. Smith, Grantor, as Trustee of The Keith L. Smith Trust.
3. Sharon L. Smith, Grantor, as Trustee of The Sharon L. Smith Trust. (R.97.)

The most relevant parts of Article II are highlighted:

A. It is understood that the Trustors or any other person may grant and the Trustees may receive, as part of this Trust, additional and real property by assignment, transfer, deed or other conveyance, or by any other means, testamentary or inter vivos, for inclusion in the Trust herein created.

B. The Smith Family Trust shall be divided into two separate Trusts, The Keith L. Smith Trust and the Sharon L. Smith Trust. *Any additional property received by the Trustee shall become a part of the Trust into which it is transferred and shall become subject to the terms of this Agreement.* If such property is not specifically appointed to any particular Trust, it shall be allocated equally between the Keith L. Smith Trust and the Sharon L. Smith Trust, if both of the Trustors are living, and otherwise to the Shelter Trust set forth therein. Property held in the name of "THE SMITH FAMILY TRUST" shall be allocated equally between the two Trusts and shall be subject to the respective provisions in the next two sentences. Property held as "THE KEITH L. SMITH TRUST" is the exclusive property of Keith L. Smith, and Sharon L. Smith hereby expressly waives all interests, including community property interests and separate property interests, therein. *Property held as "THE SHARON L. SMITH TRUST" is the exclusive property of Sharon L. Smith, and Keith L. Smith hereby expressly waives all interests, including community property interests and separate property interests, therein. . . .*

(R.78-79 (emphasis added.))

Additionally, Article VII of the Family Trust, entitled "Statement of Intention," indicates that "all future real and personal properties acquired by the Trustors are to be a part of, or to automatically become a part of, this Trust at the time acquired by the Trustors." (R.81.) In other words, when Sharon, as the sole trustor and trustee of the Sharon L. Smith Trust, received any new property, Article II.B assigned it to Sharon and therefore to the Sharon L. Smith Trust.

And as trustee of the Sharon L. Smith trust, Sharon had statutory authority to “deposit trust money in an account in a regulated financial service institution.” Utah Code § 75-7-814. Thus, if, under Article II, Sharon opted to deposit that property into an account in her own name — as opposed to a joint account — she did not thereby transfer the property into another trust, or make the property marital. Moreover, as described below, Schedule A, which is simply a list of the property that was to be transferred to the Smith Family Trust from Keith and Sharon Smith, does not state that Sharon’s property would become joint when she deposited it into a newly created account. (R.78.)

1.1.1 Subsection 2 of Schedule A does not convert all new accounts into marital property

Consistent with the above provisions, subsection 2 of Schedule A does not by itself automatically convert any new account into marital property, nor was it ever intended to do so. First, Schedule A is a list of the property that was to be conveyed to the trusts created by the Family Trust and does not contain the substantive governing provisions of the Family Trust. Second, Schedule A assigns all property listed in its subsections to either the KLS Trust, the SLS Trust, or the KLS & SLS Trusts equally. Finally, the language of Schedule A subsection 2 does not automatically assign new accounts to both trusts.

Article I of the Family Trust states that Keith and Sharon “hereby transfer and deliver to the Trustees and their successors the property listed in Schedule ‘A’, to have and to hold the same...*pursuant to any of the provisions hereof, ...for*

the uses and purposes and upon the terms and conditions herein set forth.” (R.78 (emphasis added.)) Schedule A is a list of the property transferred to the newly created trusts and is held *pursuant to* the provisions of the Family Trust, not independent of them. The language of one subsection of a list of property cannot be considered in absence of the controlling provisions of the Family Trust, as Keith suggests. But even if the court were to interpret the language in Schedule A in isolation, there is no support for Keith’s interpretation of subsection 2.

For context, it is helpful to review Schedule A in its entirety:

KEITH L. SMITH and SHARON L. SMITH, Grantors, do hereby sell, transfer, convey, quitclaim and assign for Ten Dollars (\$10.00) and other good and valuable consideration, all rights, title and interests in the property set forth below to the Grantors as Trustees of THE SMITH FAMILY TRUST, dated the 22 day of September, 2006, Grantee. In addition, property listed under the ownership category KLS is the exclusive property of THE KEITH L. SMITH TRUST, property listed as SLS is the exclusive property of THE SHARON L. SMITH TRUST, and property designated KLS & SLS is owned equally by the two Trusts.

1. All present and future interest of the Undersigned in the following real estate, together with all present and future improvements thereon, and all present and future water and water rights thereunto belonging and also including all present and all future personal property located thereon or wheresoever located:

Ownership

SLS A. Lot 12, Castagno Acres Subdivision, as described in the plat maps and records on file at the County Recorder’s Office, Tooele County, State of Utah.

[Tax Parcel Number]

COUNTY OF TOOELE, STATE OF UTAH

2. The following accounts in the following institutions, together with all future additions, interest or accumulations therein and also including all new accounts and the accumulations and the future additions, interest or accumulation in any and all other financial institutions in which new accounts are opened in the future:

Ownership

KLS&SLS A. Tooele Federal Credit Union

[Account Number]
[names of 4 accounts]

3. Vehicles:

Ownership

KLS & SLS A. 2002 Chevrolet

[Vehicle Identification Number]
[Utah Title Number]

KLS & SLS B. 1990 Chevrolet

[Vehicle Identification Number]
[Utah Title Number]

4. All right, title and interest in and to the following:

SLS A. All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership.

(R.105-06.)

The preamble to Schedule A states that all of the property listed can belong either to The Keith L. Smith Trust, the Sharon L. Smith Trust, or both equally. It does not state that future property would be subject to equal ownership and it does not indicate preference for the division of new property.

Keith relies on the latter part of subsection 2, which states that “and also including all new accounts . . . in any and all other financial institutions in which new accounts are opened in the future.” (R.105.) Keith argues that when Sharon opened a new account in her name, that account became marital property. But in fact, the language of subsection 2 that Keith cites does not say anything about ownership or assignment of the named “new accounts,” or, for that matter, any account. It identifies that the Tooele Federal Credit Union accounts belong to both the KLS & SLS Trust. That is the only mention of ownership in the subsection. The critical language that Keith implies would assign equal ownership to any new account does not exist.

As with everything else in Schedule A, ownership by one or both of the trusts is assigned on an item by item basis, not categorically by subsection. Under subsection 2, the one item listed happens to be held jointly by both trusts. This in no way assigns, let alone reassigns, ownership in new accounts; it cannot be interpreted to mean that any other account that might have been or may in the future be listed under this subsection should also be under joint ownership.

To illustrate, compare subsections 1 and 2. Subsection 1 applies to real property “and also including all present and all future personal property located thereon or wheresoever located.” The single item under this subsection is a piece of real property assigned to the Sharon L. Smith Trust exclusively. Under Keith’s interpretation, subsection 1 would give the Sharon L. Smith Trust sole ownership

of all future personal property acquired by either Sharon or Keith, wheresoever that property may be located. If Keith's interpretation were correct, he would never be able to own any personal property or any portion of personal property. In contrast, as explained below, subsection 4 differs in structure and language, indicating that the parties intended an automatic assignment of ownership.

1.1.2 Subsection 4 assigns sole ownership of the inheritance distribution to Sharon

Keith does not contend that the 2012 distribution did not fall under subsection 4 or that "all right, title and interest in and to" the inheritance was owned by the SLS Trust. Nor does Keith challenge the court's conclusion that the 2012 distribution, when delivered to Sharon as a check, was part of "[Sharon's] interest in the Luveda Fincher Family Limited Partnership." (R.160.) Instead, Keith asserts that when Sharon deposited the check into an "account" — any account — it lost its status as her "interest in the Luveda Fincher Family Limited Partnership," as described in subsection 4, and became "a new account" under subsection 2. (R.181:129-31; Op. Br. at 9.) Based on that assertion, Keith argues that the distribution transformed from separate property to marital property.

This is contrary to the plain language of subsection 4, which reaffirms Sharon as the sole owner of her inheritance. Subsection 4 unequivocally assigns Sharon's inheritance to the Sharon L. Smith Trust exclusively.

Subsection 4 reads:

4. All right, title and interest in and to the following:

SLS A. All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership.

(R.106.)

Notably, subsection 4 reads differently than subsections 1 and 2: it assigns Sharon's interest to the SLS Trust as a line item rather than as a category. Should other "rights, titles, and interests" become available in the future, they are currently unassigned. And indeed, the way subsection 4 is written sheds light on how subsection 2 could have been written if it meant what Keith says it means. If Keith were correct, subsection 2 would have had "all future accounts" as a named line-item, not as an introductory paragraph to a list of line-item accounts.

In short, the language of the Family Trust as a whole indicates that any new property received by Sharon is property of the SLS Trust, including her interest in the Luveda Fincher Family Limited Partnership, regardless of what she does with it. But even were Keith's interpretation correct, however, his argument still fails for the following reasons.

1.2 The trial court did not err as a matter of law when it interpreted the Family Trust such that the 2012 distribution remained Sharon's separate property

The trial court determined that "all distributions" from the Luveda Fincher Family Limited Partnership were "simply part of the partnership," and "belong to" Sharon. (R.160.)

Keith argues that the trial court's interpretation of subsection 2 "to exclude accounts where the funds originated from distributions from the Limited Partnership . . . was error." (Op. Br. at 7-8.) Keith asserts that, contrary to the trial court's interpretation, subsection 2 encompasses every single account that will ever be opened by the parties, regardless of whether the money being deposited into that account came from a source specifically excluded by another portion of the Family Trust. (Op. Br. at 7-8.) He also asserts that the trial court's "carve out" of funds that originated in the Limited Partnership is incorrect because "a correct interpretation [of a trust] will harmonize and give effect to all of the provisions, and not favor one over the other." (Op. Br. at 8.)

Keith asserts that it was the *depositing of funds into an account* that negates subsection 4. According to Keith, if Sharon wanted to keep three-quarters of a million dollars away from Keith, what she should have done was to "take the distribution in cash, reinvest it, spend it, or anything else," but not deposit it in a bank or brokerage "account." (Op. Br. at 9.) According to Keith, "once Sharon placed it in a financial account, the account was joint property and half of the account belonged to Keith." (Op. Br. at 9.)

"Issues concerning the meaning of trust terms [and] the legal effect of those terms . . . are all matters of trust construction." *Dahl*, 2015 UT 79, ¶24. This court should "employ familiar principles of contract interpretation when construing trust instruments." *Id.* ¶29. And when "harmoniz[ing] the provisions

of a contract," this court examines "the entire contract and all of its parts in relation to each other and give[s] a reasonable construction of the contract as a whole to determine the parties' intent. Also, when interpreting the plain language, [this court] look[s] for a reading that harmonizes the provisions and avoids rendering any provision meaningless." *Nolin v. S & S Const., Inc.*, 2013 UT App 94, ¶ 13, 301 P.3d 1026.

Under established principles of contract interpretation, Keith's argument is unpersuasive for the following reasons.

1.2.1 Keith's interpretation renders subsection 4 invalid because it is impractical – or impossible – to make use of a \$750,000 check without at least temporarily depositing it in an account

Keith admits that under his interpretation, "Sharon could take the distribution in cash, reinvest it, spend it, or anything else," such as hide it under her mattress. (Op. Br. at 9.) He does not explain whether or how any of those actions would be possible without first depositing the check into an account. In fact, Sharon testified that it is not possible to cash a \$750,000 check without at least temporarily depositing it in an account: "It has to – it had to be – no one would cash that big of a check. It had to be . . . deposited . . . [i]nto a financial account, yes." (R.181:34:13-23.) Keith has not challenged her testimony.

Keith *says* Sharon could have spent it, invested it, or hidden it, but if the bank will not let her access it then in fact she cannot. In that event, her only choices were to continue to hold the check, in which case it is actually worth

nothing, or deposit it in a bank account, in which case Keith contends he is entitled to half. In other words, because any effort to use the money requires the use of an “account,” there is no feasible way for Sharon to keep her inheritance separation as described by subsection 4.

