2017

Kathy Engle, Appellant, v. Wende Throne, Special Administrator and Trustee, Judy Engle, Eldean Roy Engle, Britta Lynn Wilcken, Alexa Thayer, and Bullock Law Firm, Appellees : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of Homer Engle, deceased. KATHY ENGLE, Appellant, vs. WENDE THRONE, Special Administrator and Trustee, JUDY ENGLE, ELDEAN ROY ENGLE, BRITTA LYNN WILCKEN, ALEXA THAYER, and BULLOCK LAW FIRM, Appellees.	Case No. 20170382-CA ***REDACTED PUBLIC RECORD***

Brief of Appellee Wende Throne

Appeal from April 12, 2017 Order Closing Probate Based on Court's Findings, Conclusions, and Order Filed on April 7, 2017, in the Third Judicial District, Salt Lake County, the Honorable Keith Kelly presiding.

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LIST OF INTERESTED NON-PARTIES

Pursuant to Rule 24(a)(1)(B), the following parties to the trial court were not designated as parties on appeal by the Appellant: The Estate of Homer Engle*, The Homer Engle 2010 Trust*, York Howell & Guymon (former counsel for Special Administrator); Fabian Van Cott (former counsel for Special Administrator); Isaac Paxman Law, LC (former counsel for Judy Engle, Roy Engle, and several business entities); Hi-Country Estates Homeowners Association Phase II (judgment creditor).

*Although Appellant has not named the Estate or Trust as parties, they are appropriate appellees and Wende Throne responds to Appellant's brief in her role as Special Administrator and Trustee.

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Brief of Appellee

STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Section 78A-4-103(2)(j).

INTRODUCTION

The probate of Homer Engle's will on November 23, 2010 resulted in immediate and rampant litigation. The litigation has largely been driven by Kathy Engle and Judy Engle—Homer Engle's two disinherited daughters—and their relentless meritless attacks on Wende Throne that the trial court has consistently found to lack credibility. In 2013, the parties entered into a global settlement agreement to resolve issues and release all claims against each other. Despite that agreement, the litigation and the meritless allegations against

Wende Throne continued. The trial court finally closed the estate in April 2018, and in doing so found Kathy's objection to the petition to close the estate was untimely. It also once again found that allegations raised by Kathy, Judy and Roy Engle against Wende Throne lacked credibility, and some of those allegations were barred by the settlement agreement.

Kathy Engle's brief does not acknowledge that the trial court has consistently found the allegations against Wende Throne lacked credibility. She also ignores that in signing the settlement agreement she agreed to waive all claims against Wende Throne. Instead, it is a thinly-veiled continuation of more than eight years of litigation in which the parties have persistently and viciously attacked Wende in her attempts to administer the estate, which has resulted in hundreds of thousands of dollars of attorney fees. For that reason, Appellant's brief should be stricken and her appeal dismissed.

STATEMENT OF THE ISSUES

1. Should this Court entertain Kathy Engle's various inadequately briefed arguments, particularly where her brief misrepresents key facts, ignores the trial court's rulings that the claims raised lack credibility or are barred by the settlement agreement?

Standard of Review. This Court may strike or disregard briefs that contain "burdensome, irrelevant, immaterial, or scandalous matters" and may assess appropriate sanctions, including attorney fees. Utah R. App. P. 24(i).

2. Should this Court reverse the trial court's finding that Kathy Engle's late-filed objection to the estate closing was untimely where Kathy makes no argument that the trial court exceeded its broad discretion, let along plainly erred?

Standard of Review. A trial court's determination that a filing is untimely is reviewed for abuse of discretion. *See Gonzalez v. State*, 2015 UT 10, ¶ 21, 345 P.3d 1168. This Court will not review an unpreserved claim absent a showing of plain error or extraordinary circumstances. *See Jacob v. Bezzant*, 2009 UT 37, ¶ 34, 212 P.3d 535.

3. Should this Court reverse the trial court's finding that the various allegations against Wende raised over the years of litigation all lack credibility or are barred by the settlement where Kathy's unpreserved argument claim fails to acknowledge the trial court's rulings, let alone marshal the ample evidence that supports them?

Standard of Review. This court will not set aside a trial court's factual findings "unless clearly erroneous," giving "due regard to the trial court's opportunity to judge the credibility of the witnesses." *Shuman v. Shuman*, 2017 UT App 192, ¶ 3, 406 P.3d 258 (citation omitted). This Court will not review an unpreserved claim absent a showing of plain error or extraordinary circumstances. *See Jacob*, 2009 UT 37, ¶ 34.

3. Should this Court review Kathy's other various unpreserved claims related to the trial court's award of attorney fees and its lack of jurisdiction to order the release of certain liens?

Standard of Review. This Court will not review an unpreserved claim absent a showing of plain error or extraordinary circumstances. *See Jacob*, 2009 UT 37, ¶ 34.

4. Should this Court awarded Wende her attorney fees and costs on appeal where Kathy Engle's brief is frivolous or for delay, and where the trial court awarded fees to be paid from the estate pursuant to statute?

Standard of Review. This Court "shall award just damages" if it determines an appeal is either frivolous or for delay." Utah R. App. P. 33(a); *accord Id.* R. 24(i). In addition, a statutory award of fees is appropriate pursuant to Utah Code Ann. § 75-3-719.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are reproduced in Addendum A:

Utah Code Ann. § 75-3-718;
Utah Code Ann. § 75-3-719;
Utah R. App. P. 24;
Utah R. App. P. 33.

STATEMENT OF THE CASE

A. Disposition.

Kathy appeals from the trial court's April 12, 2107 Order Closing Probate Based on Court's Findings, Conclusions, and Order Filed on April 7, 2017. R8420-8423. On May 8, 2017, Kathy filed a notice of appeal. R8429-8431. No

other party appealed. *See generally* Record Index. The trial court thereafter on October 3, 2017, entered Amended Findings of Fact and Conclusions of Law in response to a Rule 60(b) motion by former counsel, R10697-713. On November 2, 2017, the trial court entered an Amended Order Closing Probate Dated as of April 12, 2017 *nunc pro tunc*, R15443-460. Kathy did not file an amended or new notice of appeal.[1] *See* Record Index. As a result, this Court ruled on February 12, 2018 that this "appeal is limited solely to the issues and record existing at the time the April 12, 2017 order was entered."

B. Relevant Facts.

Homer Engle died on November 21, 2010. R11442. [redacted]

[1] On October 31, 2018, this Court summarily dismissed a separate appeal by Kathy of the trial court's denial of a Rule 60(b) motion she filed April 16 2018 to set aside the final order closing probate. *See* docket; Case No. 20180647.

[redacted]

[redacted].

C. Relevant Procedural History.

When he died, Homer Engle claimed ownership, individually or via the Trust, of the following properties listed in his Will: the State Street property, the Woods Cross property, the Chesterfield property (referred to by the parties as the Crystal Avenue property), the Spring Lake property (referred to by the parties as the Payson property), the Price property, the listed the following properties in his Will: Estate and/or Trust are referred to by the parties as the Cherokee Lane property, the Payson property, the Price property, the Provo Property (referred to by the parties as the Cherokee Lane property), and Hi-Country Estates Lots 123, 124, and 130.[2] R11449.

On November 23, 2010, shortly after Homer Engle died, Wende filed a petition for formal probate of his Will in the Third District Court for Salt Lake County. R11442-89. [redacted]

[2] The legal descriptions for these properties are included as attachments to the settlement agreement (Addendum B) and the April 6, 2017 Findings of Fact, Conclusions of Law, and Order (Addendum D).

[redacted] The trial court appointed Wende as special administrator and entered the temporary restraining orders, and later granted a preliminary injunction. R2-4; R11509-1526; R11704-711.