Without a realistic way to access the money without depositing it into an account, Keith’s interpretation renders subsection 4 effectively meaningless because, practically speaking, there is no way for Sharon to use the money from the Luveda Fincher Family Partnership *without* depositing it in an account. Effectively, Keith argues that Sharon’s inheritance is either useless or necessarily joint property – in which case, subsection 4 serves no real utility. This court may reject Keith’s argument on that basis alone. When “harmoniz[ing] the provisions of a contract,” this court examines “the entire contract and all of its parts in relation to each other and give[s] a reasonable construction of the contract as a whole to determine the parties’ intent. Also, when interpreting the plain language, [this court] look[s] for a reading that harmonizes the provisions and avoids rendering any provision meaningless.” *Nolin*, 2013 UT App 94, ¶ 13.

Keith’s interpretation also leads to an absurd result wherein, if Sharon wishes to keep it separate from him, she can neither deposit nor cash her check. Our appellate courts have frequently rejected proposed contract interpretations that lead to absurd results. *See, e.g. Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2013 UT 12, ¶15, 322 P.3d 620 (rejecting contract interpretation that would lead to

absurd results); *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶28, 266 P.3d 691 (same); *Glenn v. Reese*, 2009 UT 80, ¶15, 225 P.3d 185 (rejecting contract interpretation that “would require a strained reading and judicial contortion exceeding the bounds of reason” in favor of one that “does not produce absurd or harsh results”); *Okelberry v. West Daniels Land Ass’n*, 2005 UT App 327, ¶24, 120 P.3d 34 (same).

1.2.2 Keith’s interpretation improperly favors a general provision over a specific provision, contrary to the rules of trust construction

Even assuming that Keith was correct that any money received by the parties at any time that is deposited into any account belongs equally to the SLS & KLS Trust, and even assuming that Sharon could make use of the 2012 distribution check without depositing it in an account, the rules of construction regarding trust interpretation demonstrate that the Family Trust keeps Sharon’s interest in her mother’s estate separate regardless of what she does with it.

Like the rules of construction regarding statutes and contracts, the rules of construction regarding trusts hold that “[g]eneral terms and provisions are restricted by specific terms and provisions following them.” 90 C.J.S. *Trusts* § 208. Given that fundamental rule, subsection 2—which is a more general provision—must be construed with subsection 4—a more specific provision.

Keith’s interpretation ignores this rule of construction. He states that “a correct interpretation will harmonize and give effect to all of the provisions, and

not favor one over the other.” (Op. Br. at 8.) Then he states that “[t]he literal language of [subsection 2] applies to all existing and future financial accounts of any kind at any financial institution – period. There is no room in the language to carve out the Brokerage Accounts. It was error for the Trial Court to interpret such a carve-out into the provision – effectively rewriting it *post hoc* for Sharon’s benefit.” (Op. Br. at 8.)

Keith’s description of the court’s interpretation as a “carve-out” is intended to sound negative, but in fact, the interpretation that subsection 4 is a “carve-out” is entirely consistent with the rules of construction that a general provision regarding financial accounts must be restricted by the specific provision regarding Sharon’s interest in her inheritance. Because a specific provision declares certain property to be separate, a more general provision governing accounts does not operate to negate it.²

In sum, under the canons of contract interpretation, the more general subsection 2 is restricted by the more specific subsection 4 and the trial court was correct in interpreting it this way.

² This is not to say that there was no way for Sharon to share her inheritance with Keith. She could have done various things to give him money. She could have, for example, commingled it, which is described below in Argument 2. The trial court determined that she had not. (R.159.)

1.2.3 The trial court's interpretation is consistent with the intent of the settlors

The trial court's interpretation is also consistent with the intent of the settlors. Any analysis of trust language begins with a plain reading of the trust document itself in order to "ascertain the intent of the settlor." *Dahl*, 2015 UT 79, ¶29. "The primary object of a court, in construing the provisions of a trust, is to carry out the intent of the trustor or trustors." *Hull v. Wilcock*, 2012 UT App 223, ¶5, 285 P.3d 815 (internal quotation marks omitted).

Keith contends that Sharon's "interest" was her "bundle of rights," i.e., "the right to control the partnership, direct the use of its assets, obtain information from the partnership, enjoy the tax benefits of losses and deductions, and receive both cash and in-kind distributions, among other things," and those things remain Sharon's alone because she did not deposit them in an account. (Op. Br. at 9.)

But the sticks in the bundle of rights that Keith names — not including the actual money — are not items that belong in a trust, nor are they items that could be taken away from Sharon by anyone other than her mother. As explained in the Restatement, "a trustee may hold in trust any interest in any type of *property*." Restatement (Third) of Trusts § 40 (2003) (emphasis added). Similarly, the Family Trust states that Schedule A lists the "property" of the parties, including "any cash, securities, or other property," and notes that "additional real and personal property" may be added. (R.78.) Schedule A refers to "*all*

rights, title and interests in the property” named, and subsection 4 refers to “*all* right, title and interest” in Sharon’s inheritance. (R.105-06 (emphases added).)

Keith’s brief correctly states that “a correct interpretation will harmonize and give effect to all of the provisions, and not favor one over the other.” (Op. Br. at 8.) But a harmonious reading of the entire Family Trust indicates that only real or personal property was intended to be in the Family Trust and that all real and personal property acquired by the parties in the future would automatically be part of the Family Trust, except for Sharon’s inheritance.³

1.3 Keith’s argument is beside the point because Sharon created a new trust that amended, modified, or revoked that crucial portion of the Family Trust

In any event, even if Keith were correct on every point, the relevant part of the Family Trust is no longer applicable. Sharon testified that after she received the 2012 distribution, she created a new trust (“new trust”) that currently holds her inheritance. (R.181:35-36.) The Family Trust allows Sharon to revoke it and create a new trust: “As long as both of the Trustors are alive, each of them reserves the right, without the consent or approval of the other, to amend, modify or revoke their separate Trusts under this Agreement, in whole or in part, including this Trust, concerning the property that each has contributed to the Trust.” (R.80.) When Sharon created her new trust, she revoked any part of the

³ Keith’s argument is not revived by his noting that the impact of the accounts provision “applied equally to both parties.” (Op. Br. at 10, underlining in original). Subsection 4 makes clear that the parties knew, and had always known, that Sharon stood to inherit a large sum of money and that Keith did not.

Family Trust that controlled her inheritance, thereby negating the provisions Keith relies upon.

Revocation of the Family Trust by the creation of a new trust is also allowable by statute: “Unless the terms of a trust expressly provide that the trust is irrevocable,” which the Family Trust does not, “the settlor may revoke or amend the trust.” Utah Code § 75-7-605; *see also Dahl v. Dahl*, 2015 UT 79, ¶¶31, 38, --- P.3d --- (describing husband’s ability as settlor to revoke or amend trust in accordance with the language of the trust); *Patterson v. Patterson*, 2011 UT 68, ¶¶38-41, 266 P.3d 828 (describing settlor’s ability under statute to amend trust); Restatement (Third) of Trusts § 63 cmt. k (2003) (“If a revocable trust has more than one settlor, . . . each settlor . . . may revoke or amend the trust with regard to that portion of the trust property attributable to the settlor’s contribution.”).

Moreover, even if she had not revoked the Family Trust, *she still can*. Thus, even if Keith’s interpretation of the Family Trust were correct, his argument is beside the point.

2. The trial court equitably divided the marital estate pursuant to customary rules regarding dividing inheritance upon divorce

Throughout this brief, Sharon has pointed out that Keith has not directly challenged the divorce decree’s division of property. Keith has limited his argument to a question of law regarding interpretation of a contract.

It is worth reiterating that, in fact, it is the divorce decree—and not the Family Trust—that divides Sharon and Keith’s property. In other words, which

party has which property after the divorce was determined not by the Family Trust but by the divorce decree, which Keith has not challenged. It is unsurprising that Keith has not directly attacked the divorce decree because, as described below, a trial court has discretion to distribute a marital estate and the trial court's division here was well within its discretion according to Utah law regarding the division of inheritance upon divorce.

When a court renders a divorce decree, "the court may include in it equitable orders relating to . . . property." Utah Code § 30-3-5(1). "Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶8, 176 P.3d 476 (internal quotation marks omitted). When deciding whether property is separate or marital, the trial court "look[s] to a party's actions as a manifestation of a spouse's intent to contribute separate property to the marital estate." *Keyes v. Keyes*, 2015 UT App 114, ¶ 28, 351 P.3d 90.

Generally, appellate courts "defer to a trial court's categorization and equitable distribution of separate property due to the considerable discretion it has in this area." *Id.* ¶29.

2.1 The trial court was within its discretion when it divided the parties' property such that Sharon retained her separate property

The legal framework for property division upon divorce is simple and well-established. Before a trial court distributes marital assets, the court must

first determine whether the disputed assets are marital or separate property. *Dahl v. Dahl*, 2015 UT 79, ¶121, --- P.3d ---. "Marital property is ordinarily all property acquired during marriage . . . whenever obtained and from whatever source derived," *Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah Ct. App. 1990), and it "is ordinarily divided equally between the divorcing spouses." *Stonehocker*, 2008 UT App 11, ¶13.

By contrast, "separate property, which may include premarital assets, inheritances, or similar assets, will be awarded to the acquiring spouse." *Id.* In most cases, "equity requires that each party retain the separate property he or she brought into the marriage, including any appreciation of the separate property." *Dunn*, 802 P.2d at 1320. Said differently, "trial courts making 'equitable' property division pursuant to [Utah Code] section 30-3-5 should . . . generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value." *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988).

There are, however, two ways in which separate property may lose its separate character and thereby become subject to equitable division upon divorce. First, separate property may lose its separate character if "the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable

interest in it.” *Id.* And second, separate property may lose its separate character if “the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.” *Id.* When making this assessment, the court “look[s] to a party’s actions as a manifestation of a spouse’s intent to contribute separate property to the marital estate.” *Dahl*, 2015 UT 79, ¶143. Moreover, “[t]he question of whether a gift or inheritance has remained separate is highly fact intensive and the trial court is in the best position to weigh the evidence and make that determination.” *Poll v. Poll*, 2011 UT App 307, ¶6, 263 P.3d 534.

2.2 The trial court determined that the 2012 distribution was Sharon’s separate property

In its Findings of Fact, the trial court found that *all* of the money Sharon had received from her mother was Sharon’s inheritance and thus her separate property:

(10) As to the Luveda Fincher Family Limited Partnership, the Court believes that the Partnership was an inheritance. The way the Court views it is that the Petitioner’s mother helped the parties. The Court believes that the help was appropriate, that there was a need there, and that Petitioner’s mother addressed that need.

(11) The court finds that *all* of the monies th[at] came from the partnership and distributions out of the partnership, not including gifts from the mother that came from her personal assets, were the Petitioner’s inheritance.

(R.157-58 (emphasis added).)

But although the trial court determined that “all of the monies that came from the partnership . . . were [Sharon’s] inheritance,” the trial court also held

that certain of the funds had been commingled. (R.159.) Specifically, the trial court found that the money Sharon received from her mother's estate before 2012, which she had deposited into joint accounts and that the family had lived on, had been commingled and lost its separate quality, but that *none* of the money received in the 2012 distribution was commingled. (R.159.) The court wrote:

(16) The Court finds that in order to pay family expenses, Petitioner used some proceeds until 2012 when the large amount came in. She used those for the family to survive. The court finds those amounts were commingled, but that she did not commingle the larger payment of \$750,000 that was distributed from the partnership, and that remains as the Petitioner's sole and separate property.

(R.159.)

Keith has not challenged this factual finding. Nor could he because the finding is supported by the evidence at trial and in the record: the 2012 distribution was deposited in a separate account Sharon created specifically for that purpose and was not commingled.⁴

The trial court's finding that an equitable division of marital property leaves to Sharon the 2012 distribution stands unchallenged and, in any event, well within its discretion. (R.159.)

⁴ The trial court did not address the question, but there was no evidence to suggest that Keith had "by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in" the 2012 distribution. *Mortenson*, 760 P.2d at 308.

2.3 The trial court's conclusion is also consistent with policy regarding Sharon's mother's intentions

Finally, it is worth noting that the trial court's conclusion is consistent with Sharon's *mother's* intent that the money pass to Sharon. (Pet. Ex. 1.) Sharon's mother's intent is important under Utah law. In *Mortensen*, the Utah Supreme Court explained that the rules described above regarding inheritance upon divorce "accord[] with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family and succession should not be diverted because of divorce." 760 P.2d at 308-09. The trial court's conclusion accords with Sharon's mother's intentions in her own trust.

Conclusion

This court should affirm the decision of the trial court because it correctly determined that the Family Trust intended that Sharon's inheritance would remain her separate property. If this court does not affirm, Sharon asks this court to remand for a redetermination of alimony, as described in Sharon's conditional cross-appeal below.

Conditional Cross-Appeal

Statement of the Case

This conditional cross-appeal is limited only to the issue of alimony, and is relevant only if this court reverses the trial court's finding that Sharon's inheritance is not marital property. If this court concludes that the 2012 distribution was not Sharon's separate property, but was to be split between Sharon and Keith, then both Keith's needs and Sharon's ability to pay would change significantly. In fact, it may be, in that case, that Sharon is entitled to alimony, rather than Keith. If this court disturbs the trial court's decision regarding the 2012 distribution, this court should vacate the alimony award and remand for the trial court to recalculate alimony.

Summary of Argument

The trial court ordered Sharon to pay Keith alimony in the amount of \$502 per month on the basis that Keith had unmet needs and that, given her separate inheritance, Sharon could afford to meet them. (R.159.) The award is for the length of the marriage (35 years), terminating upon Keith's death, marriage, or cohabitation. (R.167.) Should that entire sum be paid out, Keith would eventually receive $(502 \times 12 \times 35) = \$210,840$. Keith is not entitled to both half of Sharon's inheritance and alimony that can only be paid through Sharon's inheritance. Keith acknowledged this at trial, but does not mention it on appeal. (R.181:5-6.)

Argument

In his appeal, Keith asserts that he is entitled to half of Sharon's separate property as a lump sum. Keith fails to mention that the alimony payments are connected to his not having received a portion of Sharon's separate property.

Alimony awards are predicated on three primary factors, known as the *Jones* factors: "(i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; and (iii) the ability of the payor spouse to provide support." *Dahl v. Dahl*, 2015 UT 79, ¶¶94-95, --- P.3d ---; Utah Code § 30-3-5(8)(a).

The trial court considered Keith's needs (\$1,700/month) and ability to meet his own needs through his social security payments (\$1,198/month). (R.166-67.) Given her minimal income, the trial court considered Sharon's separate property in her ability to pay Keith alimony. (R.167.) Sharon's inability to pay through any other means was supported by Sharon's Financial Declaration. (R.41.) The trial court ordered Sharon to pay Keith \$502 per month in alimony. (R.167.)

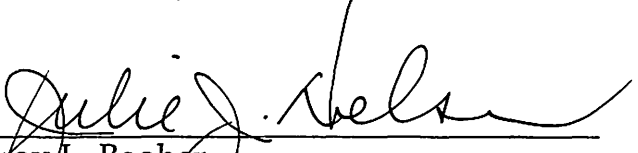
If this court reverses the trial court's conclusion that Sharon's inheritance is her separate property, it follows that Keith's needs and Sharon's ability to pay would change significantly.

Relief Sought

If this court determines that the trial court erred when it concluded that Keith was not entitled to any of Sharon's inheritance, then this court should remand for a recalculation of alimony. *McPherson v. McPherson*, 2011 UT App 382, ¶16, 265 P.3d 839.

DATED this 4th day of March, 2016.

ZIMMERMAN JONES BOOHER



Troy L. Booher
Julie J. Nelson
Attorneys for Sharon Smith

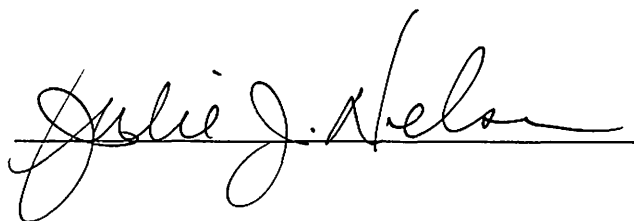
Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 9,011 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 2010 in 13 point Book Antiqua.

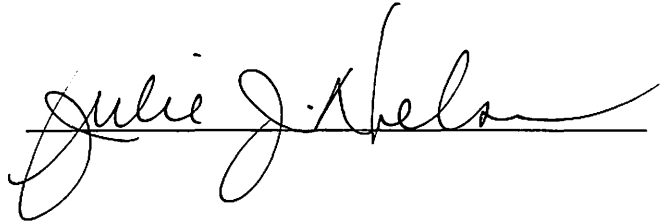
DATED this 4th day of March, 2016.

A handwritten signature in cursive script, reading "Julie J. Nelson", written over a horizontal line.

Certificate of Service

This is to certify that on the 4th day of March, 2016, I caused two true and correct copies of the Brief of Appellee to be served on the following via first class mail, postage prepaid:

Michael D. Black
Parr Brown Gee & Loveless, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Julie J. Nelson", is written over a horizontal line.

4830-0572-5742, v. 11

Tab A

The Order of Court is stated below:

Dated: March 26, 2015

06:36:54 PM

/s/ Robert W. Adkins
District Court Judge



JAIME TOPHAM (11782)
LAW OFFICE OF JAIME TOPHAM, PLLC
ATTORNEY FOR PETITIONER
291 NORTH RACE STREET
GRANTSVILLE, UT 84029
TELEPHONE: (435) 884-3426

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR TOOELE COUNTY, STATE OF UTAH**

SHARON SMITH Petitioner, vs. KEITH SMITH Respondent.	DECREE OF DIVORCE Case No. 134300466 Commissioner Michele Tack Judge Robert W. Adkins
--	---

The parties came before the Honorable Judge Robert W. Adkins on February 12, 2015 for trial on the issues concerning the parties' divorce action. Sharon Smith was present with her attorney, Jaime Topham. Keith Smith was present with his attorney Michael D. Black.

The Court heard testimony, received exhibits, heard argument, and having found proper grounds and jurisdiction, and being fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, ADJUDGED, and DECREED

1. The parties are mutually granted a divorce a divorce from one another on the grounds of irreconcilable differences, such to become final upon signature and entry herein.

PERSONAL PROPERTY

1. The court understands that both parties have emotional attachments to items of their son, [REDACTED], but the court will leave the assets where they are presently. The painting shall remain with Petitioner and the chest shall remain with Respondent.
2. The remaining personal property is awarded to each party, as they now possess it.

REAL PROPERTY

3. During the marriage the parties purchased a home together located at [REDACTED]
4. The house shall be sold and the proceeds of the sale shall be divided as follows:
 - a. First, the mortgage and the costs of the sale to include realtor and title company costs shall be paid before dividing any proceeds;
 - b. The remaining proceeds shall be divided equally between the parties with the following caveats:
 - i. The court is ordering that because the Respondent didn't pay the \$200.00 per month under the Temporary Order, entered by the Court on December 5, 2015, that there shall be deducted from his share of the equity \$200.00 per month starting September, 2014 and ending February

2015, for a total of \$1,200.00; and

- ii. Petitioner paid the full cost of the parties' two mediation sessions in the amount of \$1,125.00. The Respondent shall pay half of the mediation expenses, in the amount of \$562.50, which shall be deducted from his share of the equity.
 - iii. Petitioner shall be awarded the amounts deducted from Respondent's share of the equity as stated above.
5. The Respondent may continue to live in the home until it is sold. If he chooses to remain in the home, Respondent shall continue to pay \$200.00 a month toward the mortgage as well as all utilities associated with the home while living there. Respondent shall pay the \$200.00 to Petitioner each month. The Respondent shall take good care of the home and shall keep it in condition where it can be shown and in a condition that is acceptable to the realtor that is selected by the parties.
6. The parties shall mutually agree upon the realtor selected to sell the home and each shall cooperate to get the home sold so that the equity can be taken out of the home and divided as ordered in paragraph 4(b).
7. If there is a problem that develops and the realtor is of the

opinion that the home is not being sold because it is being lived it, the parties can address the issue with the Court by providing the Court with the information from the realtor.

8. Petitioner's request for \$5,328.00 in mortgage payments that she paid while Respondent was residing in the home shall not be granted. Respondent is responsible for the \$200.00 a month to be paid toward the monthly mortgage payment as previously ordered in paragraph 4(b)(i), but no further recoupment is ordered.

INHERITANCE

9. As to the Luveda Fincher Family Limited Partnership, the Partnership was an inheritance.
10. All of the monies that came from the partnership and distributions out of the partnership, not including gifts from the mother that came from her personal assets, were the Petitioner's inheritance.
11. In trying to reconcile Exhibit (Schedule) A to the Smith Family Trust, the Court looked at number 4 on Exhibit (Schedule) A, which states "All right, title and interest in and to the following: All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership."

12. All interest of Sharon L. Smith in the Luveda Fincher Family Limited Partnership included distributions and they were simply part of the partnership.
13. The Court is interpreting number 4 of Exhibit (Schedule) A to mean all the distributions belong to Petitioner.
14. The language of number 2 of Exhibit (Schedule A) was for other assets but did not include interest in the Luveda Fincher Family Limited Partnership.
15. In order to pay family expenses, Petitioner used some proceeds until 2012 when the large amount came in. She used those for the family to survive. Those amounts were comingled, but Petitioner did not comingle the larger payment of \$750,000.00 that was distributed from the partnership, and that remains as the Petitioner's sole and separate property.
16. Petitioner is entitled to funds in the Zions and LPL (formerly Edward Jones) account and the accounts are the sole property of the Petitioner.

ALIMONY

17. Respondent has medical circumstances and receives Social Security Disability in the amount of \$1,198.00 per month as a result of those circumstances.

18. Respondent has unmet needs.
19. Petitioner's separate property is considered in determining the unmet needs of Respondent.
20. Respondent's declaration has overstated his needs.
Therefore his needs are set at \$1,700.00 per month.
21. Respondent's income is \$1,198.00 per month and that his unmet expenses are \$1,700.00 per month leaving a need for alimony in the amount of \$502.00 per month.
22. Petitioner shall pay alimony to Respondent in the amount of \$502.00 per month, not to exceed the length of the marriage.
Alimony shall terminate upon death, remarriage, or cohabitation by the Respondent.

ATTORNEY FEES

23. Each party shall pay their own attorney fees and costs incurred in this action.

Approved as to Form and Content:

/s/ Michael D. Black

Electronically signed by Jaime Topham with permission of Michael D. Black
Attorney for Respondent

END OF ORDER

In accordance with the Utah State District Court's Efiling Standard No. 4, and Utah Rules of Civil Procedure Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic

signature at the upper right-hand corner of the first page of this Order.

Tab B

The Order of Court is stated below:

Dated: March 26, 2015

06:36:23 PM

/s/ Robert Adkins

District Court Judge



JAIME TOPHAM (11782)
LAW OFFICE OF JAIME TOPHAM, PLLC
ATTORNEY FOR PETITIONER
291 NORTH RACE STREET
GRANTSVILLE, UT 84029
TELEPHONE: (435) 884-3426

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR TOOELE COUNTY, STATE OF UTAH**

SHARON SMITH Petitioner, vs. KEITH SMITH Respondent.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 134300466 Commissioner Michele Tack Judge Robert W. Adkins
--	---

The parties came before the Honorable Judge Robert W. Adkins on February 12, 2015 for trial on the issues concerning the parties' divorce action. Sharon Smith was present with her attorney, Jaime Topham. Keith Smith was present with his attorney Michael D. Black.