Kathy's, Judy's, and Roy's challenges. Kathy, Judy and Roy each initiated challenges to Homer Engle's disinheritance of them and to Wende's appointment. The each also and filed multiple creditor's claims on their own behalf and on behalf of multiple business entities, claiming actual or equitable interests in the Trust/Estate real and personal property. R1156-57, R11565, R11719-11797, R11906-11909. [redacted] Judy and Kathy also asserted equitable interests in one or more estate properties based primarily on purported business interests. *See, e.g.,* R1156-57; R11565. For example, [redacted]

[redacted].[3] Judy and Roy have been pro se since May 24, 2014, when their attorney, Isaac Paxman, at least in part because they had already been filing pro se. R484-486. Isaac Paxman continued to represent Judy's and/or Roy's entities until June 29, 2017. R9105-108.

Other Estate Creditors. The estate had several creditors with liens or mortgages recorded against the various real properties. *See, e.g.,* R11719-720; 14420421. Hi-Country Estates Homeowners Association Phase II ("Hi-Country") was a judgment creditor of the Estate as a result of summary judgment it obtained for unpaid assessment on Hi-Country Lots 123, 124, and 130. R8387-8388; *see* Third District Court; Case No. 070918272. Hi-Country also had liens against Lots 123, 124, and 130, which the parties agreed would follow those properties. R14222.

Pre-settlement administration. Because the Estate/Trust assets consisted almost entirely of real and personal property and because the highly contentious litigation made it difficult to create liquid funds, there were not sufficient funds to pay all the Estate's bills, resulting in delinquent tax payments and/or mortgage payments. *See, e.g.,* R8-9, R14-15, R18-19, R21-23, Matters were further complicated by the fact that Judy and Kathy controlled some of the

[3] On information and belief, Isaac Paxman also briefly represented Kathy Engle, but that representation is not immediately clear from the record.

assets.[4] R3-4; R18-19; R14223-224. For example, the State Street property remained under Judy's control. R3-4. Homer Engle was in the process of evicting Judy from the State Street property when he died. *See* docket; Third District Court Case No. 090921857. On October 14, 2011, the trial court in the wrongful detainer case declined to issue a restitution order because ownership was being decided in the probate case, an instead ordered Judy to pay $800.00 per month into the court's trust. R6141-43. The court's order noted that Wende "would like to lease the subject property and thus bring additional cash into the estate," and that Judy, "despite her claimed right of possession, is not currently using the property in any way." *Id.*

[redacted].

On May 17, 2013 the trial court entered an order approving the sale of the Cherokee Lane property and to use the proceeds to pay property taxes and other

[4] The other parties sought to restrain Estate from liquidating or otherwise using the various properties, *see, e.g.,* R11919-924 (stipulated temporary restraining order).

estate debts. R13508-509; R30-31. The trial court also ordered that a loan could be taken out to provide cash to save the properties, and that the parties were not to interfere with selling the property or taking out a loan. *Id.* However, the Cherokee Lane property was not sold because the parties soon thereafter reached a global settlement agreement, in which they agreed [redacted].

The Settlement. Kathy, Judy, Roy (as individuals and members of their respective entities), and Wende (as an individual, special administrator of the Estate and trustee of the Trust) eventually reached a settlement agreement, which the trial court provisionally approved on September 13, 2013. R13836; 14216; 15405-06; 15409. Kathy agreed the settlement was binding as of that date, as did Richard Gardner, then-counsel for Wende, an Isaac Paxman, then-counsel for Roy and Judy. R13836; R14216; R15405-06; R15409. On November 14, 2013, the trial court entered an order approving the form of the Settlement, which was attached as Exhibit A to the order.[5] R14181-183; R14211-228. The Court set a hearing for final approval of the settlement agreement, and sent notice to the Estate's creditors, including Hi-Country. R766-799 (Notice of Hearing, filed August 4, 2014). Hi-Country did not file an objection or appear at either the first or second hearing to approve the settlement agreement. R956-

[5] A copy of the settlement agreement is reproduced in Addendum B.

961; R1116-1118. The trial court finally approved the settlement agreement on December 2, 2014. R1153-173. The agreement's terms included:

[redacted]

[6] Karen Kreeck withdrew on October 16, 2012. R12784-12789. Van Cott represented Wende as special administrator from January 4, 2013 to February 6, 2014. R12823; R302-306.

[redacted]

[redacted]

[redacted]

- [redacted]

Post-settlement administration. Despite the settlement, Kathy and Judy continued to interfere with Wende's estate administration. [redacted]. R14223-224. On November 26, 2013, the Court approved a plan agreed to by Kathy, Judy, and Roy, for implementing the settlement agreement. R14283-292. In part, the agreement was [redacted]. R14284-285.

The properties did not sell quickly. As a result, on March 20, 2014, the trial court ordered Wende to take out a loan secured by a deed of trust on the State Street property for a least the amount owing in taxes, and in doing so found that "this loan is consistent with [redacted] of the September 3, 2013 settlement agreement (as reflected in the order dated

November 14, 2013) and is necessary and appropriate because the Payson and Price properties may not sell soon enough to prevent a tax sale on the State Street property." R366; R 345 (minute entry).[7] Despite this order, Wende was unable to obtain the court-ordered loan due to interference by Kathy, Judy and Roy. R445-446. As a result, on May 19, 2014, the trial court granted a temporary restraining order to prevent interference by Kathy, Judy, and Roy. R445-446. The trial court also entered a civility order that directed:

> The parties are to cooperate and not interfere with the duties and responsibilities of the Special Administrator to carry out court orders and matters of the Estate. The parties will not make efforts to prevent the Special Administrator from following through with Court orders." R731-733.

At a May 21, 2015, hearing, it was proffered that the parties were now interfering in Wende's effort to sell the Payson property. The trial court ordered the parties to "not to interfere with the deal or communicate with the people who are negotiating with the broker" regarding the sale of the Payson property. R10810-811. Based on the concern that the parties may be attempting to "find out who is making an offer" so that they could contact that party, the court further ordered all parties except Wende and her counsel not to contact the potential buyer. R10810-811. The Payson and Price properties eventually sold for $254,448.00 and $70,015.00 respectively, after the trial court approve the sale of those properties. R5334; R6129.

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[7] Kathy did not include the transcript of the March 4, 2014 hearing in the record. *See* Record Index.

With regard to Payson, the trial court specifically authorized Wende to accept an offer to sell the Payson property for $254,448.00. R5057, R5061, R5336. The trial court ruled that the offer was the most reasonable one because it was without conditions and was recommended by Wende's counsel and real estate agent, and that no party objected to the sale at that price. R5057, R5061, R5334-338.

The Price property was sold to Kathy, Judy and Roy. Roy's priority I claim was satisfied through this purchase, and Kathy's priority I claim was at least partially satisfied. At the estate closing, Kathy was to provide evidence to support her assertion that $11,759.36 was still owed to her, but it is not clear from the record that she ever did. R6069 n.3; R6137; R10983-84 (Kathy stating that she did not file a written claim for any outstanding amount on her priority one claim; but was relying on the settlement agreement).

Allegations against Wende lack credibility. Throughout the years of litigation, Kathy and Judy have asserted numerous allegations against Wende in her role as special administrator and have unsuccessfully attempted to unseat her as special administrator. *See e.g.* R11565 [redacted]. The trial court has consistently found these allegations to lack credibility.[8]

[8] As stated, in the settlement agreement, Kathy, Judy and Roy agreed to waive all claims against Wende as of the date of settlement, September 13, 2013, therefore

For example, at the May 21, 2015 hearing on the sale of the Payson property, Judy accused Wende of breaching her duties by defaulting on a loan, asserting that Wende had $10,600.00 or $15,000.00 available for that to pay it. R10818-23. However, as the trial court pointed out, the money Judy was referring to was being held in trust by the court in the wrongful detainer case, which meant that Wende did not have ready access to it. R10824-25. The trial court reasoned that "breach" was not accurate because Wende had been negotiating with the original lender for an extended period of time, and because she did not have the funds available "to just write a check to pay off" that lender. R10825-826. It would take a court order from the wrongful detainer court (Case No. 090921857) to free up the funds that Judy was referring to. R10826. The trial court ruled, "I do not see the special administrator as having violated her duty by negotiating with Capital Assets and getting a take-out loan." R10828. At a later hearing, counsel for Wende expressed concern [redacted] R11250.[9]

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the Special Administrator only addresses the trial court's findings from after that date. R14226-227.