The Court heard testimony, received exhibits, heard argument, and having found proper grounds and jurisdiction, and being fully advised in the premises, does hereby enter the following:

FINDINGS OF FACT

1. The parties have been actual and bona fide residents of Tooele County, Utah for at least three months immediately prior to the filing of this divorce action.
2. The parties were married on December 15, 1979, in Maricopa County, Arizona, are husband and wife and maintained their marital domicile in Tooele County, Utah.

3. There are irreconcilable differences existing as to both parties and both parties are entitled to a divorce on the grounds of irreconcilable difference.

PERSONAL PROPERTY

1. The court understands that both parties have emotional attachments to items of their son, [REDACTED], but the court will leave the assets where they are presently. The painting will remain with Petitioner and the chest will remain with Respondent.
2. The remaining personal property is awarded to each party, as they now possess it.

REAL PROPERTY

3. During the marriage the parties purchased a home together located at [REDACTED]
4. The Court finds that the home was transferred to the Smith Family Trust to protect the home from the Respondent's potential liabilities. Respondent had been engaged in a business which entailed a higher than normal degree of risk. So the Court finds that the house was transferred to protect it from potential liabilities, but that the house remained a marital asset.
5. The house should be sold and the proceeds of the sale should

be divided as follows:

- a. First, the mortgage and the costs of the sale to include realtor and title company costs should be paid before dividing any proceeds;
- b. The remaining proceeds will be divided equally between the parties with the following caveats:
 - i. The court is ordering that because the Respondent didn't pay the \$200.00 per month under the Temporary Order, entered by the Court on December 5, 2015, that there will be deducted from his share of the equity \$200.00 per month starting September, 2014 and ending February 2015, for a total of \$1,200.00; and
 - ii. Petitioner paid the full cost of the parties' two mediation sessions in the amount of \$1,125.00. The Respondent shall pay half of the mediation expenses, in the amount of \$562.50, which will be deducted from his share of the equity.
 - iii. Petitioner shall be awarded the amounts deducted from Respondent's share of the equity as stated above.
6. The Respondent may continue to live in the home until it is sold. If he chooses to remain in the home, Respondent should continue to pay \$200.00 a month toward the mortgage as well as all utilities associated with the home while living there.

Respondent should pay the \$200.00 to Petitioner each month.

The Respondent should take good care of the home and should keep it in condition where it can be shown and in a condition that is acceptable to the realtor that is selected by the parties.

7. The parties should mutually agree upon the realtor selected to sell the home and each should cooperate to get the home sold so that the equity can be taken out of the home and divided as ordered in paragraph 8(b).
8. If there is a problem that develops and the realtor is of the opinion that the home is not being sold because it is being lived it, the parties can address the issue with the Court by providing the Court with the information from the realtor.
9. Petitioner's request for \$5,328.00 in mortgage payments that she paid while Respondent was residing in the home will not be granted. Respondent will be responsible for the \$200.00 a month to be paid toward the monthly mortgage payment as previously ordered in paragraph 8(b)(i), but no further recoupment will be ordered.

INHERITANCE

10. As to the Luveda Fincher Family Limited Partnership, the

Court believes that the Partnership was an inheritance. The way the Court views it is that the Petitioner's mother helped the parties. The Court believes that the help was appropriate, that there was a need there, and that Petitioner's mother addressed that need.

11. The court finds that all of the monies the came from the partnership and distributions out of the partnership, not including gifts from the mother that came from her personal assets, were the Petitioner's inheritance.
12. In trying to reconcile Exhibit (Schedule) A to the Smith Family Trust, the Court looked at number 4 on Exhibit (Schedule) A, which states "All right, title and interest in and to the following: All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership."
13. The court believes that all interest of Sharon L. Smith in the Luveda Fincher Family Limited Partnership included distributions and they were simply part of the partnership.
14. The Court is interpreting number 4 of Exhibit (Schedule) A to mean all the distributions belong to Petitioner.
15. The court believes the language of number 2 of Exhibit (Schedule A) was for other assets but did not include interest

in the Luveda Fincher Family Limited Partnership.

16. The Court finds that in order to pay family expenses, Petitioner used some proceeds until 2012 when the large amount came in. She used those for the family to survive. The court finds those amounts were comingled, but that she did not comingle the larger payment of \$750,000.00 that was distributed from the partnership, and that remains as the Petitioner's sole and separate property.

17. Petitioner is entitled to funds in the Zions and LPL (formerly Edward Jones) account and the accounts are the sole property of the Petitioner.

ALIMONY

18. The court understands the Respondent has medical circumstances and that he receives Social Security Disability in the amount of \$1,198.00 per month as a result of those circumstances.

19. The Court finds that the Respondent has unmet needs.

20. The Court finds that the Court, in this case, should look at separate property of the Petitioner in looking at the unmet needs of Respondent.

21. The Court, in calculating Respondent's unmet needs, finds

that Respondent's declaration has overstated his needs, and therefore sets his needs at \$1,700.00 per month.

22. The Court finds that Respondent's income is \$1,198.00 per month and that his unmet expenses are \$1,700.00 per month leaving a need for alimony in the amount of \$502.00 per month.

23. The court finds that Petitioner should pay alimony to Respondent in the amount of \$502.00 per month, not to exceed the length of the marriage. Alimony should terminate upon death, marriage, or cohabitation by the Respondent.

ATTORNEY FEES

24. Each party should pay their own attorney fees and costs incurred in this action.

CONCLUSIONS OF LAW

1. The parties are subject to the jurisdiction of this Court as set forth above.
2. The parties should be granted a divorce on the grounds of irreconcilable differences.
3. That the personal property should be awarded as set forth above.
4. That the real property should be distributed as set forth above.
5. That Petitioner's interest in the Luveda Fincher Family Limited Partnership is her separate inheritance.

6. That the Zions account and the LPL account should be awarded as set forth above.
7. That Respondent has an unmet need for alimony and that alimony should be awarded as set forth above.
8. That attorney fees should be discharged as set forth above.

Approved as to Form and Content:

/s/ Michael D. Black

Electronically signed by Jaime Topham with permission of Michael D. Black
Attorney for Respondent

END OF ORDER

In accordance with the Utah State District Court's Efiling Standard No. 4, and Utah Rules of Civil Procedure Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.

Tab C

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 30. Husband and Wife
Chapter 3. Divorce (Refs & Annos)

U.C.A. 1953 § 30-3-5

§ 30-3-5. Disposition of property--Maintenance and health care of parties and children--Division of debts--Court to have continuing jurisdiction--Custody and parent-time--Determination of alimony--Nonmeritorious petition for modification

Currentness

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children including responsibility for health insurance out-of-pocket expenses such as co-payments, co-insurance, and deductibles;

(b)(i) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(ii) a designation of which health, hospital, or dental insurance plan is primary and which health, hospital, or dental insurance plan is secondary in accordance with the provisions of Section 30-3-5.4 which will take effect if at any time a dependent child is covered by both parents' health, hospital, or dental insurance plans;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services; and

(e) if either party owns a life insurance policy or an annuity contract, an acknowledgment by the court that the owner:

(i) has reviewed and updated, where appropriate, the list of beneficiaries;

(ii) has affirmed that those listed as beneficiaries are in fact the intended beneficiaries after the divorce becomes final; and

(iii) understands that if no changes are made to the policy or contract, the beneficiaries currently listed will receive any funds paid by the insurance company under the terms of the policy or contract.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5)(a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(8)(a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining whether to award alimony and the terms thereof.

(c) "Fault" means any of the following wrongful conduct during the marriage that substantially contributed to the breakup of the marriage relationship:

- (i) engaging in sexual relations with a person other than the party's spouse;
- (ii) knowingly and intentionally causing or attempting to cause physical harm to the other party or minor children;
- (iii) knowingly and intentionally causing the other party or minor children to reasonably fear life-threatening harm; or
- (iv) substantially undermining the financial stability of the other party or the minor children.

(d) The court may, when fault is at issue, close the proceedings and seal the court records.

(e) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the

time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(f) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(g) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(h) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(i)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(j) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and the payor party's rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Credits

Laws 1909, c. 109, § 4; Laws 1969, c. 72, § 3; Laws 1975, c. 81, § 1; Laws 1979, c. 110, § 1; Laws 1984, c. 13, § 1; Laws 1985, c. 72, § 1; Laws 1985, c. 100, § 1; Laws 1991, c. 257, § 4; Laws 1993, c. 152, § 1; Laws 1993, c. 261, § 1; Laws 1994, c. 284, § 1; Laws 1995, c. 330, § 1, eff. May 1, 1995; Laws 1997, c. 232, § 4, eff. July 1, 1997; Laws 1999, c. 168, § 1, eff. May 3, 1999; Laws 1999, c. 277, § 1, eff. May 3, 1999; Laws 2001, c. 255, § 4, eff. April 30, 2001; Laws 2003, c. 176, § 3, eff. May 5, 2003; Laws 2005, c. 129, § 1, eff. May 2, 2005; Laws 2010, c. 285, § 1, eff. May 11, 2010; Laws 2013, c. 264, § 1, eff. May 14, 2013; Laws 2013, c. 373, § 1, eff. May 14, 2013.

Codifications R.S. 1898, § 1212; C.L. 1907, § 1212; C.L. 1917, § 3000; R.S. 1933, § 40-3-5; C. 1943, § 40-3-5.

Notes of Decisions (1483)

U.C.A. 1953 § 30-3-5, UT ST § 30-3-5

Current through 2015 First Special Session

End of Document

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Tab D

THE SMITH FAMILY TRUST

INCLUDING THE KEITH L. SMITH TRUST AND THE SHARON L. SMITH TRUST

ARTICLE I

TRANSFER IN TRUST

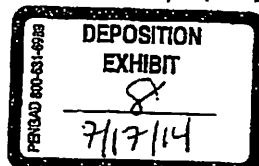
For good and valuable consideration, the Trustors, Keith L. Smith and Sharon L. Smith, husband and wife, of Grantsville, State of Utah, hereby transfer and deliver to the Trustees and their successors the property listed in Schedule "A", annexed hereto and incorporated herein by reference, to have and to hold the same, and any cash, securities or other property which the Trustees may, pursuant to any of the provisions hereof, at any time hereafter hold or acquire, all of such property being hereinafter referred to collectively as the "Trust Estate", for the uses and purposes and upon the terms and conditions herein set forth.

ARTICLE II

ADDITIONS TO TRUST

A. It is understood that the Trustors or any other person may grant and the Trustees may receive, as part of this Trust, additional real and personal property by assignment, transfer, deed or other conveyance, or by any other means, testamentary or inter vivos, for inclusion in the Trust herein created.

B. The Smith Family Trust shall be divided into two separate Trusts, The Keith L. Smith Trust and The Sharon L. Smith Trust. Any additional property received by the Trustee shall become a part of the Trust into which it is transferred and shall become subject to the terms of this Agreement. If such property is not specifically appointed to any particular Trust, it shall be allocated equally between The Keith L. Smith Trust and The Sharon L. Smith Trust, if both of the Trustors are living, and otherwise to the Shelter Trust set forth herein. Property held in the name of "THE SMITH FAMILY TRUST" shall be allocated equally between the two Trusts and shall be subject to the respective provisions in the next two sentences. Property held as "THE KEITH L. SMITH TRUST" is the exclusive property of Keith L. Smith, and Sharon L.



Smith hereby expressly waives all interests, including community property interests and separate property interests, therein. Property held as "THE SHARON L. SMITH TRUST" is the exclusive property of Sharon L. Smith, and Keith L. Smith hereby expressly waives all interests, including community property interests and separate property interests, therein.