[9] Kathy only included a partial transcript of the February 24, 2016 hearing, and much of the discussion of the Payson property was omitted. R11249.

In August 2016, Judy Engle moved to have Wende removed as special administrator, alleging among other things that Wende had mismanaged and or stolen certain properties. R4960. Wende responded that the allegations against her lacked merit. R5185-90. In another round of similar filings at the same time, Kathy accused Wende of a conflict of interest, alleging among other things, that she had breached her duties by not making timely loan payments, and allegedly collecting $90,000 from rental properties but refusing to "pay any properties." R5247.

At an August 31, 2016 hearing, the trial court turned over management for the State Street property from Judy to Wende. R5258. After an October 3, 2016 evidentiary hearing, the denied the motion to remove Wende as special administrator because Judy "failed to meet the statutory burden necessary to show cause for removal of Wende Throne as the Special Administrator." R5494-503; R5613-15.[10]

Finally, Kathy Engle's untimely objection to Wende's petition to close the estate alleged that Wende had not conducted an appropriate accounting, had failed to properly account for the estate personal property, and had misused or mismanaged estate assets. R7393-417.

The trial court's April 7, 2017 Findings of Fact and Conclusions of Law ruled that the prior and new allegations against Wende "lack credibility," and

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[10] Kathy did not include the transcript of the October 3, 2016 hearing in the record. The minute entry and resulting order are attached in Addendum C.

were "not well taken, and (as noted above) untimely." R8385. It further ruled that as a party to the settlement agreement, Kathy had "waived all claims … arising prior to September 3, 2013." *Id.* The Court made a similar ruling with regard to the similar allegations against Wende raised by Judy and Roy Engle. R8384-8385.

On November 3, 2017, the trial court declined Kathy's invitation to revisit its ruling on the matter.[11] R15461-462; R17518-528. The court explained that it had "very carefully considered" the allegations and that is ruling was based on dozens of hearings, including evidentiary hearings, legal arguments, affidavits, and testimony. R17520-521. "And, unfortunately, this estate has had, has just been full of venom and attacks on the special administrator that have just lacked credibility." R17522. The trial court noted these attacks had been "relentless … claiming that she's committed all kinds of wrongdoing over the years." R17521. The trial court found these "long, repeated, venomous, angry, frustrated attacks, repeated attacks on the special administrator…. I have found those to lack credibility. They just haven't stood up to the analysis of the facts." R17525. The trial court noted that in addition to lacking credibility, the litigation "has been dragged out for a period of time due to animosity against the special administrator and attacks against the special administrator. So that's my finding." R17525-526.

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[11] A transcript of the entire ruling is reproduced in Addendum E. Kathy did not appeal from this ruling. *See* Record Index.

Accountings and Estate Closing. In April 2016, the parties filed various accountings with the trial court for the accounting period from January 1, 2013 to January 31, 2016. Wende filed a balance sheet, ledger, profit and loss statement, and transaction details for the Estate January 1, 2013 through January 31, 2016. R2967-2971; R3347-350, R3749. Kathy and Judy were able to submit questions about Wende's accounting, which she answered in detail and provided additional documentation. R4162-287.

On December 15, 2016, Wende filed a petition to close the estate, and she filed an amended petition on December 29, 2016. R5948-6057; R6066-6173. The amended petition outlined that Wende had fulfilled her duties by selling the Payson and Price properties, satisfying the Payson and State Street property tax claims, and satisfying various priority I claims. R6068-069. The petition asserted that Kathy's priority I claim had been partially satisfied and Kathy was to provide proof of any outstanding amount. As of the estate closing, Wende was the only Priority I claimant who had none of her claim satisfied, she also did not charge an hourly rate for her services despite her authority to do so. The amended petition also sought to join the wrongful detainer action to the probate so that the funds held in trust could be released. The petition sought to have those funds distributed to State Street.

The remaining distributions were to be as follows: 5/6 of the Hi-Country properties and the Crystal Avenue property to Kathy; the Cherokee property, the Woods Cross property, and one-sixth of the Hi-Country properties to Judy; and

the State Street property, including rents held in escrow by the court in case no. 090921857 to Wende as trustee of the Trust. R6070. The petition also included a request for fees performed by YHG for Wende in her capacity as special administrator.[12] R6072-073. The final accounting included a balance sheet, profit and loss statement, and general ledger from January 31, 2013 to December 15, 2016. R6166-173.

The trial court set a January 18, 2018 deadline for objections, which was extended by the parties' stipulation to January 30, 2017. R5873, R6365. On February 1, 2017, Kathy filed an untimely objection to the petition. R7393; R8384.

The Court heard the petition on February 21, 2017.[13] R8107-111. At the hearing, the trial court heard arguments related to the outstanding issues, including the Hi-Country judgment and liens, attorney fees[14] and Judy's fraud claim. It specifically ruled as to claims of misconduct by Wende, "as of the time

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[12] The request for fees only requested fees for YHG's representation of Wende as special administrator. The trial court had previously found YHG's legal fees from before June 1, 2016 to be "reasonable and payable." R5259, R6046, R8385-386.

[13] Kathy included only a partial transcript of this hearing in the record. The transcript includes discussion of the Hi-Country claims, a partial discussion of the attorney fees (Roy Engle's argument is omitted). R11021. It does not include the first part of the hearing, or a record of a discussion of Judy's renewed claims of "fraud" or the first part of the trial court's ruling, which concluded with the court's statement that "it's just been dealt with." R11077, R11035-036.

[14] Karen Kreeck claimed $141,000.00, R10988, Van Cott claimed $224,288.83 in attorney fees, R418, Isaac Paxman claimed at least $273,687.65. R5464. YHG's claim was supplemented and increased to $60,315.25. R8140-8142. YHG had previously been awarded $21,139.00 from the Estate. R5258.

of settlement, those issues were resolved and those claims were waived." R10980. During discussion of the attorney fees, Kathy affirmed that her "expenses as to taking care of McKinley were taken care of in the settlement of Price." R11013-014.

On April 6, 2017, the trial court entered its Findings of Fact, Conclusions of Law and Order which found and concluded that:

- Wende provided a complete accounting. Kathy and Judy had previously submitted questions to Wende that Wende answered. R8384-8385. The court approved Wende's accounting as to form and content. R8391.

- The allegations against Wende from before October 2016 had been previously litigated and found to have been lacking in credibility. The allegations from before September 2013 were waived by the settlement agreement. The new allegations were untimely, not well taken and lacked credibility. R8384-385.

- The trial court awarded York, Howell & Guymon (YHG) $60,315.25 in statutory attorney fees for its representation of Wende as special administrator from May 8, 2014 to May 31, 2017. R845-846; R8684; R5954-955; R6033-048. In awarding YHG attorney fees according to statute, the trial court reasoned that YHG had not been a party to settlement agreement and that the fees requested were reasonable. R8386, 8389-90, 8391-92.

- The remaining $10,568.33 held by the estate was to be paid to Isaac Paxman and Van Cott for their claims for fees. R8390. The trial court found that both Paxman and Van Cott had done work necessary to prevent waste. *Id.* It did not award any fees to Karen Kreeck because she did not respond to the motion for summary judgment in the Hi-Country case. R8389, 8392.

- There were not sufficient funds remaining to pay Wende her $15,000 Priority I claim or Kathy any amount remaining of her partially satisfied Priority I claim. R6069, R8382, 8390.

- Hi-Country would not receive payment from the Estate because it had not timely objected to the approval of the settlement agreement. R8390-8391, 8392. The Court also declined to order the release of the Hi-Country liens from Lots 123, 124 and 130, which Kathy and Judy were to receive as tenants-in-common because the court lacked jurisdiction to do so. *Id.*

SUMMARY OF ARGUMENT

Kathy's brief should be stricken in its entirety because it does not identify where in the record the issues she raises were preserved, fails to support her arguments with record evidence or analysis of pertinent case law, for the most part entirely ignores the trial court's rulings, and continues more than eight years of persistent, meritless attack against Wende Throne in her capacity as special administrator.

ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER KATHY'S INADEQUATELY BRIEFED ARGUMENTS

"[O]ur system is designed so that the 'appellant must do the heavy lifting,'" *Hampton v. Prof'l Title Servs.*, 2010 UT App 294, ¶ 5, 242 P.3d 796 (quoting *State v. Robison*, 2006 UT 65, ¶ 21, 147 P.3d 448). "Arguments, like gardens, take work, and a party who hopes to prevail on appeal should be willing to dig in the dirt and not expect that opposing counsel or the court will do that work for them." *A.S. v. R.S.*, 2017 UT 77, ¶ 16, 416 P.3d 465; *accord State v. Roberts*, 2015 UT 24, ¶ 18, 345 P.3d 1226 ("appellants who fail to follow rule 24's substantive requirements will likely fail to persuade the court of the validity of their position."). Therefore, to "permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable" the Court to understand "what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are

material ones necessitating reversal or other relief." *State v. Garner*, 2002 UT App 234, ¶ 13, 52 P.3d 467 (quotation and citation omitted); *accord Dahl v. Dahl*, 2015 UT 23, ¶ 141, 345 P.3d 566 (appellant has "burden of directing [the Court's] attention to specific facts in the record to support her contention that the district court abused its discretion"). As a result, this Court may "disregard or strike briefs that do not comply with rule 24's substantive requirements." *Roberts*, 2015 UT 24, ¶ 18; *see also State v. Hawkins*, 2016 UT App 9, ¶ 47, 366 P.3d 884 ("Hawkins fails to support this argument with citations to any legal authority" and therefore "failed to carry his burden of persuasion on appeal"); *Sivulich v. Dep't of Workforce Servs.*, 2015 UT App 101, ¶ 3, 348 P.3d 748 (declining to address argument that simply "reargues his position that the Board's findings were wrong" without pointing to evidence); In addition, this Court rejects challenges to arguments that do not address the actual basis for the trial court's ruling. *See iDrive Logistics LLC v. IntegraCore LLC,* 2018 UT App 40, ¶ 79, 424 P.3d 970 ("Where an appellant fails to address the basis of the district court's ruling, we reject the challenge."); *Wing v. Still Standing Stable, LLC,* 2016 UT App 229, ¶ 19, 387 P.3d 605 (same). And, the Court has discretion to strike briefs that include "burdensome, irrelevant, immaterial, or scandalous matters, and the court may assess an appropriate sanction including attorney fees for the violation." Utah R. App. P. 24(i).

Although the Court grants pro se parties "'every consideration that may reasonably be indulged,'" this does not relieve self-litigants of their burden on

appeal. *Allen v. Friel*, 2008 UT 56, ¶ 11, 194 P.3d 903 (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983)). A party who represents herself is generally "'held to the same standard of knowledge and practice as any qualified member of the bar.'" *Id.* (quoting *Nelson*, 669 P.2d at 1213). The Court should therefore "decline to undertake the gargantuan task of sifting through the record in this case to make [Kathy's] argument for her." *See Dahl*, 2015 UT 23, 345 P.3d 566; *see also Hampton*, 2010 UT App 294, ¶ 5 (quoting *State v. Robison*, 2006 UT 65, ¶ 21, 147 P.3d 448) (alteration in original) ("'An appellate court that does the lifting for an appellant distorts [the] fundamental allocation of benefits and burdens.'").

Kathy's brief simply does not comply with rule 24, Utah Rules of Appellate Procedure. While it raises several issues, it does not provide any record citations to where in the record any of those issues were preserved, instead inviting the Court to sort through voluminous record pages to find out what, if any, issues Kathy raised in the trial court. Br.Aplt. 9. Utah R. App. P. 24(a)(5)(B) (requiring "citation to the record showing that the issue was preserved"). Nor does Kathy clearly state the standard of review for any individual issue. *See* Br.Aplt. 7-9; Utah R. App. P. 24(a)(5)(A). Additionally, Kathy fails to adequately support her various arguments with record citations or relevant legal authority, instead making largely bald allegations while misstating the law. Utah R. App. P. 24(a)(6) ("The statement of the case must include … citations to the record"); *id.* R. 24(a)(8) ("The argument must explain, with reasoned analysis supported by

citations to legal authority and the record, why the party should prevail on appeal.").

The brief largely ignores the trial court's rulings, instead appearing to seek de novo review of Kathy's various grievances against Wende, some of which arose after Kathy filed her notice of appeal. It is peppered with "burdensome, irrelevant, immaterial, [and] scandalous matters." *See* Utah R. App. P. 24(i) (providing sanctions, including striking or disregarding a brief, and/or other "appropriate sanction including attorney fees"). For example, pages 17-19 of Kathy's brief are riddled with of false and unsubstantiated claims against Wende while also failing to mention that the trial court consistently ruled that the allegations were not credible and that Wende had provided a complete accounting. R8384-385.

Finally, because Kathy failed to include in the record full transcripts of all the hearings, including those related to her various allegations against Wende, she cannot now claim that the trial court's "finding or conclusion is unsupported by or is contrary to the evidence." Utah R. App. P. 11(e)(2). If "an appellant fails to provide an adequate record on appeal, we presume the regularity of the proceedings below." *State v. Pritchett*, 2003 UT 24, ¶ 13, 69 P.3d 1278. As a result, "[w]hen crucial matters are not included in the record, the missing portions are presumed to support the action of the trial court." *Id.* (citing *State v. Linden*, 761 P.2d 1386, 1388 (Utah 1988)); *see also Gines v. Edwards*, 2017 UT App 47, ¶ 21, 397 P.3d 612 ("It is well established that in the absence of a

transcript of a crucial proceeding, we will presume that a trial court's decision is reasonable, supported by the evidence, and did not constitute an abuse of discretion."). Specifically, Kathy did not include a transcript of the October 3, 2016 hearing at which the trial court heard evidence before denying a motion to remove Wende as special administrator, or the portion of the February 21, 2017 transcript that dealt with allegations of "fraud." *See* Record Index.

For all of the above reasons, Kathy's brief is so devoid of analysis that she leaves this Court to guess at what rulings she is even challenging. It also mischaracterizes the record, entirely fails to adequately cite the record, and lacks supporting relevant legal authority. Kathy therefore has not provided this Court with "reasoned analysis supported by citations to legal authority and the record." Utah R. App. P. 24 (a)(8). Kathy has therefore entirely failed to meet her burden of persuasion, and this Court should exercise its discretion to "disregard or strike" her brief and award Wende her reasonable attorney fees incurred in defending against it. *See Roberts*, 2015 UT 24, ¶ 18; Utah R. App. P. 24(i).

II. KATHY HAS SHOWN NO ABUSE OF DISCRETION IN THE TRIAL COURT'S RULING THAT HER OBJECTION TO ESTATE CLOSING WAS UNTIMELY.