C. Unmatured life insurance policies transferred to the Trust at the death of either of the Trustors shall be allocated to the Shelter Trust and shall be under control of the Trustees of that Trust, except if the insured is a Trustee of that Trust; then the control shall rest solely in the Co-Trustee named or with the successor Trustees named after the insured.

ARTICLE III

SIGNATURES

The Trustor, Keith Lance Smith, has signed his name and is known by his whole name or by a portion thereof only or by a certain combination of names and the initials thereof. The Trustor, Sharon Lynn Smith, has signed her name and is known by her whole name or by a portion thereof only or by certain combinations of names and initials thereof, and also by the name of Mrs. Keith L. Smith, and a portion only of said name or the initials thereof. Regardless of what combinations of the names and signatures of the Trustors appear on past, present or future written documents, the names and signatures of the Trustors, as written below, are intended by the Trustors and shall be effective to transfer and convey the property listed in said written documents into this Trust.

ARTICLE IV

GOVERNING LAW

The validity of this trust and the construction of its beneficial provisions shall be governed by the laws of the State of Utah in force from time to time. Questions with regard to the construction and administration of the trusts contained in this Agreement shall be determined by reference to the laws of the State in which the trust is then currently being administered.

ARTICLE V

NO BOND REQUIRED

No Trustee named herein need give bond in any jurisdiction. If a fiduciary's bond may not be dispensed with, the Trustors request that the bond be accepted without surety and in the lowest possible amount. In the absence of breach of trust, no Trustee shall ever be required to qualify before, be appointed by, or account to any court, or obtain the order or approval of any court in the exercise of any power or discretion herein given.

ARTICLE VI

REVOCATION AND AMENDMENT

A. As long as both of the Trustors are alive, each of them reserves the right, without the consent or approval of the other, to amend, modify or revoke their separate Trusts under this Agreement, in whole or in part, including this Trust, concerning the property that each has contributed to the Trust, in whole or in part, also including the principal and the present or past undisbursed income from such principal. Such revocation shall be by an instrument in writing signed by the Trustors and shall be effective upon signing without notice to any successor Trustee. After the first of the Trustors has died, the survivor may amend or revoke only the Survivor's Trust provisions pertaining to the assets transferred therein by the surviving Trustor, and may not, however, amend or revoke the QTIP Marital Trust. The Shelter Trust shall continue as an irrevocable Trust and will be administered and distributed as set forth herein. On the death of the survivor of the Trustors, the remainder of the Trust Estate and the Trusts created hereinafter shall become irrevocable.

B. While any of these Trusts remain revocable, the Trustors may, in their discretion, make such use of the funds or properties of these Trusts as they may deem prudent, and such use shall be deemed to have been made with the consent and approval of the Trustees as though a formal writing were submitted in accordance with the provisions above.

C. The interest of the beneficiaries is a present interest which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all rights and privileges thereunder shall be controlled and exercised by the Trustees named herein.

ARTICLE VII

STATEMENT OF INTENTION

It is specifically the intention of the Trustors that all real and personal properties now owned by the Trustors are to be a part of this Trust; provided further, that all future real and personal properties acquired by the Trustors are to be a part of, or to automatically become a part of, this Trust at the time acquired by the Trustors.

ARTICLE VIII

INEFFECTUAL PROVISIONS

If any provision of this Trust Agreement is unenforceable, the remaining provisions, nevertheless, shall be carried into effect.

ARTICLE IX

GENDER

In any provision of this Trust Agreement, the masculine includes the feminine and vice versa, and the neuter includes the masculine or feminine and vice versa. Where applicable, the singular includes the plural and vice versa.

ARTICLE X

PERPETUITIES SAVINGS CLAUSE

In any event, and anything to the contrary herein contained notwithstanding, the Trust created in this Agreement shall be subject to the Rule Against Perpetuities in place in the jurisdiction governing this trust.

In the event of the termination of this Trust as provided for herein, the Trustee shall distribute the Trust Estate as it shall then be constituted, together with any net income, to the beneficiaries then entitled to the income from the Trust Estate, in the same proportions in which they are entitled to such income.

ARTICLE XI

SPENDTHRIFT PROVISION

After any of the Trusts created herein becomes irrevocable, the interests of each beneficiary in income and principal shall be free from the control or interference of any creditor of such beneficiary or the spouse of a married beneficiary, or the parent of a child beneficiary, and shall not be subject to attachment or be subject to assignment

either voluntarily or involuntarily. Each and every beneficiary under this Trust and the various estates created hereunder is hereby restrained from and shall be without right, power or authority to sell, transfer, assign, pledge, mortgage, hypothecate, alienate, anticipate, bequeath or devise, or in any manner affect or impair his, her or their beneficial right, title, interest, claim and estate in and to either the income or principal of any trust created hereunder, or to any part thereof, during the entire terms of said trusts; nor shall the right, title, interest or estate of any beneficiary be subject to any right, claim, demand, lien or judgment of any creditor of any such beneficiary, nor be subject nor liable to any process of law or equity, but all of the income and principal, except as otherwise provided in this Trust Agreement shall by the Trustee be payable and deliverable to or for the benefit of only the named and designated beneficiaries, as set forth in this trust agreement, and receipt by such beneficiaries shall relieve the Trustee from responsibility for such good faith distributions. This spendthrift clause shall not be construed to limit in any way the survivor of the Trustors' rights to income or principal under the Shelter Trust or the Marital Trust.

ARTICLE XII

PARTIES DEALING WITH TRUSTEES

No purchaser and no issuer of any stock, bond or other instrument evidencing a deposit of money or property, or other person dealing with the Trustees hereunder with respect to any property hereunder, as purchaser, lessee, party to a contract or lease or in any other capacity whatsoever, shall be under any obligation whatsoever to see to the disbursing of money paid to the Trustees or to the due execution of this Trust in any particular, but such persons shall be absolutely free in dealing with the Trustees on the same basis as though the Trustees were the absolute owner of the said property, without any conditions, restrictions or qualifications whatsoever.

ARTICLE XIII

DELEGATION OF AUTHORITY

When a Trustor is unable or unwilling to serve as Trustee under this Trust Agreement due to death, resignation or incompetence, the remaining Trustor shall serve as Trustee.

When the original Trustors are unable or unwilling to serve as Trustee under this Trust Agreement due to death, resignation or incompetence, the successor Trustees in

the order of succession set forth in Article XXVII shall serve as Trustees. For all purposes of this Trust, each Trustee shall continue to be deemed mentally competent, unless determined not to be competent by two physicians selected by the Co-Trustee or the successor Trustee. The physicians shall not be liable for any determination made as to the competency of the Trustee if the determination is made in a reasonable manner.

ARTICLE XIV

POWER OF THE TRUSTEES

A. The Trustees shall have full power to do everything in administering these Trusts that they deem to be for the best interests of the beneficiaries (whether or not it be authorized or appropriate for fiduciaries but for this broad grant of authority) including, but not limited to, the following:

1. To buy, sell and trade in securities of any nature, including short sales and on margin, and for such purposes may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased by them with such brokers as security for loans and advances made to the Trustees, and to acquire by purchase or otherwise and to retain, so long as they deem advisable, any kind of realty or personal property or undivided interests therein, including common and preferred stocks, bonds or other unsecured obligations, options, warrants, interests in limited partnerships, investment trusts and discretionary common trust funds, all without diversification as to kind or amount, without being limited to investments authorized by law for the investment of trust funds, and power to hold or take title to property in the name of a nominee;
2. To sell for cash or on credit, at private or public sale, exchange, hypothecate, sell short or otherwise dispose of any real or personal property;
3. To make distributions as authorized in this Trust Agreement, including distributions to themselves as Trustees, in kind or in money or partly in each, even if shares be composed differently. For such purposes, the valuation of the Trustees shall be given effect, if reasonably made;
4. To withhold from distribution, in the Trustee's discretion, at the time for distribution of any property in this trust, without the payment of interest, all or any part of the property, as long as the Trustee shall determine in the Trustee's discretion that such property may be subject to conflicting claims, to tax

deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the estate.

5. If, in the Trustees' discretion, any beneficiary (whether a minor or of legal age) is incapable of making proper disposition of any sum of income or principal that is payable or appointed to said beneficiary under the terms of this Trust Agreement, the Trustees may apply said sum to or on behalf of the beneficiary by any one or more of the following methods: by payments on behalf of the beneficiary to anyone with whom the beneficiary resides, by payments in discharge of the beneficiary's bills or debts, including bills for premiums on any insurance policies, or by paying an allowance to a beneficiary directly. The foregoing payments shall be made without regard to other resources of the beneficiary or the duty of any person to support the beneficiary and without the intervention of any guardian or like fiduciary; provided, however, that the Trustees shall insure and see to the application of the funds for the benefit of the beneficiary, so that the funds will not be used by any adult person, or any other person for a purpose other than the direct benefit of the beneficiary, and particularly so that said funds will not be diverted from the purpose of support and education of said beneficiary;

6. To determine whether and to what extent receipts should be deemed income or principal, whether or to what extent expenditures should be charged against principal or income, and what other adjustments should be made between principal and income, provided such adjustments do not conflict with well-settled rules for the determination of principal and income questions;

7. To delegate powers to agents including accountants, investment counsel, appraisers, legal counsel, and other experts, remunerate them and pay their expenses, to employ custodians of the trust assets, bookkeepers, clerks and other assistants and pay them out of income or principal;

8. To execute or enter into contracts, deeds, agreements or any other documents of any nature whatsoever which the Trustees deem necessary or desirable to carry out the provisions and purposes of the Trusts, to renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration or litigation, obligations or claims held by or asserted against the Trustors, the Trustees or the trust assets;

9. To borrow money from others or from the Trustees, for the payment of taxes, debts or expenses, or for any other purpose which, in the opinion of the

Trustees, will facilitate the administration of these Trusts, and pledge or mortgage property as security for any such loans, and if money is borrowed from any Trustee individually, to pay interest thereon at the then prevailing rate of interest;

10. To lend money to any person, including the probate estate of either Trustor, provided that any such loan shall be adequately secured and shall bear a reasonable rate of interest.

11. To lease, or grant options to lease, for periods to begin presently or in the future, without regard to statutory restrictions or the probable duration of any Trust, to erect or alter buildings or otherwise improve and manage property, demolish buildings, make ordinary and extraordinary repairs, grant easements and changes, make party wall contracts, dedicate roads, subdivide, adjust boundary lines, partition and convey property or give money for equity of partition;

12. To operate, either solely or in conjunction with others, any business operation or enterprise of any nature, whether it be an individual business, general or limited partnership or corporation, for as long a time and in such a manner as the Trustees deem proper for the best interests of the Trust, with full power to organize and/or operate as a sole proprietorship or partnership, to incorporate such business or to execute or join in any plan of refinancing, merger, consolidation or reorganization thereof with full power to borrow monies as the Trustees may deem advisable for the purposes thereof;

13. To charge to operating expenses all current costs of amortization, obsolescence and depreciation of any properties of the Trust and to provide adequate reserves for such amortization, obsolescence and depreciation;

14. To effect and keep in force life, fire, rent, title, liability or casualty insurance, or other insurance of any nature, in any form, and in any amount;

15. To enter into transactions with any other trusts in which the Trustors or the beneficiaries of this Trust Agreement, or any of them, have beneficial interests, even though any trustee of such other trust is also a Trustee under this Trust Agreement;

16. To exercise all the foregoing powers alone or in conjunction with others, even though any of the Trustees are personally interested in the property that is involved, notwithstanding any rules of law relating to divided loyalty or self-dealing;

17. To invest in common trust funds, to hold and invest the funds of all Trusts in solido without a physical division of the assets, as the Trustees in their discretion may determine.