Kathy appears to argue that the trial court "erred" when it ruled her objection to the estate closing was untimely.[15] Br.Aplt. 6, 17, 43. However, Kathy's brief does not cite to any part of the record where Kathy preserved this

[15] Although Kathy's brief refers to an objection to settlement, from the context, it appears she referring to the trial court's ruling on her February 5, 2017 objection to the amended petition to close the estate.

argument, nor does it make even a cursory argument that the trial court exceeded its discretion, let alone plainly erred, in its ruling that her objection was untimely. *See id.* Instead, it simply states that this Court should "[d]irect[] the District Court to rule Kath[y's] Objection's to the Closing out of the Estate was timely." Br.Aplt. at 43. This bald assertion without any citation to supporting authority is not enough to meet Kathy's burden on appeal. *See, e.g., Hawkins*, 2016 UT App 9, ¶ 47 ("Hawkins fails to support this argument with citations to any legal authority" and therefore "failed to carry his burden of persuasion on appeal"); *Sivulich*, 2015 UT App 101, ¶ 3 (declining to address argument that simply "reargues his position that the Board's findings were wrong" without pointing to evidence).

In any event, Kathy has not shown an abuse of discretion, let alone obvious, harmful error. Although trial courts may extend time "for good cause" on motion made after time has expired "if the party failed to act because of excusable neglect," Utah R. Civ. P. 6(b)(1)(B), they also "have broad discretion 'to manage [their] docket[s] and set firm deadlines for motion practice.'" Gonzalez, 2015 UT 10, ¶ 48 (quoting *State v. Bergeson*, 2010 UT App 281, ¶ 7, 241 P.3d 777) (alterations in original). "Recognition of the trial court's prerogative to manage its docket serves a number of beneficial interests, including promoting judicial efficiency and economy, creating a predictable system of advocacy, fostering finality in convictions, and reducing litigation expenses." *Id.*

As stated, Kathy filed her objection to Wende's petition to close the estate on February 1, 2017—two days after the January 30, 2017 *stipulated* deadline. R5873, R6365, R7393, R8384. The record does not reflect that Kathy requested an extension before or after the filing deadline. *See generally* Record Index. Kathy's brief does not make even a cursory argument that the trial court abused its discretion, let alone plainly erred, when it ruled, "Kathy's Objection was filed on February 1, 2017, two days after the deadline established by the Amended Scheduling Order and, therefore, is untimely." R8384. *See, e.g., Stoddard v. Smith,* 2001 UT 47, ¶ 25, 27 P.3d 546 (trial court did not abuse its discretion in denying plaintiff's motion to extend time to file a motion for substitution of parties where plaintiff failed to show excusable neglect); *Williams v. Dep't of Corr.*, 2016 UT App 156, ¶ 28, 380 P.3d 340 (trial court did not abuse its discretion in ruling inmate's filing was untimely where trial court noted inmate had "managed to timely file documents … over the course of this litigation"); *Hatch v. Kuhn (In re Estate of Kuhn),* 2008 UT App 400U, *2 (trial court did not exceed its discretion in striking untimely opposition to motion for summary judgment where appellant "made no showing of excusable neglect"). Instead, Kathy cites Rule 6(c), Utah Rules of Civil Procedure, as the basis for her argument. But that rule, which allows three extra days for parties to respond to papers served on them by mail, is inapplicable where the deadline was set by a stipulated court order, not the date of the service on Kathy (who was served by email, not mail). *See* R6076; Utah R. Civ. P. 6(c).

Thus, because Kathy's brief has not made even a cursory argument as to why the exceeded its broad discretion, let alone plainly erred, in ruling her objection was untimely, Kathy has not met her burden of persuasion. *See Roberts*, 2015 UT 24, ¶11; Utah R. App. P. 24(i).

III. This Court should decline to consider Kathy's various other arguments because they are unpreserved.

Kathy does not cite any specific part of the record where she preserved any argument, but throughout her brief states that she raised her arguments in the untimely objection. *See, e.g.,* Br.Aplt. 9, 39. Because Kathy's objection was not timely filed, it did not preserve any argument that Kathy now raises on appeal. Because Kathy also does not argue plain error or exceptional circumstances exist, this Court should decline to consider any of her arguments.

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. "[T]he preservation rule applies to every claim, including constitutional questions, unless [an appellant] can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred."[16] *Id.* (citations omitted); *accord Andersen v. Andersen*, 2015 UT App 260, ¶ 4, 361 P.3d 698 ("An appellant is required to include a citation to the record showing that each issue was preserved in the district court."); *State v. Coco*, 2008 UT App 128U (quoting *Salt Lake County v.*

[16] Plain error requires showing obvious, harmful error, i.e. that the trial court's ruling is contrary to well-settled case law and that absent the error there is a reasonable likelihood of a more favorable outcome for the appellant. *See, e.g.,* S*tate v. Litherland,* 2000 UT 76, ¶ 31, 12 P.3d 92.

Carlston, 776 P.2d 653, 655 (Utah App. 1989) ("'It is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon.'").

In order to preserve an issue for appeal, an appellant must make a timely objection that provides the trial court with an adequate opportunity to correct any claimed errors. "An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on that issue." *Wolferts v. Wolferts*, 2013 UT App 235, ¶ 19, 315 P.3d 448; *accord 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (same). "To provide the court with this opportunity, the issue must be specifically raised [by the party asserting error], in a timely manner, and must be supported by evidence and relevant legal authority." *Wolferts*, 2013 UT App 235, ¶ 19 (alteration in original) (citation and internal quotation marks omitted);*accord Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366 (same); *State v. Richins*, 2004 UT App 36, ¶ 8, 86 P.3d 759 (same).

The timeliness requirement is "a pre-condition to appellate review because entertaining belatedly raised issues sanction[s] the practice of withholding positions that should properly be presented to the trial court but which may be withheld for the purpose of seeking a reversal on appeal.'" *State v. Johnson*, 2013 UT App 276, ¶ 8, 316 P.3d 994 (quoting *State v. Brown*, 856 P.2d 358, 361-62 (Utah App. 1993)) (alteration in original); *accord Hart v. Salt Lake*

Cty. Comm'n, 945 P.2d 125, 130 (Utah Ct. App. 1997) (explaining the timeliness requirement affords the trial court "an opportunity to rule on the issue's merits").

In addition, preservation requires the appellant to "state clearly and specifically all grounds for objection." *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993). Thus, even timely objections will not preserve an issue for appeal if they lack specificity and do not "introduce supporting evidence or relevant legal authority." *438 Main St.*, 2004 UT 72, ¶ 51. Merely presenting evidence at trial that could potentially support a claim of error is not sufficient to preserve it for appeal. Rather, an appellant must make a specific and timely objection to the trial court. *See State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551.

This Court should decline to address any of the issues raised in Kathy's brief because the objection that she cites to as preserving them was untimely, and she does not argue that any exception to the preservation rule should apply. *See Holgate,* 2000 UT 74, ¶ 11.

IV. KATHY'S UNSUBSTANTIATED ALLEGATIONS AGAINST WENDE ARE NOT CREDIBLE

Kathy appears to argue that Wende breached her duties as special administrator by 1) not properly protecting estate property, primarily the State Street property (Br. Aplt. at 7, 17-18, 41); 2) using "improper accounting methods" (Br.Aplt. at 7, 42-43); and 3) not distributing the real properties pursuant to the estate closing order (Br.Aplt. at 4, 18, 41-42).

These arguments ignore that the trial court has consistently found the parties' allegations against Wende to lack credibility. In its April 6, 2017 findings of fact and conclusions of law, the trial court specifically found and concluded that:

- All parties to the settlement agreement "have released all claims against each other arising on or before September 3, 2013."
- All claims of wrongdoing against Wende arising on or before October 3, 2016 "have already been litigated, found to lack credibility, and denied by the Court."
- Wende "has a provided a complete accounting of the Estate financial transactions that have occurred from January 2013 to the present."
- Kathy, Judy and Roy, were allowed to submit questions to Wende about the accounting, and Wende answered their questions.
- As with Judy's and Roy's allegations, "Kathy's current allegations of wrongdoing lack credibility" and "are untimely."

R8384-8385. Kathy's brief entirely fails to acknowledge those findings by the trial court. As a result, this Court should decline to consider any of the allegations against Wende. *See iDrive Logistics LLC v. IntegraCore LLC,* 2018 UT App 40, ¶ 79, 424 P.3d 970 ("Where an appellant fails to address the basis of the district court's ruling, we reject the challenge."); *accord Cattani v. Drake*, 2018 UT App 77, ¶ 52, 424 P.3d 1131 (declining to consider appellants arguments that were "silent as to the district court's conclusion"); *Golden Meadows Props., LC v. Strand*, 2010 UT App 257, ¶ 17, 241 P.3d 375 (appellant who "fails to attack the district court's" ruling "cannot demonstrate that the district court erred").

As will be shown, Kathy's failure to acknowledge the trial court's findings and the evidence supporting them is fatal to her attempt to show the trial court exceeded its broad discretion, let alone plainly erred in its ruling that her old and new allegations all lacked credibility or had been waived.

A. Kathy has not shown that the trial court plainly erred in ruling her allegations against Wende lack credibility.

Kathy's brief is peppered with various unsupported allegations of wrongdoing against Wende related to her Estate accounting and managing of Estate properties. *See* Br.Aplt. at 7, 17-18, 41-43. Specifically, Kathy alleges that Wende did not provide a proper accounting of all estate assets "from the time of death" and should be required to do so and that she mismanaged the State Street property. Br.Aplt. 42-43.

As stated, this Court should "reject the challenge" because Kathy fails to acknowledge that the trial court has found her allegations to lack credibility and has also ruled that she waived all claims that arose before September 2013 by entering into the settlement agreement. *See iDrive Logistics LLC v. IntegraCore LLC,* 2018 UT App 40, ¶ 79, 424 P.3d 970. Kathy has also failed to provide a complete record of Kathy's brief ignores the ample record evidence that supports the trial court's findings that the allegations against Wende lack credibility. She did not include a transcript of the October 3, 2016 hearing at which parties presented evidence related to those claims. She included only a partial transcript of the February 24, 2016 hearing and of the February 21, 2017 hearing. This

"absence of a transcript of a crucial proceeding," means that the Court should "presume that [the] trial court's decision is reasonable, supported by the evidence, and did not constitute an abuse of discretion." *See Gines v. Edwards*, 2017 UT App 47, ¶ 21, 397 P.3d 612; *accord State v. Pritchett*, 2003 UT 24, ¶ 13, 69 P.3d 1278 (same). Finally, Kathy failed to appeal from the trial court's ruling that it would not alter its finding that the allegations against Wende lack credibility, in part because the "long, repeated, venomous, angry, frustrated attacks, repeated attacks on the special administrator.... just haven't stood up to the analysis of the facts." R17525.

In any event, Kathy cannot show an abuse of discretion, let alone plain error because she ignores the evidence supporting the trial court's finding that the allegations lack credibility. "When reviewing a challenge to the sufficiency of the evidence, [the Court] will not set aside a trial court's factual findings 'unless clearly erroneous,' giving 'due regard to the trial court's opportunity to judge the credibility of the witnesses.'" *Shuman*, 2017 UT App 192, ¶3 (quoting Utah R. Civ. P. 52(a)(4)). Kathy's failure to marshal the evidence supporting the trial court's findings "greatly undermine[s]" the persuasiveness of her argument on appeal. *Cf. State v. Nielsen*, 2014 UT 10, ¶44, 326 P.3d 645 (sufficiency of evidence challenge).

1. **Kathy's accounting allegations lack credibility.**

Kathy's unpreserved arguments related to Wende's accounting ignore the evidence supporting the trial court's finding that her accounting was complete.

For example, while Kathy cites to her own objection to the accounting, she ignores that Wende has provided multiple accountings, that she was able to ask questions about those accountings, and that Wende answered those questions. R2967-971; R3347-50; R3749; R4162; R6066-173. It further ignores that the trial court heard evidence on Judy's motion to remove Wende, which included allegations related to accounting, and rejected it. R5494-503; R5613-15. Finally, Finally, ignoring the trial court's ruling that Wende provided "Kathy vaguely asserts that Wende did not comply with GAAP and therefore a special master should be appointed, but she does not point to any specific part of the accounting that is incomplete or inaccurate, or cite any authority to support her assertion. Br.Aplt. 39-40, 42-43. Moreover, Kathy ignores that the Court specifically found that Wende "provided a complete accounting" and approved it as to form and content. R8385, 391.

She therefore cannot meet her burden of persuasion to show that the trial court abused its discretion, let alone plainly erred, in approving Wende's accounting rather than *sua sponte* appointing a special master. *See, e.g., Dahl*, 2015 UT 23, ¶ 67 (appellant has "burden of directing [the Court's] attention to specific facts in the record to support her contention that the district court abused its discretion"); *Hawkins*, 2016 UT App 9, ¶ 47 (appellant who did not support argument with analysis of legal authority "failed to carry his burden of persuasion on appeal").

2. Kathy's property management allegations lack credibility.

Kathy further asserts that Wende breached her duties by taking out a loan rather than using rental proceeds to pay property taxes, primarily on the State Street property. Br.Aplt. 18-19. Kathy's argument ignores that the trial court on more than one occasion ordered Kathy, Judy and Roy to not interfere with her estate administration. *See, e.g.,* R13508-509; R30-31; R10825-826. It also ignores the trial court's specific ruling that such a loan was needed because there were no funds available to pay the taxes. R10825-826. It ignores that the parties' settlement agreement [redacted], and that the court ordered that a loan be taken out to save the State Street property. R14223, R10833. Kathy's brief further ignores that Wende was willing to use $10,000.00 of her own personal funds to avoid foreclosure if needed. R10833. Finally, Kathy ignores that the trial court specifically rejected an allegation that not paying a loan was a breach of duty because Wende had been negotiating with the original lender for an extended period of time, and because the Estate did not have the funds available "to just write a check to pay off" that lender. R10825-826.

Thus, Kathy has not demonstrated that the trial court's findings are against the clear weight of the evidence, let alone that the trial court plainly erred in its rulings. *See, e.g., Dahl*, 2015 UT 23, ¶ 67; *Hawkins*, 2016 UT App 9, ¶ 47.

As a result of the foregoing, Kathy's arguments do not comport with rule 24, Utah Rules of Appellate Procedure, and she cannot meet her burden of persuasion on appeal to show that the trial court's finding that her allegations

against Wende lack credibility, let alone that the trial court's finding was plain error. *See, e.g., Roberts* 2015 UT 24, ¶ 18.

B. The settlement resolved all claims among the parties that arose before September 3, 2013.

Kathy's various purported grievances that arose before the settlement agreement and argument that Wende should be required to provide an accounting "from date of death" ignores the plain language of settlement agreement. Br.Aplt. 20-21, 42. Her arguments also ignore that the trial court ruled that the parties' settlement "released all claims against each other arising on or before September 3, 2013." R8384.

When a contract's language is unambiguous, "courts 'first look to the four corners of the agreement to determine the intentions of the parties . . . from the plain meaning of the contractual language.'" *Gillmor v. Macey*, 2005 UT App 351, ¶ 34, 121 P.3d 57 (quoting *Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12, 40 P.3d 599). Kathy concedes that the "plain terms of the Settlement Agreement dictate the outcome of this appeal." Br.Aplt. 26. The settlement unambiguously provides: [redacted] R14226.

Kathy does not acknowledge the trial court's ruling or challenge it. Nor does she argue any ambiguity or latent ambiguity in her release of claims. Thus, Kathy has not shown the trial court abused its discretion, let alone plainly erred in ruling that the settlement agreement "released all claims against … arising on

or before September 3, 2013." R8384; *See iDrive Logistics LLC,* 2018 UT App 40, ¶ 79; *Dahl*, 2015 UT 23, ¶67; *Roberts*, 2015 UT 24, ¶18.