18. To consolidate, for the purposes of unified administration only, the assets of any trust created herein with the assets of any other trust created herein, to the extent it declares the same to be the best interest of the respective trust. Furthermore, there need be no physical segregation or division of the various trusts, except segregation or division may be required by the termination of any of the trusts, but the Trustee shall keep separate accounts for the different undivided interests;

19. To take any action and to make any election, in the Trustee's discretion, to minimize the tax liabilities of this trust and its beneficiaries and it shall have the power to allocate the benefits among the various beneficiaries, or between the income and principal accounts, to compensate for the consequences of any tax election or any investment or to administrative decision that the Trustee believes has had the effect of directly or indirectly preferring one beneficiary or group of beneficiaries over others.

B. Any Trustee may decline to act or may resign as Trustee at any time by delivering a written resignation to the beneficiaries of a Trust then subsisting.

C. Any Trustee may, from time to time, delegate to one or more of the remaining Trustees any powers, duties or discretions. Every such delegation shall be a writing delivered to the delegate or delegates and shall remain effective for the time therein specified or until earlier revocation by a further writing similarly delivered. Everyone dealing with the Trustees shall be absolutely protected in relying upon the certificate of any Trustee as to whom the Trustees are acting for and as to the extent of their authority by reason of any delegation or otherwise.

D. From the income of the Trusts hereby created or, if that be insufficient, from the principal thereof, the Trustees shall pay and discharge all expenses incurred in the administration of the Trusts.

E. No successor Trustee shall be liable for any misfeasance of any prior Trustee.

F. The Trustee shall be prohibited from making any payments in reimbursement to any governmental entity which may have incurred expenses for the benefit of a beneficiary, and the Trustees shall not pay any obligation of a beneficiary

which obligation is otherwise payable by any governmental entity or pursuant to any governmental program of reimbursement or payment.

ARTICLE XV

COURT SUPERVISION NOT REQUIRED

All trusts created under this Agreement shall be administered free from the active supervision of any court.

Any proceedings to seek judicial instructions or a judicial determination shall be initiated by the Trustee in the appropriate state court having original jurisdiction of those matters relating to the construction and administration of trusts.

ARTICLE XVI

RENDITION OF ACCOUNTS

A. During the lifetime of the Trustors, the Trustee shall account only to the Trustors and their written approval shall be final and conclusive in respect to transactions disclosed in the account as to all beneficiaries of the trust, including unborn and contingent beneficiaries. After the death of one of the Trustors, the Trustee shall, in addition to any accounting required under applicable law, render an accounting, from time to time, but not less frequently than annually, regarding the transactions of any trust created in this instrument. Accountings shall also be rendered by any Trustee within 30 days after his resignation or removal by a court of competent jurisdiction.

B. Accountings shall be made by delivering a written accounting to each beneficiary entitled to current income distributions or, if there are no current income beneficiaries, to each beneficiary entitled to any current distribution out of income or principal, and each remainderman in being. If any person entitled to receive an accounting is a minor or is under a disability, the accounting shall be delivered to his parents or the guardian of his person if he is a minor or to the guardian or conservator of his person if he is under any other disability. Unless any beneficiary, including parents, guardians or conservators of beneficiaries, shall deliver a written objection to the Trustee within sixty (60) days after receipt of the Trustee's accounting, the account shall be final and conclusive in respect to transactions disclosed in the accounting as to all beneficiaries of the trust, including unborn and unascertained beneficiaries. After settlement of the accounting by agreement of the parties objecting to it, or by expiration of the sixty (60) day period, the Trustee shall no longer be liable to any beneficiary of

the trust, including unborn and unascertained beneficiaries, in respect to transactions disclosed in the accounting, except for the Trustee's intentional wrongdoing or fraud.

ARTICLE XVII

CERTIFIED COPIES OF TRUST

To the same effect as if it were the original, any person or institution may rely upon a copy certified by a Notary Public to be a true copy of this instrument and any schedules or exhibits attached hereto. Any person or institution may rely upon any statement of fact certified by anyone who appears from the original Trust, or a certified copy thereof, to be a Trustee hereunder.

ARTICLE XVIII

DEATH

If either of the Trustors has a serious illness or operation, the Trustors request that the Trustees call J. RANDALL RICHARDS, Attorney at Law, Salt Lake City, Utah, to obtain instructions in case either of the Trustors should die. If death makes this prior conversation impossible, then the Trustees should call said attorney as soon as possible.

ARTICLE XIX

LOCATION OF DOCUMENTS

This Trust has been prepared in duplicate, each copy of which has been executed as an original. One of these executed copies is in the possession of the Trustors, and the other is deposited for safekeeping with J. RANDALL RICHARDS, Attorney at Law, Salt Lake City, Utah. Either copy may be used as an original without the other and, if only one copy of this Trust Agreement can be found, then it shall be considered as the original and the missing copy will be presumed inadvertently lost. Clarifications or instructions concerning this Trust Agreement may be obtained by calling said law firm.

ARTICLE XX
PROVISIONS RELATING
TO POLICIES OF INSURANCE

In the event the Trustee is named the beneficiary under any policies of insurance, said Trustee shall hold the same, subject to order of the owner of the policy, without obligation other than the safekeeping of any policies which may be delivered to the Trustee.

The owner of the policy retains all rights, options and privileges with respect to said policies. Upon receiving possession of insurance policies, proof of death of the insured, or upon maturity of any policies prior to the death of the insured, the trustee shall use reasonable efforts to collect all sums payable on such policies for which the Trust is designated a beneficiary or owner. All insurance settlements as received by the Trustee shall become principal of the Trust Estate, except interest paid by the insurer, which shall be classed as income. The Trustee may compromise, arbitrate or otherwise adjust claims upon any of the policies. The receipt of the Trustee to the insurance company shall be a full discharge of the company.

The Trustee shall not be responsible for payment of any insurance premiums or any act or omission of the insured or the owner of the policy. The Trustee shall not be required to prosecute any action, to collect any insurance or to defend any action relating to any policy of insurance unless indemnified against costs and expenses, including attorney's fees.

ARTICLE XXI
DISPOSITION DURING JOINT
LIVES OF THE TRUSTORS

During the joint lives of the Trustors, the Trustees shall hold, manage, invest and reinvest the Trust Estate, and shall collect the income thereof and shall dispose of the net income and principal as follows:

A. Income. The Trustees shall pay to the Trustors all of the net income of this Trust, in monthly or other convenient installments, but at least semi-annually.

B. Principal. The Trustees may, in their discretion, pay or apply for the benefit of the Trustors, in addition to the income payments herein provided for, such amounts of the principal of the Trust Estate, up to the whole thereof, as the Trustees

may from time to time deem necessary or advisable for the use and benefit of the Trustors.

C. Incapacity. If, in a Trustee's sole and absolute judgment, either of the Trustors is so incapacitated by reason of illness, age, or other cause that he or she is incapable of handling funds for his or her own use and benefit, or if unavailable to give prompt attention to his or her financial affairs, the Trustee may use so much of the net income and principal of the Trust Estate as the Trustee, in Trustee's sole and absolute discretion, deems necessary or advisable, (1) for the comfort, support, maintenance, health and education of said incapacitated Trustor and any person who, in the judgment of the Trustee, is dependent upon said incapacitated Trustor, (2) for the payment of premiums on any insurance policies owned by said Incapacitated Trustor, whether or not subject to the terms of this Trust Agreement, and (3) for the purpose of discharging any debt or obligation incurred by said incapacitated Trustor and believed by the Trustee to be a valid debt including, but not limited to: home rental/mortgage payments, utilities, installment obligations and established charitable contribution customs.

ARTICLE XXII

DISPOSITION AFTER DEATH OF THE FIRST OF THE TRUSTORS

A. At the death of the first of the Trustors (and in case of simultaneous deaths, this Trust will operate as if the wife had survived the husband), after payment of currently due debts, expenses and costs of last illness and funeral out of the decedent's Estate, the Trustees shall divide the Trust Estate into three separate Trusts, hereinafter designated as the "Marital Trust", the "Shelter Trust" and the "Survivor's Trust", respectively.

B. The Marital Trust shall consist of a fractional proportion in all property of the first of the Trustors to die that qualifies for the marital deduction determined as follows:

1. The numerator of such fractional proportion of the Trust Estate shall be the smallest amount which, if allowed as a marital deduction, would result in the least possible federal estate tax being payable as a result of the Trustor's death, after allowing for the unified credit against federal estate tax and all available credits and deductions claimed.

The numerator shall be reduced by the value of any other property which passes to the Trustor's spouse which qualifies for the marital deduction other than the trust property.

2. The denominator of this fraction shall be the value of the entire trust property. Values assigned to property for purposes of this computation shall be those values finally determined for federal estate tax purposes. The Trustee shall have the power to distribute assets, in cash or in kind, to the respective Trusts and to select specific property to be distributed to the respective Trusts without regard to the income tax basis of such property. In making these allocations, the Trustee shall use the value of the assets as of the date or dates of distribution, so that each distribution shares proportionately in the appreciation or depreciation of assets between the date of the Trustor's death and the date or dates of distribution. However, no allocation of assets shall be made to the Marital Trust which do not qualify for the marital deduction. The Trustee shall have the power to select specific property to be distributed to the Trusts without regard to the income tax basis of such property. To the extent that other assets which qualify for the marital deduction are available, there shall not be allocated to the Marital Trust: (a) assets with respect to which an estate tax credit for foreign taxes paid is allowable; (b) United States Treasury Bonds that are eligible for redemption at par value in payment of the federal estate tax. In computing the marital deduction, all generation-skipping transfers for which the Trustor is the "deemed transferor" shall be disregarded.

C. The Marital Trust shall be held by the Trustees separately in trust for the following purposes:

1. The Trustee shall collect the income on said Trust and pay or apply for the surviving spouse the net income thereof, in quarterly or other convenient installments (but at least annually), for and during the term of said surviving spouse's life.

2. Any remaining trust corpus shall be added at the death of the surviving spouse to the Shelter Trust and shall be held and administered as a part thereof; provided, however, that the Trustees shall first pay from the Marital Trust the last illness and funeral expenses and any death taxes of the survivor of the Trustors.

D. The Survivor's Trust shall consist of the property which is the exclusive ownership of the surviving spouse, such as said surviving spouse's interest in all

community property and separate property belonging to said survivor or said survivor's Trust. Said Trust Estate is under the full control of the surviving Trustor and, if not appointed otherwise, shall, upon the death of the surviving spouse, be distributed pursuant to the provisions of the Shelter Trust.

E. The Shelter Trust shall contain the balance of the Trust Estate remaining after setting aside all property of the Trust Estate that is included in the Marital Trust and Survivor's Trust. The Shelter Trust shall be subject to the payment of all the death taxes of the first of the Trustors to die and shall be held by the Trustees separately in trust for the following purposes:

1. The Trustees may distribute the income of the Shelter Trust among the issue of both of the Trustors as the survivor of the Trustors may appoint.

2. During the lifetime of the surviving Trustor, the Trustees of the Shelter Trust may distribute to said survivor such part or all of the net unappointed income and principal of the Shelter Trust as said Trustee, in his sole discretion, determines necessary or appropriate for the support and maintenance of said survivor in the standard of living to which the surviving Trustor is accustomed, including reasonably adequate health, medical, dental, hospital, nursing and invalidism expenses. The powers herein granted to the surviving Trustor, while serving as a Trustee or Co-Trustee of this Trust Agreement, shall be limited as follows: The surviving Trustor shall have no right to determine the amount of any income or principal of the Shelter Trust to be retained or to be distributed to said survivor or to distribute such but such determination and distribution shall be made by the Trustee or Trustees serving with the surviving Trustor. If such survivor is serving as sole Trustee of this Trust Agreement, then said determination and distribution shall be made by the successor Trustee or Trustees named immediately after the Trustors in this Trust Agreement.