C. This Court lacks jurisdiction to consider Kathy's assertion that Wende has not complied with the estate closing order.

Kathy's brief raises various unsubstantiated arguments related to issues that arose after the April 12, 2017 final order from which she appeals. For example, it asserts that "deed distributions were incomplete, untimely and not prepared according to the terms of the Settlement or the D.Court's instructions." Br.Aplt. 17. It then asserts that there is a "pending *order to show cause*," apparently based on Kathy's October 19, 2017 motion for order to show cause. Br.Aplt. 18.

This Court lacks jurisdiction to consider any of these arguments because the Court's jurisdiction is limited to the issues and the record as it stood as of the April 12, 2017 final order closing probate. A timely notice of appeal is required to vest jurisdiction in the appellate court. *See* Utah R. App. P. 4. "A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any [rule 60(b) motion] shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment." *Id.* R. 4(b)(2); *accord Bowen v. Hart*, 2012 UT App 351, ¶ 3, 294 P.3d 573 ("To bring the disposition of the rule 59 motion within the scope of the appeal, a new or amended notice of appeal must be filed after the entry of the order resolving the motion.").

Accordingly, to the extent Kathy's brief asserts arguments related to issues that arose after the final order she appealed from, it should be stricken because those arguments fall outside the scope of Kathy's appeal and this Court lacks jurisdiction to consider them. *See* Utah R. App. P. 4(b)(2).

V. KATHY'S VARIOUS OTHER CLAIMS LACK MERIT.

Kathy also argues that this Court should reverse its award of attorney fees to YHG, Van Cott and Isaac Paxman and that liens held by Hi-Country and Isaac Paxman against certain real properties awarded to entities owned by Kathy and Judy should be released.[17] Although Wende responds to these arguments in her capacity as special administrator of the Estate, she does not represent any of the parties whose interests would be impacted by these arguments. Her response is therefore limited to the Estate's position and to jurisdictional issues.

As an initial matter, Wende renews her argument that this Court lacks jurisdiction over Kathy's arguments related to YHG, Van Cott, Isaac Paxman, or Hi-Country, because Kathy did not join them as parties. *See Davis v. Mercantile Tr. Co.*, 152 U.S. 590, 593 (1894) ("[A]ll the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity

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[17] Kathy also appears to assert that the trial court should have awarded her "the appraised value of Coins" to be applied to her priority I claim. Br.Aplt. 6. However, Kathy has provided no record citation to show where this issue was preserved, nor does she provide even a cursory analysis to show that it should have been obvious to the trial court that she was entitled to the coins or any value received therefrom. This Court should therefore reject any argument in that regard. *See, e.g., Dahl*, 2015 UT 23, ¶ 67; *Roberts*, 2015 UT 24, ¶ 18; *Hawkins*, 2016 UT App 9, ¶ 47.

to be heard on such appeal."); *In re Estate of Anderson*, 821 P.2d 1169, 1172 (Utah 1991) (quoting *Tulsa Professional Collection Services Inc. v. Pope,* 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800 (1983)) ("[I]f appellant's identity as a creditor was known or 'reasonably ascertainable,' then the Due Process Clause requires that appellant be given 'notice by mail or other means as certain to ensure actual notice'" for nonclaims statute to apply); *Hiltsley v. Ryder*, 738 P.2d 1024, 1025 (Utah 1987) ("Courts can generally make a legally binding adjudication only between the parties actually joined in the action."); Utah Code Ann. § 75-1-403(2)(a) ("[N]otice … shall be given to every interested person." Given that creditors are entitled to notice at other stages of the proceeding, requiring estate creditors to affirmatively intervene in the appeal rather than placing the burden on the appellant to ensure that all interested parties whose rights would be impacted by the appeal are joined does not comport with due process.

A. YHG was not a party to the settlement; Wende was statutorily entitle to her attorney fees.

Kathy asserts that YHG's attorney fees are unreasonable, should be subrogated to her own claim, and that Wende should be personally liable for those fees because [redacted] Br.Aplt. 31-34, 42. She also argues that the fees were unreasonable and some were related to representation of Wende personally. *Id.* Br.Aplt. 31-33. In addition to generally

failing to cite any record evidence or authority to support this argument, Kathy's brief ignores the basis for the trial court's award of fees to YHG from the Estate—the fees were "reasonable and appropriate," YHG was not a party to the settlement and did not agree to subordinate fees, and attorney fees were a priority expense of administration pursuant to Utah Code Ann. § 75-3-805. R8385-386. Additionally, YHG had reclassified $17,211.00 in fees that were not payable from the Estate. *Id.* Thus, because she fails to cite any relevant evidence or authority, let alone acknowledge the basis for the trial court's ruling, Kathy cannot meet her burden of persuasion on appeal. *See iDrive Logistics LLC,* 2018 UT App 40, ¶ 79 ("Where an appellant fails to address the basis of the district court's ruling, we reject the challenge."); *Dahl*, 2015 UT 23, ¶ 141 (appellant has "burden of directing [the Court's] attention to specific facts in the record to support her contention that the district court abused its discretion").

In any event, Kathy has not shown an abuse of discretion, let alone plain error because it is fundamental that "the 'provisions of a contract' would not apply to a mere party to the litigation who is unmentioned in the contract." *Hooban v. Unicity Int'l, Inc.*, 2012 UT 40, ¶ 23, 285 P.3d 766. "Most contracts bind only those who bargain for them, and 'the burden of proof for showing the parties' mutual assent as to all material terms and conditions is on the party claiming that there is a contract.'" *Bybee v. Abdulla*, 2008 UT 35, ¶ 8, 189 P.3d 40 (citing *Aquagen Int'l, Inc. v. Calrae Trust,* 972 P.2d 411, 413 (Utah 1998) and quoting *Cal Wadsworth Constr. v. City of St. George,* 898 P.2d 1372, 1376 (Utah

1995)). Given that the settlement agreement references only the fees of Karen Kreeck, Van Cott, and Isaac Paxman, Kathy cannot show that the trial court plainly erred in ruling that YHG's fees were not subject to the settlement.

Nor is Kathy's assertion that Wende should be personally liable persuasive. The Utah code provides that costs and expenses of administration are a priority claim, *see* Utah Code Ann. § 75-3-805. It further provides that a "personal representative and an attorney are entitled to reasonable compensation for their services." *Id.* § 75-3-718(1). Further, "[i]f any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate all necessary expenses and disbursements, including reasonable attorney fees incurred."[18] *Id.* § 75-3-719.

For the above Kathy's argument that Wende should be personally liable for YHG's fees associated with the Estate or that those fees should be paid after hers lack merit. Br.Aplt. 34.

B. Kathy's arguments related to Van Cott, Paxman, and Hi-Country

Likewise Kathy fails to acknowledge the basis for the trial court's awards of fees of Paxman and Van Cott, or its ruling that it lacked jurisdiction to remove the

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[18] Kathy's brief also fails to cite any record evidence in support of her allegation that YHG's representation presented a conflict of interest. Br.Aplt. 38. The record does not support this accusation, particularly where Wende was not reimbursed for YHG's representation of her as an individual. R4595, 8386.

Hi Country and Paxman liens. *See generally* Br.Aplt. 29-35. She also fails to identify where in the record she preserved her arguments in that regard. This Court should therefore decline to consider those arguments. *See, e.g., Roberts*, 2015 UT 24, ¶ 18 (the Court may "disregard or strike briefs that do not comply with rule 24's substantive requirements").