3. The surviving Trustor shall have the unrestricted power at any time to invade the principal of the Shelter Trust (nonmarital trust) annually, to the extent of the greater of the following amounts: a) the sum of \$5,000 or b) 5% of the fair market value of the property of the Shelter Trust determined by the Trustee as of the end of the month immediately preceding the request. This power shall be noncumulative and the power with respect to each year shall, if not exercised, lapse on the last day of each calendar year the power is held. The exercising of this power shall be made in writing by said surviving Trustor to the Trustee.

4. Upon the death of the surviving Trustor, the Trustees shall dispose of the unappointed remaining principal and income of the Shelter Trust as directed in Article XXIII.

F. Statutory interests, if any, of the survivor of the Trustors, in his or her spouse's real and personal property, is hereby expressly waived by both of the Trustors.

G. If this Trust is named beneficiary under any retirement plan, then such amounts so received shall be held pursuant to the provisions of Article XXII, paragraph E, provided further, that no federal estate nor state inheritance taxes nor any debts or liabilities of the deceased Trustor/plan participant may be paid from such proceeds.

H. If the Trustors or any primary and secondary beneficiary die simultaneously or under such conditions that it cannot be determined from credible evidence which of them was the first to die, the provisions made herein for the surviving spouse shall be construed as though the Trustor-wife survived the Trustor-husband. Any secondary beneficiary shall be deemed to have predeceased the primary beneficiary.

ARTICLE XXIII
DISPOSITION ON DEATH OF
THE SURVIVING TRUSTOR

All Trust principal, with all accumulated income thereof, directed to be disposed of under the provisions herein, shall, upon the death of the survivor of the Trustors, be held in Trust for the benefit of the following beneficiaries of the Trustors and shall be disposed of as follows:

A. An amount determined by the Trustees, in their sole discretion, shall be set aside from the balance of the funds held in Trust and shall be used for the support, maintenance, health insurance or to meet the costs of any illness or accident and education of the beneficiaries of this Trust as determined by Article XXIII, paragraph C, who have not reached age 21 prior to the death of the survivor of the Trustors. Education of the beneficiaries shall include, but not be limited to, musical education, dancing lessons, grammar school, secondary school, college, graduate school, trade school, private school and vocational training school.

In determining the amount to be set aside under the provisions of this paragraph and the amounts to be paid therefrom, the Trustees shall take into account the needs, ages, assets and other available sources of income and support of the beneficiaries, including each beneficiary's ability to contribute to his or her own support. The Trustees

shall determine the amounts to be distributed, the beneficiary or beneficiaries to whom distributions are to be made, and the time and manner of distributions made under this paragraph and shall distribute according to the various needs of the beneficiaries, even if such distributions are unequal. After the youngest beneficiary described in paragraph B herein has attained age 21, the balance, if any, of the amounts set aside under this paragraph shall be distributed according to Article XXIII, paragraph C.

B. In the event [REDACTED] Smith is under 18 years of age, the Trustees shall set aside in Trust, the real property last used as the principal residence of the Trustors, for the benefit of [REDACTED] until such time as she attains 18 years of age. The Trustees shall also set aside a sufficient amount of money to pay all expenses related to the upkeep of the principal residence. When [REDACTED] turns 18, the Trustees shall distribute the principal residence according to the provisions set forth in paragraph "C" below.

C. After setting aside sufficient amounts to carry out the purposes of Article XXIII, paragraph A, above, the Trustees shall divide the Trust Estate into as many equal shares as there are children of the Trustors then living and children of the Trustors then deceased but leaving surviving issue; provided further, that each of said shares, if not immediately distributed, shall constitute and be held, administered and distributed by the Trustees as a separate Trust, as follows:

1. One such share shall be set aside for the benefit of each of the children of the Trustors who may then be living and, if held in Trust, shall constitute the Trust Estate of such child's Trust.

2. One such equal share of the Trust Estate shall be set aside for the benefit of the surviving issue, by right of representation, of each of the children of the Trustors who may then be deceased but leave issue surviving and, if held in Trust, shall constitute the Trust Estate of such issue's Trust; the amounts so set aside may be used for the purposes and benefits as enumerated in Article XXIII, paragraph A, above.

3. As each above-described beneficiary attains age 21, the share of the Trust Estate for said beneficiary shall be distributed to him or her free and clear of Trust, upon his or her request therefore, as follows: 1/3 of the Trust Estate shall be distributed to each beneficiary when he or she has attained the age of 21; 1/2 of the remaining balance of the Trust Estate shall be distributed to each beneficiary when he or she has attained the age of 25; and the remaining balance shall be distributed to each beneficiary upon attaining age 30.

D. Whenever used herein, the terms "issue", "child", "children" and "descendants" include adopted issue, adopted child, adopted children and adopted descendants, as well as natural issue, natural child, natural children and natural descendants, and include descendants of adopted issue, adopted child, adopted children and adopted descendants.

E. If any of the above beneficiaries are unable or unwilling to take any portion of the Trust Estate, then the Trustees shall distribute the portion of the property of that beneficiary to his or her issue by right of representation and, if none, then to the other Trust beneficiaries proportionate to each beneficiary's interest in the Trust and, if no remaining beneficiaries, then: one-half to the living heirs at law of the first of the Trustors to die and one-half to the living heirs at law of the last of the Trustors to die; provided further, that said heirs at law of each of the Trustors shall take the Trust property in the same priority and in the same distributive order as listed in the law of intestate succession of the state referred to in Article I as in force on the date of the signing of this Trust Agreement.

ARTICLE XXIV

ADMINISTRATION OF TRUST UPON THE DEATH OF A TRUSTOR

A. On the death of a Trustor, the Trustee is authorized, but not directed to pay the following:

1. Expenses of the last illness, funeral and burial of such Trustor.
2. Legally enforceable claims against such Trustor or such of Trustor's estate.
3. Expenses with regard to the administration of such Trustor's estate.
4. Federal estate tax, applicable state inheritance or estate taxes, or any other taxes occasioned by the death of such Trustor.
5. Statutory or court ordered allowances for qualifying family members.
6. The payments authorized under this Article are discretionary, and no claims or right to payment by third parties may be enforced against the trust by virtue of such discretionary authority.

7. The Trustee shall be indemnified from the trust property for any damages sustained by the Trustee as a result of the Trustee exercising, in good faith, the authority granted the Trustee under this Article.

B. If the Trust created herein holds United States Treasury Bonds which are eligible for redemption at par in payment of the federal estate tax, the Trustee shall redeem such bonds to the extent necessary to pay federal estate tax as a result of such Trustor's death.

C. This paragraph shall be utilized to help facilitate the coordination between the personal representative of a Trustor's probate estate and the Trustee with respect to any property owned by the Trustors outside of this Trust Agreement on such Trustor's death.

1. The Trustee, in the Trustee's sole and absolute discretion, may elect to pay the payments authorized under this Article either directly to the appropriate persons or institutions or to the personal representative of such Trustor's probate estate.

The Trustee may rely upon the written statements of such Trustor's personal representative as to all material facts relating to these payments; the Trustee shall not have any duty to see to the application of such payments.

2. The Trustee is authorized to purchase and retain in the form received, as an addition to the Trust, any property which is a part of such Trustor's probate estate. In addition, the Trustee may make loans, with or without security, to such Trustor's probate estate. The Trustee shall not be liable for any loss suffered by any Trust created herein as a result of the exercise of the powers granted in this paragraph.

3. The Trustee is authorized to accept distributions from the personal representative of an Trustor's probate estate without audit and the Trustee shall be under no obligation to examine the records or accounts of the personal representative of such Trustor's probate estate.

ARTICLE XXV

TRUSTEE'S AUTHORITY TO MAKE TAX ELECTIONS

The Trustee may exercise any available elections with regard to state or federal income, inheritance, estate, succession, or gift tax law.

A. Alternate Valuation Date. The authority granted the Trustee in this Article includes the right to elect any alternate valuation date for federal estate, state estate or inheritance tax purposes.

B. Tax and Returns. The Trustee may also:

1. Sign joint tax returns.

2. Pay any taxes, interest or penalties with regard to taxes.
 3. Apply for and collect tax refunds and interest thereon.
- C. All expenses, taxes and claims shall be paid without apportionment, and without reimbursement from any person.

ARTICLE XXVI

PERSONAL PROPERTY DISTRIBUTIONS

All personal properties listed on the Personal Property List are to be distributed to the named designees and such items shall be conveyed to such persons in addition to their respective distributive shares of the Trust described herein.

ARTICLE XXVII

TRUSTEES AND FAMILY MEMBERS

- A. The present living children of the Trustors and their birth dates are:
- | | |
|------------------|------------------|
| ██████████ Smith | ██████████, 1980 |
| ██████████ Smith | ██████████, 1985 |
| ██████████ Smith | ██████████, 1988 |
| ██████████ Smith | ██████████, 1993 |
- B. The following people shall serve as Trustees:
1. ██████████ Smith and ██████████ Smith, Trustors, as Co-Trustees of The Smith Family Trust.
 2. ██████████ Smith, Grantor, as Trustee of The ██████████ Smith Trust.
 3. ██████████ Smith, Grantor, as Trustee of The ██████████ Smith Trust.
 4. When a Grantor is unable or unwilling to serve as Trustee, the remaining Grantor shall serve as Trustee.
 5. When neither Grantor is able or willing to serve as Trustee, the following persons are appointed as Trustees in the following order of succession:
 - a. ██████████ Smith.
 - b. ██████████ Swenson.
 - c. A Trustee chosen by a majority of beneficiaries, with a parent or legal guardian voting for minor beneficiaries.
- C. Whenever more than one Trustee is designated to act concurrently, a majority of the Trustees, whether individual or corporate, shall have the power to make

any decision, undertake any action, or execute any documents affecting the Trusts created herein. In the event of a difference of opinion among the Trustees, the decision of a majority of them shall prevail, but the dissenting or nonassenting Trustees shall not be responsible for any action taken by the majority pursuant to such decision. After the death of the first of the Trustors to die, if only two individual Trustees are in office, they must act unanimously. If an individual and a corporate Trustee are in office, the determination of the individual Trustee shall be binding.

D. Each Successor Trustee shall have the same duties and powers as are assumed in this Trust Agreement.

E. No successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee. Unless requested in writing within sixty (60) days of appointment by an adult beneficiary of the trust, no successor Trustee shall have any duty to investigate or review any action of a predecessor Trustee and may accept the accounting records of the predecessor Trustee showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the trust.

ARTICLE XXVIII

SPECIAL TRUSTEE PROVISIONS

A. As used throughout this Agreement, the word Trustee shall refer to the original Trustee as well as any single, additional, or successor Trustee. It shall also refer to any individual, corporation or other entity acting as a replacement, substitute, or added Trustee.

B. After the death of the first of the Trustors, the surviving Trustor shall have the right, from time-to-time, to discharge any Trustee or Successor Trustee of any trust hereunder and to appoint a successor as Trustee in its place. Upon the death of the surviving Trustor, the unanimous consent of the then Beneficiaries of all Trusts then established shall be sufficient to discharge any Trustee or Co-Trustee and appoint a successor Trustee or Co-Trustee. Discharge of a Trustee shall be by delivering to such Trustee thirty (30) days notice of discharge accompanied by the name of the intended Successor Trustee. The Trustee of any trust hereunder, including any Successor Trustee, may resign by delivery of ninety (90) days' written notice of resignation to all of the then income beneficiaries of such trust. In the event of such resignation, such income beneficiaries who are adults shall have the right to appoint a Successor Trustee in its place; provided, that if no such income beneficiary is an adult, then such

appointment shall be made by the parent or legal guardian of such income beneficiary; provided further, that in the event of dispute among such income beneficiaries, their parents or their guardians, the majority shall prevail.