In any event, even if Kathy could show plain error, the remedy would not be to pay Kathy's [redacted] claim in full. It would be to remand to the trial court to determine a fair redistribution of the funds pro-rata among [redacted]. *See, e.g.,* Utah Code Ann. § 75-3-902(2) ("Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will."). As stated, Wende is the only party to the settlement [redacted] who has received no payment, and as stated she has not taken payment from the Estate for her time. As a result, Kathy's requested relief is not only not allowed under the law, it would be manifestly unjust.

Finally, to the extent Kathy argues that the trial court should have removed the Hi-Country and Isaac Paxman liens so that she could receive quiet title, her brief ignores that the trial court specifically ruled that it lacked jurisdiction to do

so.[19] Br.Aplt. 27, 29-30. In addition, Kathy has no standing to challenge the Paxman lien against the Cherokee Lane property because she has no legal interest in that property. And, because Kathy's entities, not Kathy individually, own the Hi-Country lots, she is not a proper party to challenge the Hi-Country liens. *See, e.g., Chen v. Stewart,* 2005 UT 68, ¶50, 123 P.3d 416 ("To satisfy the 'basic requirements' of the traditional standing test, 'a party must allege that he or she has suffered or will imminently suffer an injury that is fairly traceable to the conduct at issue such that a favorable decision is likely to redress the injury.'") (quoting *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 9, 86 P.3d 735; *Packer v. National Service Indus., Inc.*, 909 P.2d 1277, 1278 (Utah App. 1996) (codefendant in a multiparty litigation could not oppose a summary judgment motion between other parties where no cross-claim had been brought).

Moreover, Kathy claimed actual ownership of the Hi-Country lots in at least one creditor's claim. R11752. And the settlement agreement specifically stated [redacted] R14222. Thus, because Hi-Country did not appeal the trial court's ruling that the Estate was not liable to pay its judgment and because Kathy agreed [redacted], she cannot show that the trial court

[19] To the extent Kathy argues the settlement granted jurisdiction, "'acquiescence of the parties is insufficient to confer jurisdiction on the court.'" *First Nat'l Bank of Layton v. Palmer*, 2018 UT 43, ¶ 6, 427 P.3d 1169 (quoting *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323, 325 (Utah 1991)).

plainly erred. Likewise, because Judy did not appeal, Kathy cannot show the trial court plainly erred in declining to remove the lien Judy agreed to from the Cherokee Lane property.

VI. This Court should award Wende her attorney fees and costs on appeal.

A. Wende is entitled to attorney fees because Kathy's brief is frivolous and for delay.

This Court should award Wende her attorney fees under Rules 24(i) or 33(b), Utah Rules of Appellate Procedure. This Court may "strike or disregard a brief that contains burdensome, irrelevant, immaterial, or scandalous matters, and the court may assess an appropriate sanction including attorney fees for the violation." Utah R. App. P. 24(i). As stated, Kathy's brief is riddled with false and scandalous matters, fails to even acknowledge the trial court's rulings, let alone explain how they were an abuse of discretion, and includes so few record citations and so minimal legal analysis that that her brief "expect[s] that opposing counsel or the court will do" her work for her. *See A.S.*, 2017 UT 77, ¶ 16. This Court should therefore strike her brief and award Wende her costs and fees incurred on behalf of the Estate in defending against it. *See supra* Point I.

In addition, on a finding that a brief is frivolous or for delay, this Court must award the prevailing party "just damages," i.e. single or double costs and/or attorney fees. A frivolous brief is "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(b). An appeal filed for delay "is one interposed for any

improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper." *Id.*

Although Rule 33(b) sanctions are reserved for "egregious cases," it is available in cases that are "obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment." *See Porco v. Porco,* 752 P.2d 365, 369 (Utah App. 1988) (Rule 33 sanctions appropriate where plaintiff's repeated civil actions against defendant forced her to pay substantial costs and fees); *Harris v. Harris*, 2002 UT App 401U (Rule 33 sanctions appropriate where "Husband has obfuscated and mischaracterized the issues in an attempt to mislead this court and provide legitimacy to his appeal."); *see also Porenta v. Porenta*, 2017 UT 78, ¶ 54, 416 P.3d 487 (nonfrivolous appeal "brought with the intention of hindering or delaying restoration of the property" at issue violated Rule 33).

As stated above, Kathy's brief is peppered with false and scandalous allegations against Wende, includes irrelevant material, and includes so little analysis that it is a challenge to respond to. She has not made even a cursory showing that her arguments are "grounded in fact, … warranted by existing law, or … based on a good faith argument to extend, modify, or reverse existing law." *See* Utah R. App. P. 33(b). She has "obfuscated and mischaracterized the issues in an attempt to mislead this court and provide legitimacy to [her] appeal." *See Harris*, 2002 UT App 401U.

For example, Kathy's brief asserts that Wende breached her duty by taking out a loan to pay the State Street property taxes, when the trial court specifically found no breach, Br.Aplt. 40; R10818-23. Kathy's argument also ignores that the Estate simply had no liquid funds, that the Court ordered the loan, and that Wende had negotiated with the original lender. R10824-826. Likewise, Kathy's arguments entirely ignore the trial court's ruling that her allegations were either released by the settlement or lacking in credibility. R8384-385. Nor does she acknowledge that the trial court declined to revisit that ruling because the "long, repeated, venomous, angry, frustrated attacks, repeated attacks on the special administrator.... just haven't stood up to the analysis of the facts." R17525.

Finally, this appeal is the culmination of eight years' of persistent venomous attacks against Wende as special administrator that has resulted in over $440,000 in legal fees. *See, e.g.,* R418, R5285, R5464, R8140-142. Kathy's assertions related to other Hi-Country litigation, *see* Br.Aplt. 29, 36, and her various baseless allegations against Wende related to the court's order, *see* Br.Aplt. 17-18, 23, suggest that rather than seeking legitimate legal recourse, Kathy is improperly using this Court either to revisit rulings of other courts, or as an expensive means to delay the estate distribution and further harass Wende while other matters are decided. Such an "improper purpose" has caused "needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper." *See* Utah R. App. P. 33(b); *Porenta*, 2017 UT 78, ¶ 54.

As a result, Kathy should be ordered to pay Wende her attorney fees and double costs incurred in defending this appeal on behalf of the Estate.

B. Wende is entitled to her attorney fees under the probate code.

Alternatively, Wende is entitled to her attorney fees by statute as special administrator. *See* Utah Code Ann. § 75-3-719 ("If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate all necessary expenses and disbursements, including reasonable attorney fees incurred."). "This court has interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them." *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998). Additionally, "when a party who received attorney fees below prevails on appeal, 'the party is also entitled to fees reasonably incurred on appeal.'" *Id.* (quoting *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193, 1197 (Utah App. 1991)).

Here, the trial court awarded Wende her statutory attorney fees incurred fulfilling her role as special administrator from the Estate. R8391. She is also entitled to her attorney fees on appeal, and a remand to determine an equitable distribution of fees.

CONCLUSION

For the foregoing reasons, Wende, through counsel, respectfully asks the Court to affirm the trial court's order closing the estate. She also requests an

award of her attorney fees and double her costs on appeal. Wende does not believe that oral argument would assist the Court in deciding this case.

Respectfully submitted on February 11, 2019.

/s/ Deborah L. Bulkeley
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(a)(11),Utah Rules of Appellate Procedure, this brief contains 12,323 words, excluding the table of contents, table of authorities and addenda, and it complies with rule 21, Utah Rules of Appellate Procedure, governing private records. I further certify that in compliance with rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared using the proportionally spaced Georgia 13-point font.

/s/ Deborah L. Bulkeley
Counsel for Appellee

CERTIFICATE OF DELIVERY

In accordance with Utah Supreme Court Standing Order No. 11, I certify that on February 11, 2019, I caused one copy of the brief of appellant to be served via email to the following, and that printed copies will be delivered by hand or U.S. Mail within seven days:

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