C. As long as any individual named in this instrument shall serve as Co-Trustee of these trusts, that individual shall have the power from time-to-time to delegate to the other Co-Trustee all or any of his powers as Co-Trustee during temporary vacation periods or other temporary periods. The power of delegation shall be exercised by delivery by the individual Co-Trustee to the other Co-Trustee of written notice specifying the powers delegated; this delegation shall terminate on delivery by the individual Co-Trustee to the other Co-Trustee of written notice of termination of delegation. The individual Co-Trustee shall incur no liability to any beneficiary of the Trust Estate as a result of any action taken or not taken within the scope of delegation during the period of delegation.

D. The Original Trustee or Co-Trustees shall receive no compensation for ordinary services performed hereunder. The Successor Trustee or Trustees, whether corporate or noncorporate, shall be entitled to receive reasonable compensation for services rendered by them or counsel retained by them, including services in connection with the transfer of assets to beneficiaries or successor Trustees and the appointment of successor Trustees. Reasonable compensation shall be based upon the then prevailing rates charged for similar services in the locality where the same are performed by other fiduciaries engaged in the trust business or acting as Trustees.

E. The Trustee may abandon any real or personal property which may be determined to be worthless; any such determination by the Trustee shall be binding upon all parties interested hereunder.

F. If an individual Co-Trustee is unable to participate in trust activities because of illness, disability, or any other reason, the remaining Trustee may, during any such incapacity, make any and all decisions regarding the Trust Estate as though it were the sole Trustee. In determining the disability of the Individual Trustee, the remaining Trustee may rely on a certificate or other written statement from two licensed physicians who have examined the individual Trustee. In the absence of such a certificate or statement, the remaining Trustee shall petition the court having jurisdiction over this trust for authority to proceed as sole Trustee; under authority of this paragraph. The remaining Trustee shall incur no liability to any beneficiary of the trust or to the individual Trustee as a result of any action taken under this paragraph.

G. This trust is created upon the express understanding that the issuer (including transfer agents) or custodian of any shares of stock or mutual funds shall be under no liability whatsoever to see to its proper administration; and that upon the transfer of the right, title and interest in and to said shares by any Trustee hereunder, said issuer or custodian shall conclusively treat the transferee as the sole owner of said shares. In the event that any shares, cash, or other property shall be distributable at any time under the terms of said shares, the said issuer or custodian is fully authorized to pay, deliver and distribute the same to whosoever shall then be Trustee hereunder, and shall be under no liability to see the proper application thereof. The issuer or custodian is authorized to make such distributions under a mutual fund systematic withdrawal plan as have been specified by any Trustee acting hereunder. Until the issuer or custodian shall receive from some person interested in this trust written notice of any death or other event upon which the right to receive may depend, the issuer or custodian shall incur no liability for payments made in good faith to persons whose interests shall have been affected by such event. The issuer or custodian shall be protected in acting upon any notice or other instrument or document believed by it to be genuine and to have been signed or presented by the proper party or parties. The Trustee shall have the right to pledge the shares as collateral for any loans made to the trust or to any Trustors.

H. During the lifetime of the Trustors, they shall have the power in their discretion, to direct that the Trustee employ a reputable professional investment counsel of their choice, provided that the investment counsel shall currently be handling at least five other accounts of similar size. Any investment counsel designated by the Trustors or either of them shall continue to be retained in that capacity after the death of the survivor of the Trustors. In the absence of compelling circumstances to the contrary or except as provided below. On the death or legal disability of the surviving Trustor, each child of the Trustors who has attained the age of 25 shall have the power, in his discretion, to direct that the Trustee employ a reputable professional investment counsel of his choice (provided that the investment counsel shall currently be handling at least five other accounts of similar size) to supervise the investment of the trust set aside for that child and his issue.

The Trustee shall abide by the decision of the independent counsel with respect to property placed under his control, but shall not be held liable or otherwise surcharged for losses directly attributable to investments made on the advice of the independent counsel. During the period that independent counsel is retained by the

Trustee, the Trustee shall not be required to conduct reviews of estate or trust investments subject to the supervision of the investment counsel, and it shall be required to take no action in respect to those estate or trust investments unless it shall receive written instructions from the investment counsel.

In the event investment counsel is obtained, the Trustee's fees for its ordinary services in respect to property subject to supervision of the investment counsel for the period the counsel is retained, shall be reduced a reasonable amount to take account of the absence of investment responsibility in respect to that property.

ARTICLE XXIX

NO CONTEST PROVISION

Trustors specifically desire that the trusts created by this document shall be administered and distributed without litigation or dispute of any kind. If any beneficiary of this trust, or any other person, shall seek to establish or assert any claim to the Trust Estate established herein, other than as provided in this document, or to attack, oppose, or seek to set aside the administration and distribution of the Trust Estate other than as herein set forth, then and in such event, such person or persons who shall initiate such action shall receive from the Trustees the sum of One Dollar (\$1.00) and no more in lieu of any interest in the Trust Estate.

ARTICLE XXX

S CORPORATION STOCK

A. In the event any Trust created under this Trust Agreement owns stock in one (1) or more S Corporations as defined under Section 1361 of the Internal Revenue Code of 1986 (or any successor Act provision), as amended or supplemented, the following shall apply. Such Trust shall be divided into two (2) parts, held as separate shares. One (1) part shall consist of all assets allocated to such Trust except stock in any S Corporations. This part shall be held and administered in accordance with the provisions of the Article creating the Trust. The balance of the assets, composed of only S Corporation stock, shall be maintained as separate equal shares for each of the primary beneficiaries, each of which such separate shares will constitute a Qualified Subchapter S Trust for the benefit of the said primary beneficiary as provided in the Article of this Trust Agreement creating such Trust. For purposes of this Article, the term primary beneficiary shall mean the individual currently entitled to receive income

and/or principal from the Trust (but shall not include dependents of such person unless specifically named as a beneficiary of such Trust). Except for this provision establishing the separate Qualified Subchapter S Trust hereunder, all other provisions of the Article establishing such Trust shall be applicable, except to the extent that the following specific requirements shall be applicable to such Trust. It is the Trustors' intention that each such separate share holding the S Corporation stock shall constitute a Qualified Subchapter S Trust, as defined in Internal Revenue Code Section 1361(d)(3), as amended or supplemented, and as such, the following specific requirements shall be applicable to each of such separate shares:

1. All income of each such separate share shall be distributed to the primary beneficiary who shall be the income beneficiary of such separate share.
2. During the life of the current income beneficiary, there shall be only one (1) income beneficiary of each such separate share.
3. The current income beneficiary of each such separate share shall be a citizen or resident of the United States.
4. Any corpus distributed during the life of the current income beneficiary may be distributed only to such beneficiary.
5. The income interest of the current income beneficiary in the separate share shall terminate on the earlier of such beneficiary's death or the termination of the Trust.
6. Upon the termination of the Trust during the life of the current income beneficiary, the Trust shall distribute all of the assets held as a separate share to such beneficiary.

B. The provisions of this Article shall apply regardless of whether the election to be taxed as an S Corporation was made prior or subsequent to the Trustor's death.

ARTICLE XXXI

GUARDIAN'S EXPENDITURES

The Trustors do not desire, after their death, that the guardian of any minor beneficiary should incur personal expense in the support and maintenance of such beneficiary. The Trustee is authorized to disburse funds from such beneficiary's Trust Estate for the purpose of reimbursing such guardian for reasonable expenses incurred in supporting and caring for such minor beneficiary.

ARTICLE XXXII

MISCELLANEOUS PROVISIONS


A. Use of principal residence. On the death of the first of the Trustors, the surviving Trustor shall have the right to continue to occupy and use the home, that the surviving Trustor and the deceased Trustor were using as a principal residence (if it is part of the Trust Estate), provided, however, that the surviving Trustor, in his or her discretion, may direct the Trustees to sell any such property and replace it with or rent or lease another residence selected by the survivor of the Trustors of comparable or lower value. The surviving Trustor shall not be required to pay any rent for the use of said residence.

B. Simultaneous Death. If there is not sufficient evidence that the Trustors died otherwise than simultaneously, then for purposes of this Trust Agreement it shall be conclusively presumed for all purposes of administration and tax effect of this Trust that the Decedent shall be the Husband and the Survivor shall be the Wife.

C. Limitations of Trust Powers. Administration control and all other powers relating to the various Trust Estates created hereunder, shall be exercised by the Trustee in a fiduciary capacity and solely for the benefit of the survivor and the issue of the Trustors. Neither the Trustee, the Trustors, nor any other person, shall be permitted to purchase, exchange, reacquire or otherwise deal with or dispose of the principal of any of the various Trust Estates or the income therefrom, for less than an adequate interest in any case or without adequate security therefor. Any person holding a fiduciary power hereunder may release or reduce the scope of his power or may disclaim any part or all of such power.

D. Headings. Clause headings are not part of this Trust Agreement.

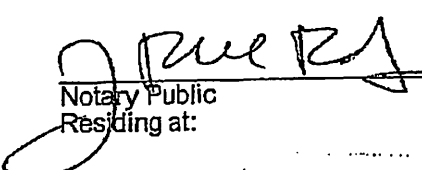
IN WITNESS WHEREOF, the Trustors have executed this Trust Agreement on the 22 day of September, 2006, as Trustors and Trustees:


KEITH L. SMITH

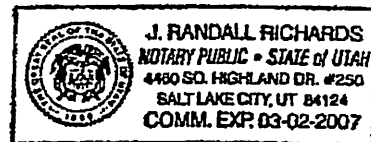

SHARON L. SMITH

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

The foregoing instrument was acknowledged before me this 22 day of
September, 2006, by Keith L. Smith and Sharon L. Smith.


Notary Public
Residing at:

My commission expires:



SCHEDULE "A"

KEITH L. SMITH and SHARON L. SMITH, Grantors, do hereby sell, transfer, convey, quitclaim and assign for Ten Dollars (\$10.00) and other good and valuable consideration, all rights, title and interests in the property set forth below to the Grantors as Trustees of THE SMITH FAMILY TRUST, dated the 22 day of September, 2006, Grantee. In addition, property listed under the ownership category as KLS is the exclusive property of THE KEITH L. SMITH TRUST, property listed as SLS is the exclusive property of THE SHARON L. SMITH TRUST, and property designated KLS & SLS is owned equally by the two Trusts.

1. All present and future interest of the Undersigned in the following real estate, together with all present and future improvements thereon, and all present and future water and water rights thereunto belonging and also including all present and all future personal property located thereon or wheresoever located:

Ownership

SLS A. [REDACTED], Castagno Acres Subdivision, as described in the plat maps and records on file at the County Recorder's Office, Tooele County, State of Utah.

Tax Parcel No.: [REDACTED]

COUNTY OF TOOELE, STATE OF UTAH

2. The following accounts in the following institutions, together with all future additions, interest or accumulations therein and also including all new accounts and the accumulations and the future additions, interest or accumulation in any and all other financial institutions in which new accounts are opened in the future:

Ownership

KLS & SLS A. [REDACTED] Credit Union

Account No. [REDACTED]

Prime Share
Premier Money Market
Budget Shares
Choice Plus Checking

3. Vehicles:

Ownership

KLS & SLS A. 2002 Chevrolet

Vehicle Identification No.: [REDACTED]
Utah Title No.: [REDACTED]


KLS & SLS B. 1990 Chevrolet


Vehicle Identification No.: [REDACTED]
Utah Title No.: [REDACTED]

4. All right, title and interest in and to the following:

SLS A. All interest of [REDACTED] Smith in and to [REDACTED] Family Limited Partnership, an Arizona Limited Partnership.

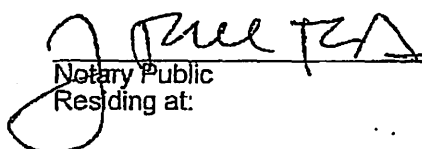
Dated the 22 day of September, 2006.


KEITH L. SMITH


SHARON L. SMITH

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

The foregoing instrument was acknowledged before me this 22 day of September, 2006, by Keith L. Smith and Sharon L. Smith.


Notary Public
Residing at:

My commission expires:

