

2004

Louis J. Uzelac, Barbara Uzelac v. Joseph G. Uzelac Jr. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

L.R. Curtis, Jr.; Mary Cl. Gordon; Manning Curtis Bradshaw & Bednar LLC; Counsel for Appellee.
Charles M. Bennett; Blackburn & Stoll; Counsel for Appellant.

Recommended Citation

Brief of Appellee, *Uzelac v. Uzelac*, No. 20040356 (Utah Court of Appeals, 2004).
https://digitalcommons.law.byu.edu/byu_ca2/4943

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF
LOUIS J. UZELAC,

Deceased.

BARBARA UZELAC,

Plaintiff/Appellant,

vs.

JOSEPH G. UZELAC, JR., as Personal
Representative of the Estate of Louis J.
Uzelac,

Defendant/Appellee.

No. 200430356-CA

BRIEF OF APPELLEE

Appeal from the Judgment of
the Third Judicial District Court, County of Salt Lake, State of Utah, Judge L.A. Dever

L.R. Curtis, Jr. #0784
Mary C. Gordon #6880
MANNING CURTIS BRADSHAW
& BEDNAR LLC
Third Floor Newhouse Building
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 363-5678

Counsel for Appellee

Charles M. Bennett #0283
BLACKBURN & STOLL, LC
257 West 200 South, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 521-7900

Counsel for Appellant

FILED
UTAH APPEALS
AUG 19 2004

IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF LOUIS J. UZELAC, Deceased.	No. 200430356-CA
BARBARA UZELAC, Plaintiff/Appellant, vs. JOSEPH G. UZELAC, JR., as Personal Representative of the Estate of Louis J. Uzelac, Defendant/Appellee.	

BRIEF OF APPELLEE

Appeal from the Judgment of
the Third Judicial District Court, County of Salt Lake, State of Utah, Judge L.A. Dever

L.R. Curtis, Jr. #0784
Mary C. Gordon #6880
MANNING CURTIS BRADSHAW
& BEDNAR LLC
Third Floor Newhouse Building
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 363-5678

Counsel for Appellee

Charles M. Bennett #0283
BLACKBURN & STOLL, LC
257 West 200 South, Suite 800
Salt Lake City, Utah 84101
Téléphone: (801) 521-7900

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
JURISDICTION	1
ISSUES FOR REVIEW	1
CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	3
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENT	13
ARGUMENT	17
I. THE TRIAL COURT CORRECTLY HELD THAT IF BARBARA IS A CREDITOR, HER CLAIMS ARE TIME BARRED UNDER UTAH CODE ANN. § 75-3-803.	19
A. Barbara's Complaint is Time Barred Because it Was Filed Over a Year after the Deadline for Presentment of Creditor Claims Expired. ...	19
B. Merely Providing a Copy of the Ante Nuptial Agreement to the Personal Representative is Not Adequate Presentment of a Claim under Utah Code Ann. § 75-3-804.	20
II. THE TRIAL COURT'S APPROVAL OF THE PERSONAL REPRESENTATIVE'S DEED DISTRIBUTING TO LOU'S DAUGHTERS PROPERTY OWNED BY LOU PRIOR TO THE MARRIAGE WAS PROPER UNDER UTAH CODE ANN. § 75-3-703.	24
III. THE TRIAL COURT'S INTERPRETATION OF "ACQUIRED BY THE PARTIES" IS SUPPORTED BY THE PARTIES' STATED INTENT AND UTAH LAW.	26
A. The Trial Court's Interpretation of Paragraph 5 Gives Effect to All Terms of the Ante Nuptial Agreement.	27
B. Barbara's Interpretation is Directly Contrary to the Parties' Stated Intent.	34

C.	Barbara's Interpretation is Not Supported by the Record.	38
D.	The Trial Court's Interpretation is Consistent with Lou's and Barbara's Conduct During the Marriage	41
E.	The Trial Court's Interpretation is Consistent with Lou's Will.	42
IV.	THE ISSUE OF THE PERSONAL REPRESENTATIVE'S WAIVER OF RIGHTS IN THE PERSONAL PROPERTY IS NOT PROPERLY BEFORE THE COURT OF APPEALS.	44
	CONCLUSION	46

TABLE OF AUTHORITIES

STATUTES AND RULES

Utah Code Ann. § 75-6-107	4, 26
Utah Code Annotated § 75-3-703	3, 6, 18, 24-26, 33, 35, 38
Utah Code Annotated § 75-3-712	13
Utah Code Annotated § 75-3-803	3, 6, 19, 21
Utah Code Annotated § 75-3-804	4, 6, 13, 21
Utah Rule Appellate Procedure 24	45
Utah Rule Civil Procedure 8(a)	23

CASES

<i>Berman v. Berman</i> , 749 P.2d 1271 (Utah App. 1988)	31, 40
<i>Elman v. Elman</i> , 2002 UT App. 83, 45 P.3d 176	33
<i>Howe v. Professional Manivest, Inc.</i> , 829 P.2d 160 (Utah App. 1992)	2
<i>In re Estate of Hunt</i> , 842 P.2d 872 (Utah 1992)	37
<i>In re V.K.S.</i> , 2003 UT App 13, 63 P.3d 1284	1
<i>In re Wallich</i> , 420 P.2d 40 (Utah 1966)	42
<i>Jeffries v. Jeffries</i> , 895 P.2d 835, 837 (Utah App. 1995)	33
<i>Monson v. Carver</i> , 928 P.2d 1017 (Utah 1996)	45
<i>Munford v. Lee Servicing Co.</i> , 2000 UT App. 108, 99 P.2d 23	35
<i>Peirce v. Peirce</i> , 2000 UT 7, 994 P.2d 193	38, 39

<i>Pledger v. Gillespie</i> , 1999 UT 54, (Utah 1999)	2
<i>Quinn v. Quinn</i> , 772 P.2d 979 (Utah App. 1989)	21-23
<i>State v. Lopez</i> , 886 P.2d 1105 (Utah 1994)	45
<i>State v. Sloan</i> , 2003 UT App 170, 72 P.2d 138	45
<i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998)	46
<i>Uckerman v. Lincoln Nat'l Life Ins. Co.</i> , 588 P.2d 142 (Utah 1978)	38
<i>WebBank v. Am. Gen. Annuity Serv. Corp.</i> , 2002 UT 88, 54 P.3d 1139	27

TREATISES

80 Am. Jur. 2d WILLS § 1261	36, 37, 43
-----------------------------------	------------

JURISDICTION

The Court of Appeals had jurisdiction of this matter pursuant to Utah Code § 78-2-2(4). The Supreme Court has jurisdiction pursuant to Utah Code § 78-2-2(3)(j).

ISSUES FOR REVIEW

1. Did the trial court properly find that Appellant did not submit a written creditor claim to the Appellee Personal Representative within one year of the deceased's death as required under Utah Code Ann. §§ 75-3-803 and -804? Interpretation of a statute is a legal issue for which the standard of review is correction of error. *In re V.K.S.*, 2003 UT App 13 ¶ 7, 63 P.3d 1284.

2. Did the trial court properly approve the deed executed by the Personal Representative transferring property owned by the deceased prior to the marriage to his children, subject to Appellant's life estate, on the basis that the deed was consistent with the deceased's will and did not constitute a breach of fiduciary duty under Utah Code Ann. § 75-3-703? Interpretation of a statute is a legal issue for which the standard of review is correction of error. *In re V.K.S.*, 2003 UT App 13 at ¶ 7.

3. Did the trial court properly rule that under paragraph 5 of the parties' Ante Nuptial Agreement, which states that "assets acquired by the parties" pass to the surviving spouse, Appellant was not entitled to a distribution equal to all income earned by the deceased during the marriage (including gifts he made to his children), but was instead entitled to a distribution of all property jointly held by Appellant and the deceased?

Interpretation of a contract is a legal issue for which the standard of review is correction of error. *Howe v. Professional Manivest, Inc.*, 829 P.2d 160, 162 (Utah App. 1992).

4. Did the trial court properly resolve Appellant's assertion that the Appellee Personal Representative waived the estate's rights to the deceased's personal property owned prior to the marriage by establishing a written waiver procedure, a procedure to which Appellant has not objected on appeal? The question of waiver is a mixed question of fact and law. "[W]hether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations, to which we give a district court deference." *Pledger v. Gillespie*, 1999 UT 54 ¶ 16, 982 P.2d 572.

**CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS**

Utah Code Ann. § 75-3-703(1)

A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

Utah Code Ann. § 75-3-803(1), (3):

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

- (a) one year after the decedent's death; or
- (b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801(1) for all claims barred by publication.

...

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

- (a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or
- (b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

Utah Code Ann. § 75-3-804(1):

Claims against a decedent's estate may be presented as follows:

(a) The claimant may deliver or mail to the personal representative, or the personal representative's attorney of record, a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on either the receipt of the written statement of claim by the personal representative or the personal representative's attorney of record, or the filing of the claim with the court, whichever occurs first. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(b) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction to obtain payment of the claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death.

STATEMENT OF THE CASE

Appellant Barbara Uzelac ("Barbara") is the surviving spouse of the deceased, Louis J. Uzelac ("Lou"). Lou died on November 6, 1999. On February 4, 2002, Barbara filed a Complaint against Appellee, the Personal Representative of Lou's estate¹ (the "Personal Representative") asserting various claims under the parties' Ante Nuptial Agreement. R. 984-85. Prior to trial, the trial court ruled, on the Personal Representative's motion, that (a) the Ante Nuptial Agreement was a valid and binding agreement (R. 139); (b) the Ante Nuptial Agreement created in Barbara a life estate in the residence located at 5559 and 5561 East Highland Drive, Salt Lake City, Utah owned by Lou prior to his marriage to Barbara (R. 139-40); (c) Barbara's claims to elective share, homestead and family allowance were barred as untimely or due to their waiver in the Ante Nuptial Agreement (R. 198); (d) Barbara's claims to reimbursement of her civil service annuity discontinued during her marriage to Lou, COLA increases on the annuity as reinstated after Lou's death, health insurance and life insurance fail as a matter of law and undisputed fact (R. 837-38); and (e) Barbara was not entitled to a recapture of the amount of Lou's POD accounts that passed to his daughters outside of probate (R. 837-38). The trial court also further ruled in a Minute Entry dated September 27, 2003 that

¹The original personal representative appointed under Lou's Will was Lou's brother Joseph G. Uzelac. R. 16. Mr. Uzelac passed away on November 20, 2003. R. 1244. Mr. Uzelac's son Joseph G. Uzelac, Jr. was appointed successor Personal Representative of Lou's estate on February 18, 2004. R. 1310.

the Personal Representative's distribution of the two parcels on which the Residence is located to Lou's daughters subject to Barbara's life estate (the "Deed"), was in accordance with Utah Code Ann. § 75-3-703, Lou's Will and the Trial Court's previous ruling that Barbara held a life estate in the encumbered parcels. R. 1080-82.

Trial on Barbara's remaining claims was held on October 7, 2003. At trial, Barbara asserted that she was a creditor of the estate—a position she had not asserted until she challenged the Deed shortly before trial—and sought damages in the amount of \$293,320.09. R. 1141. Barbara's damages calculation was based on her assertion that she was entitled to a distribution equal to the amount of all income earned by Lou during the marriage. At the trial, the trial court ruled that Barbara, even if she were a creditor of the estate, failed to bring a timely creditor claim under Utah Code Ann. § 75-3-803 and -804. R. 1303. In its April 6, 2004 Order following trial, the trial court dismissed Barbara's Complaint with prejudice. R. 1347. The trial court ruled that based on the terms of the Ante Nuptial Agreement, the parties' intent stated therein, and the evidence of the parties' course of conduct during the marriage presented at trial, the Ante Nuptial Agreement's directive that on the death of the first spouse to die all properties "acquired by the parties" during the marriage pass to the survivor referred only to properties that were held by Barbara and Lou jointly at Lou's death. R. 1345-46. The trial court also ruled that Barbara's life estate in the Residence did not include personal property in the Residence owned by Lou prior to the marriage. R. 1346. In response to Barbara's objection that the

Personal Representative had waived the estate's rights in the personal property, the trial court, in a separate Minute Entry dated April 6, 2004, confirmed that the personal property in the Residence belonged to the estate, and directed that if the Personal Representative wished to waive any claim to this property he should do so by filing a written waiver with the court. R. 1349. The Personal Representative has not filed a waiver.

STATEMENT OF FACTS

1. The deceased, Louis J. Uzelac ("Lou"), and Appellant Barbara Uzelac ("Barbara") were married on April 14, 1976. At the time of their marriage, Lou was 60 years old and Barbara was 49 years old. R. 1340-41.

2. Lou's first wife Ruth died in January of 1974. R. 1341.

3. Lou had two children from his marriage to Ruth: Allyson Uzelac and Susan Brooke (Uzelac) Mageras. R. 1341.

4. Barbara's first husband Renold died in August of 1970. Barbara had two children with Renold, one of whom had died in 1974. R. 1341.

5. Several weeks prior to their marriage, Lou and Barbara executed an Ante Nuptial Agreement dated March 25, 1976 (the "Ante Nuptial Agreement"). R. 1341.

6. In the Ante Nuptial Agreement, Lou and Barbara acknowledged that they had separate children and had "acquired certain real and personal properties" prior to their marriage. R. 1341.

7. Lou and Barbara agreed that the purpose of the Ante Nuptial Agreement was to "protect the interests of their heirs at law in and to the property acquired by the parties during their lives, . . . define and make definite the property interest of each of them with respect to the other's property, and . . . put into written form their understanding with respect to the disposition of their respective properties" R.

1341.

8. Accordingly, in paragraph 1 of the Ante Nuptial Agreement, Lou and Barbara agreed that "[i]n the event of the termination of this marriage by death or otherwise all of the real, personal or mixed property owned by each party prior to their marriage shall be the sole and separate property of him or her or their respective estates" R. 1341.

9. In paragraph 5 of the Ante Nuptial Agreement, Lou and Barbara agreed that in the event of the death of one of them, "all property, whether real, personal or mixed, acquired by the parties shall go to the survivor." R. 1341-42.

10. Paragraph 3 of the Ante Nuptial Agreement provides that in the event of Lou's death Barbara would have "the right to reside in the dwelling house of the parties for her lifetime, or such shorter time as she may elect however, in the event that she should remarry then she shall move therefrom within a reasonable time back to her own separate property." R. 1342.

11. On September 29, 1978, Lou prepared a holographic will (the "Will"). On February 11, 1980, Lou prepared a Codicil to his Will (the "Codicil"). Lou's Will incorporating the Ante Nuptial Agreement and the Codicil were entered into probate on December 7, 1999. R. 1342.

12. In his Will and Codicil, Lou directed that his estate be divided as follows:

a. First, all debts, expenses and administration expenses are to be paid.

- b. Then Lou left all of his property in equal shares to his daughters Brooke Mageras ("Brooke") and Allyson Uzelac ("Allyson").
- c. Then Barbara was "to receive per terms our ante nuptial agreement dated March 25, 1976"
- d. Lou then made a \$5,000 bequest to each of his granddaughters Angela Mageras ("Angela") and Amanda Mageras ("Amanda").

R. 1342.

13. At the time of his marriage to Barbara, Lou owned certain real property, including two parcels located at 5561 and 5559 Highland Drive, Holladay, Utah, and six water shares in Cottonwood Tanner Ditch Company. R. 1342.

14. Barbara and Lou lived in the residence located on the 5559 and 5561 Highland Drive properties (the "Residence") during their marriage. R. 1342-43.

15. At the time of his marriage to Barbara, Louis held bank accounts in his name having a total value of \$52,012.42. R. 1343.

16. During his marriage to Barbara, Lou deposited all of his earnings and other monies he received in bank accounts held in his individual name. R. 1343.

17. During her marriage to Lou, Barbara deposited all of the her income and monies received in bank accounts held in her name alone or in accounts held with her daughter from her previous marriage. R. 1343.

18. Lou and Barbara each made various gifts of cash and property to their

separate children during the marriage. R. 1343.

19. Lou died on November 6, 1999. He was survived by Barbara and his two children, Allyson and Brooke, and his granddaughters, Amanda and Angela. R. 1343.

20. Joseph G. Uzelac, Lou's brother, was appointed personal representative of Lou's estate on December 7, 1999. R. 1343.

21. At the time of his death, Lou held eight accounts at financial institutions having a total balance of \$277,716.00. All but one of these accounts were in Lou's individual name. R. 1343.

22. Of these accounts, four were "payable on death" ("POD") accounts having date of death balances totaling \$201,839.15. Barbara was the death beneficiary on one account, which had a date of death balance of \$12,790.00. The surviving death beneficiaries on the other accounts were Brooke and Allyson. R. 1343.

23. Consequently, Lou's non-POD accounts held \$75,876.85 on his date of death. R. 1343.

24. At his death, Lou also owned certain stocks having a date of death value of \$36,950.91, which he held in his individual name. R. 1344.

25. Barbara has received \$15,000 withdrawn from one of Lou's individual accounts prior to his death and deposited after Lou's death in a joint Zions bank account in Lou's and Barbara's names. She has also received the \$4,858.83 held in the joint account prior to this deposit. R. 1344.

26. On Lou's death, Barbara received approximately \$12,790 from the POD account in Lou's name on which she was designated death beneficiary. R. 1344.

27. On May 31, 2003, the Personal Representative executed a Deed of Distribution whereby he transferred the property on which the Residence was located to Lou's daughters, subject to Barbara's life estate (the "Deed"). R. 1080.

28. Barbara's life estate had a value at Lou's death of \$307,090.00. Plaintiff's Trial Exhibit 3, Estate Tax Return, Schedule M, Page 27.

SUMMARY OF ARGUMENT

The trial court's interpretation of the Ante Nuptial Agreement should be affirmed because it is consistent with the parties' intent, the language of the entire agreement, the parties' course of conduct during their marriage, and Lou's Will. But even without reaching the issue of interpretation of the Ante Nuptial Agreement, the trial court's dismissal of Barbara's Complaint was proper because she failed to assert her claims within the one-year period for presenting a creditor claim. The trial court properly ruled that if Barbara was a creditor, her claim was barred by the one-year limitation period because she did not present a written claim to the Personal Representative or file her Complaint within this period. The trial court properly rejected Barbara's assertion that merely delivering a copy of the Ante Nuptial Agreement to the Personal Representative at the original probate hearing constituted delivery of a written claim under Utah Code Ann. § 75-3-804. Barbara's Complaint is wholly time-barred under Utah Code Ann. § 75-3-803 and was therefore properly dismissed by the trial court.

Likewise, the Deed transferring the remainder interest in two properties owned by Lou prior to the marriage to his children should stand, as affirmed in the trial court's September 29, 2003 Minute Entry. On appeal, Barbara has provided no legal basis to overturn the Deed under Utah Code Ann. § 75-3-703. The Deed satisfied the Personal Representative's fiduciary duties, was in accordance with Lou's Will and the Ante Nuptial Agreement, and was not a conflict of interest transaction. Barbara's assertion that the

validity of the Deed is tied to the trial court's interpretation of paragraph 5 of the Ante Nuptial Agreement dealing with monies Lou earned during the marriage is incorrect. The Deed conveyed only property owned by Lou **prior** to the marriage, subject to Barbara's life estate. Thus the disposition under paragraph 5 of assets earned **during** the marriage has no bearing on the Deed.

The trial court also properly rejected Barbara's interpretation of the Ante Nuptial Agreement. Barbara's assertion that paragraph 5 of the Ante Nuptial Agreement, which awards all of the property "acquired by the parties" during the marriage to the survivor, entitles her to a distribution equal to the amount of Lou's earnings during the marriage, including gifts to Lou's daughters during the marriage and at his death, is not a reasonable interpretation of the Ante Nuptial Agreement. The parties, as evidenced by their intent set forth in Ante Nuptial Agreement, intended that the agreement preserve their separate assets acquired during their lives—including during the marriage—for their children. Only joint assets were to pass to the surviving spouse. The parties acted consistently with this intent during the marriage. They kept their separate earnings in separate accounts and made gifts to their separate children without objection by the other spouse. The Personal Representative has acted consistent with this intent. Barbara has received all of the assets Lou held jointly with her at his death, including approximately \$19,858.83 held in a joint account and the \$12,790 POD account upon which she was designated as Lou's death beneficiary. Under the Deed, the Personal Representative conveyed to Barbara the life

estate in the Residence set forth in paragraph 4 of the Ante Nuptial Agreement. The Personal Representative properly conveyed the remainder interest in this property to Lou's daughters—the beneficiaries who Barbara acknowledged in the Ante Nuptial Agreement were entitled to this property.

Finally, Barbara's claim to the personal property located in the Residence and owned by Lou prior to the marriage is not properly before the Court of Appeals because Barbara has not objected to the trial court's procedure established to address the personal property. The trial court established a procedure in his April 6, 2004 Minute Entry by which the Personal Representative could waive any claim to the personal property. Barbara has not appealed this Minute Entry or objected to the procedure set forth in it. This issue is therefore not properly before the Court of Appeals, and Barbara's waiver arguments should be disregarded.

Barbara has received property and assets worth almost \$350,000 as a result of her husband's death. These distributions constitute all of the distributions to which Barbara is entitled under the Ante Nuptial Agreement. Barbara's late assertion of creditor status does not improve her claim—it further mandates its dismissal since Barbara, as a creditor, did not submit this claim within the one-year creditor claim period as required under Utah Code Ann. § 75-3-803. The Personal Representative's execution of the Deed was entirely consistent with both Lou's Will and the Ante Nuptial Agreement and the trial court therefore properly refused to disturb it. The trial court's ruling dismissing Barbara's

Complaint with prejudice should therefore should be affirmed and costs on appeal awarded to the Personal Representative.

ARGUMENT

Barbara's brief on appeal contains two significant oversights that must be addressed as an initial matter. First, nowhere in her brief does Barbara disclose what it is she actually sought at trial. Barbara sought damages against Lou's estate in the amount of \$293,320.09, based on her assertion that a provision in the parties' Ante Nuptial Agreement entitled her to a distribution upon Lou's death equal to all of the income he earned during the marriage. R. 1037. Barbara's claim therefore included the value of all bank accounts in Lou's individual name at his death, including \$189,049.15 in POD accounts on which Lou's daughters were death beneficiaries, a \$5,000 insurance obligation that the trial court had previously held Lou satisfied by creating a POD account for Barbara's benefit from which she received \$12,790 at Lou's death, and \$59,086.22 in gifts that Lou made during the marriage to his daughters. R. 1141. Barbara obscures the amount of her damages sought at trial because they reveal the unreasonableness of her interpretation of the Ante Nuptial Agreement.

Second, throughout her brief Barbara falsely claims to have received virtually "nothing" from Lou's estate under the trial court's interpretation of the Ante Nuptial Agreement. Barbara's assertion that the trial court's interpretation would result in her taking nothing from Lou's estate is patently untrue. Under the trial court's interpretation, Barbara is entitled to, and has already received: a joint bank account holding \$19,858.83, a POD account holding \$12,790, and a life estate valued at more than \$300,000. These

distributions are far from "nothing" and demonstrate the reasonableness of the trial court's interpretation.

The trial court properly held that Barbara, if a creditor, failed to submit a proper creditor claim, either by written statement or Complaint, within the one-year creditor claim period. The trial court also properly upheld the Deed under Utah Code Ann. § 75-3-703, and Barbara has provided no legal basis to challenge the trial court's ruling on this issue. The trial court's interpretation of the Ante Nuptial Agreement—under which Barbara received all properties owned by Lou and Barbara jointly at Lou's death—was proper because it followed the intent of the parties and the language of the entire Ante Nuptial Agreement. Finally, the issue of waiver is not properly before the Court of Appeals; Barbara does not challenge the trial court's procedure established to allow a waiver as to the personal property. Barbara's arguments on this issue should therefore be disregarded.

I. THE TRIAL COURT CORRECTLY HELD THAT IF BARBARA IS A CREDITOR, HER CLAIMS ARE TIME BARRED UNDER UTAH CODE ANN. § 75-3-803.

Barbara seeks a distribution from Lou's estate under the Ante Nuptial Agreement referenced and incorporated in Lou's Will in addition to those she has already received. Shortly before trial, Barbara asserted for the first time that she was a creditor of the estate with a claim superior to those of the other beneficiaries. R. 923-25. She continued to assert her status as a creditor at trial. The trial court properly ruled at trial that Barbara, if a creditor, failed to present her claim within the one-year creditor claim period imposed under Utah Code Ann. § 75-3-803. R. 1343. Barbara's Complaint was filed over two years after Lou's death. R. 984-85. Her argument that simply providing a copy of the Ante Nuptial Agreement to the Personal Representative at the original probate hearing constituted adequate presentment under this statute fails under Utah Code Ann. § 75-3-804, which sets forth the straightforward requirements for presentment of an adequate creditor claim. Barbara's delivery of the Ante Nuptial Agreement is entirely deficient under these requirements. Her Complaint is therefore time-barred and the trial court's dismissal of it should be affirmed.

A. Barbara's Complaint is Time Barred Because it Was Filed Over a Year after the Deadline for Presentment of Creditor Claims Expired.

Under Utah Code Ann. § 75-3-803(3), a claim that arises after the death of the decedent is barred unless presented to the estate the later of three months after it arises or one year after the decedent's death. Under Utah Code Ann. § 75-3-803(3):

All claims against a decedent's estate that arise at or after the death of the decedent . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as follows: . . . (b) . . . within the later of three months after it arises, or the time specified in subsection 1(a)."

Subsection 1(a) provides that creditor claims are barred one year after the decedent's death. *Id.* Barbara's claim to a distribution upon Lou's death under paragraph 5 of the Ante Nuptial Agreement arose at his death. Lou died on November 6, 1999, and Barbara's deadline to file a creditor claim ran on November 6, 2000. Barbara did not file the Complaint until February 4, 2002, over two years after Lou's death, and long after the creditor claim deadline expired. Barbara's Complaint is therefore time-barred under Utah Code Ann. § 75-3-803.

B. Merely Providing a Copy of the Ante Nuptial Agreement to the Personal Representative is Not Adequate Presentment of a Claim under Utah Code Ann. § 75-3-804.

The trial court properly denied Barbara's assertion that she presented a timely creditor claim by delivering a copy of the Ante Nuptial Agreement at the initial probate hearing. The Ante Nuptial Agreement does not satisfy the requirements of Utah Code Ann. § 75-3-804. Barbara's assertion that this statute requires "only the delivery of . . . 'a written statement of the claim'" misrepresents what the statute actually says. To constitute adequate delivery of a claim, the claimant must deliver or mail to the personal representative, or file with the probate court "a written statement of the claim indicating

its basis, the name and address of the claimant, and the amount claimed." Utah Code Ann. § 75-3-804(1)(a) (emphasis added). Of these required elements, the Ante Nuptial Agreement includes at most Barbara's name.

Likewise, Barbara's assertion that mere delivery of the Ante Nuptial Agreement satisfies the standard set forth in *Quinn v. Quinn*, 772 P.2d 979 (Utah App. 1989)—the leading Utah case on the adequacy of notice of a creditor claim—is not supported by the case itself. In *Quinn*, the Court described the requirements for presentment of a creditor claim as follows.

Utah's version of the Uniform Probate Code sets forth two methods of presenting claims to an estate. First, the claimant may "deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed" Utah Code Ann. § 75-3-804(1)(a) (1978). Alternatively, the claimant may commence a court action against the personal representative of the estate. Utah Code Ann. § 75-3-804(1)(b) (1978).

Id. at 980.

The inadequacy of Barbara's delivery of the Ante Nuptial Agreement as presentment of a claim under sections 75-3-803 and -804 is clear when compared to the notice of the claim provided in *Quinn*. The claim presented in *Quinn* was described by the court as follows:

Kip's written claim for \$650,000 stated, with our emphasis, "The basis of this claim is that on or about May 24, 1984, Fenton G. Quinn caused the *death of Dawana W. Quinn* and that said action was done in a willful and malicious manner

with the premeditated attempt to cause the *death of Dawana W. Quinn*." It also stated that the exact amount of the claim "as a result of decedent's actions" would have to be determined at trial.

Id. at 981 (emphasis in original). The claimant in *Quinn* provided a dollar amount for the claim and a description of the tort basis of the claim. The Ante Nuptial Agreement provides a set dollar figure only for the life insurance (\$5,000.00). The Ante Nuptial Agreement could, as a contract, give rise to a breach of contract claim, but nothing in the document itself indicated that a breach or any other act giving rise to a cause of action had occurred. In addition, the claimant in *Quinn* provided notice that she was actually asserting a claim. In contrast, nothing about Barbara's delivery of the Ante Nuptial Agreement indicated she intended anything other than to provide a copy of the document referenced in the just-probated Will. The Personal Representative did not dispute the validity of the Ante Nuptial Agreement and has made distributions to Barbara under it. The Personal Representative therefore reasonably viewed the Ante Nuptial Agreement as addressing Barbara's beneficiary rights under the Will into which it was incorporated, and not as a creditor claim.

Significantly, the *Quinn* Court held that a claimant must describe the claim sufficient to satisfy the "notice-pleading" standard for a complaint in order to provide adequate notice of a claim under the presentment requirements of Utah Code Ann. § 75-3-804. "Under a notice-pleading standard, an adequate complaint is one that affords fair notice of the nature and basis of the claim asserted and a general indication of the type of

litigation involved." *Quinn*, 772 P.2d at 981 (citation and quotations omitted). The court therefore held that:

[The] claim was sufficient for purposes of section 75-3-803 and section 75-3-804(1)(a) insofar as it gave [the personal representative] fair notice that the estate was facing a sizeable tort claim, that the basis of the \$ 650,000 claim was the death of Dawana at the hands of Fenton Glade, and that a trial would be necessary to fix the exact amount of liability if he decided not to approve or compromise the claim. [The] personal representative[] had those facts to take into account as he acted on all claims, thus furthering his speedy and efficient administration and distribution of the estate. Because he was adequately advised of the basis of this claim and the likely amount, he could make an informed decision concerning the effect his action on it would have on the administration of the estate as a whole. Sections 75-3-803 and -804 should be applied to facilitate settlement of estates without unduly restricting the rights of timely claimants who in good faith endeavor to comply with the requirements of the statute.

Id. at 981-82. Contrary to Barbara's assertion that merely delivering the Ante Nuptial Agreement satisfies *Quinn*, it is clear that under the Utah Rules of Civil Procedure, an action commenced by merely filing and service of a copy of the Ante Nuptial Agreement would be deficient to state a claim for relief. "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself to be entitled." Utah R. Civ. P. 8(a). The Ante Nuptial Agreement contains neither of these elements. It is therefore insufficient to present a creditor claim under *Quinn*.

Under the clear terms of Utah Code Ann. §§ 75-3-803 and -804 and *Quinn*, the trial court correctly held that Barbara failed to make a timely presentment of her claim.

Barbara's Complaint is therefore wholly time-barred. The Court's April 6, 2004 Order may be affirmed, and Barbara's Complaint dismissed with prejudice, on this basis alone.

II. THE TRIAL COURT'S APPROVAL OF THE PERSONAL REPRESENTATIVE'S DEED DISTRIBUTING TO LOU'S DAUGHTERS PROPERTY OWNED BY LOU PRIOR TO THE MARRIAGE WAS PROPER UNDER UTAH CODE ANN. § 75-3-703.

Barbara, without a single citation to any legal authority, asserts that the trial court's September 27, 2003 Minute Entry improperly denied her motion to set aside the Deed, by which the Personal Representative distributed to Lou's daughters (subject to Barbara's life estate) real property owned by Lou prior to his marriage. "A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and [the Utah Probate Code] and as expeditiously and efficiently as is consistent with the best interests of the estate." Utah Code Ann. § 75-3-703. Barbara asserts that the Deed "jeopardized her ability to obtain full compensation for damages she sought" and was therefore voidable under section 75-3-703. She also asserts that the fact that the Deed was consistent with "some of the terms of a will is not dispositive" of this issue. She does not indicate, however, what legal principle she believes is dispositive of this issue. Instead, Barbara's sole support for this argument is her assertion that allowing a personal representative to distribute an asset of the estate consistent with the decedent's will would excuse all personal representatives from the duty to pay creditors.

Barbara's assertion ignores the clear terms of section 75-3-703, which requires a

personal representative to balance the duties to distribute assets according to the decedent's will, administer the estate efficiently and expeditiously, and follow the dictates of the Utah Probate Code. The Utah Probate Code contains an entire chapter dealing with the presentment, litigation and payment of creditor claims. Utah Code Ann. §§ 75-3-801 through -816. This procedure will not be disrupted by requiring a personal representative to follow the dictates of the deceased's will as required under section 75-3-703. Indeed, Barbara has not asserted that the Personal Representative failed to follow or ignored the creditor claim procedure. She has not asserted that the Deed was not in the estate's best interest, nor has she asserted that its execution increased the time or expense required to administer the estate. Barbara does not challenge to the Deed under the section 75-3-703 factors² except to state that the Deed was contrary to the direction in Lou's Will that distribution be made after "just debts, funeral expenses and expenses of administration are paid." She claims that the Personal Representative's execution of the Deed was therefore justified only if she had no valid creditor claim. This assertion fails, however, because it ignores the Ante Nuptial Agreement itself, the very document under which Barbara makes her putative creditor claim. Barbara asserts that her rights as a "creditor" under the Ante Nuptial Agreement foreclose execution of the Deed. Yet in paragraph 1 of the Ante Nuptial Agreement, Barbara explicitly agreed that she had no claim to Lou's property

²The trial court also ruled that the Personal Representative's execution of the Deed was not a conflict of interest under Utah Code Ann. § 75-3-712. R. 1082. Barbara does not challenge this ruling on appeal.

owned prior to the marriage. R. 1046.³ The Deed therefore follows both the dictates of the Ante Nuptial Agreement and Lou's Will. It preserved Barbara's life estate in the Residence, and conveyed to Lou's daughters only property to which Barbara agreed she had no claim under the Ante Nuptial Agreement. The trial court's September 27, 2003 Minute Entry ruling that the Deed was in accordance with Lou's Will and Utah Code Ann. § 75-3-703 was correct and should be affirmed.⁴

III. THE TRIAL COURT'S INTERPRETATION OF "ACQUIRED BY THE PARTIES" IS SUPPORTED BY THE PARTIES' STATED INTENT AND UTAH LAW.

The trial court correctly held that Barbara was entitled only to property owned jointly with Lou at his death—all of which has been distributed to her—and the trial court properly dismissed the Complaint on that basis. Barbara asserts that paragraph 5 of the

³As a result, Barbara's assertion that reversal of the trial court's interpretation of the Ante Nuptial Agreement would mandate a reversal of the Minute Order approving the Deed overreaches. Even if Barbara were to prevail on her interpretation of paragraph 5 of the Ante Nuptial Agreement, this would entitle her to receive only property acquired **during** the marriage. Property owned by Lou **prior** to the marriage such as the real property conveyed via the Deed would still pass to his daughters under both Barbara's and the Personal Representative's interpretations of the paragraph 1 of the Ante Nuptial Agreement.

⁴Furthermore, to the extent Barbara's claim seeks to assess property owned by Lou prior to the marriage for amounts passing through the POD accounts to his daughters, the trial court properly held in the September 27, 2003 Minute Entry, and Barbara does not dispute on appeal, that Barbara's claim fails under Utah Code Ann. § 75-6-107. If Barbara wanted to recapture the amount of these POD account distributions, her remedy under this statute was to file a written demand on the Personal Representative within two years following Lou's death. *Id.* She failed to do so. R. 1081.

Ante Nuptial Agreement entitles her to a distribution equal to Lou's income earned during the marriage. This assertion is contrary to the parties' intent stated in the Ante Nuptial Agreement and evidenced by their conduct during the marriage. It would necessarily have the effect of requiring the Personal Representative to assess property owned by Lou prior to the marriage—which Barbara acknowledged in the Ante Nuptial Agreement passed to Lou's daughters—in order to fund a distribution to her. The Personal Representative has always followed an interpretation of the Ante Nuptial Agreement that is in accordance with the agreement's terms, the parties' stated intent and Lou's Will. The trial court therefore properly interpreted of the Ante Nuptial Agreement to find that Barbara was not entitled to distributions from the estate in addition to those that she had already received.

A. The Trial Court's Interpretation of Paragraph 5 Gives Effect to All Terms of the Ante Nuptial Agreement.

"The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract." *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 15, 54 P.3d 1139. In interpreting the Ante Nuptial Agreement, the Court must "look to the writing itself to ascertain the parties' intentions," and must "consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." *Id.* at ¶ 18. The trial courts interpretation of the Ante Nuptial Agreement is correct because it gives effect to the parties' intent stated in the agreement, all of the Ante Nuptial Agreement's provisions, and Lou's Will.

1. **Recitals.** The recitals to the Ante Nuptial Agreement clearly set out the parties' intentions with respect to their separate and joint property. When they married, Barbara was 49 and Lou 60. Each had been married previously and had children from their prior marriages. R. 1045. Both Barbara and Lou had already worked for most of their lives, and acquired significant assets during the course of their respective previous marriages. R. 1045. Thus Barbara and Lou were not like a typical young couple that marries with the intent of creating a family and acquiring a lifetime's worth of assets together. Instead, Barbara and Lou married at the end of their working lives. So they directed that the overriding purpose of the Ante Nuptial Agreement was "to protect the interests of their **heirs at law** in and to the property acquired by the respective parties **during their lives.**" Ante Nuptial Agreement at 1. R. 1045. (emphasis added). Lou and Barbara signed the Ante Nuptial Agreement prior to their marriage, at which time their respective heirs were their separate children (and descendants). Thus Barbara and Lou explicitly established their intent to protect all of the property acquired by each of them, whether prior to or during the marriage, **for their descendants.** Had Barbara and Lou intended to protect only their separate children's interest in property owned **prior** to the marriage, this recital would have narrowly referred to protecting property acquired by the respective parties "prior to the marriage." Instead, it broadly refers to protecting all property acquired by each party "during their lives" for their separate children.

2. Paragraph 1. Paragraph 1 of the Ante Nuptial Agreement deals specifically with the disposition of each party's property owned prior to the marriage.

Paragraph 1 provides that:

In the event of the termination of this marriage by death or otherwise all of the real, personal or mixed property owned by each party hereto prior to the marriage shall be the sole and separate property of him and her or their respective estates and that each party hereto agrees to execute and deliver to the other or his estate a quit-claim deed in and to all real, personal or mixed property owned by him or her prior to the marriage. In the event that said quit-claim deeds are not executed this Agreement shall suffice as an adequate quitclaim deed for such purpose.

Ante Nuptial Agreement ¶ 1, R. 1046. This provision therefore provides that assets owned by each spouse prior to the marriage pass to his or her estate on death, and obligates the surviving spouse to execute a deed conveying any property held by the survivor that constitutes the deceased spouse's premarital property to the deceased's estate. This deed requirement helps to implement paragraph 9—which provides that premarital property that is converted into another form remains premarital property despite such conversion. This provision, by preserving each party's separate property owned prior to the marriage for his or her respective descendants or estates is entirely consistent with the Ante Nuptial Agreement's recital stating that the purpose of the agreement is to preserve each party's property acquired during his or her life for his or her heirs.

3. Paragraphs 2, 3 and 4. The meaning of these provisions was addressed by the trial court on the parties' cross motions for summary judgment.

Barbara's claims asserted under these provisions were dismissed. This dismissal included Barbara's claim for \$5,000 in life insurance under paragraph 2, which the trial court dismissed on the basis that Lou satisfied this obligation by establishing the POD account from which Barbara received approximately \$12,790 at Lou's death. Ante Nuptial Agreement ¶¶ 2, 3 and 4, R. 836-39. Barbara nevertheless continued to include the \$5,000 life insurance payout in her damages asserted at trial.

4. Paragraph 5. Paragraph 5 of the Ante Nuptial Agreement provides that on the death of the first spouse to die, property "acquired by the parties" would pass to the survivor. Ante Nuptial Agreement ¶ 5, R. 1046-47. The trial court properly ruled that this provision, referring to assets acquired "by the parties," means that the survivor received any properties or assets that Lou and Barbara acquired together. On the face of the Ante Nuptial Agreement, it is apparent that Lou and Barbara meant the assets described in this paragraph to include joint assets only and not all of the deceased spouse's separate property. For instance, paragraph 1 clearly states that property owned by "each party" prior to the marriage would remain that person's "sole and separate" property or the property of "his or her" "respective estates." Thus Lou and Barbara were well able to describe and segregate property owned by them prior to their marriage, and were well able to describe themselves in their separate rather than joint capacity. Lou and Barbara, having previously specifically referred to property owned by the "respective parties," "each party" and their "respective estates" in paragraph 1, do not use these

individuating terms in paragraph 5. Instead, they refer to simply "the parties." Where Lou and Barbara previously referred to themselves as separate and distinct individuals with respect to assets that pass to their separate children, in paragraph 5 they refer to themselves only in their joint capacity when describing property that passes to the surviving spouse.

The words that Barbara and Lou used in the Ante Nuptial Agreement had meaning. In Utah, antenuptial agreements are specifically subject to the fundamental rule of contract construction providing that "[i]n interpreting contracts, the principal concern is to determine what the parties intended **by what they said.**" *Berman v. Berman*, 749 P.2d 1271, 1273 (Utah App. 1988) (emphasis added). When construing an ante nuptial agreement, a court "[cannot] add, ignore, or discard words in this process," but must "render certain the meaning of the provision . . . in dispute . . . by an objective and reasonable construction of the whole contract." *Id.* (citation and quotations omitted). Therefore, "[t]he ordinary and usual meaning of the words used is given effect, and effect is to be given the entire agreement without ignoring any part thereof." *Id.* (citations and quotations omitted). Under these rules of construction, the trial court correctly interpreted the different terms that Lou and Barbara used in the Ante Nuptial Agreement to describe themselves and their property individually and jointly as having different meanings. Furthermore, granting to the survivor only the parties' property acquired jointly during the marriage is consistent with the recital that the Ante Nuptial Agreement's purpose was to

preserve each party's separate property for his or her separate heirs.

5. Paragraph 6. Paragraph 6 states that paragraph 5, under which assets acquired by the parties during the marriage pass to the survivor, is subject to paragraph 9, which preserves the pre-marital character of assets that a party converts to another form during the marriage. Ante Nuptial Agreement ¶ 6, R. 1047. This paragraph further evidences the Ante Nuptial Agreement's primary intent to preserve each party's assets for his or her descendants, by ensuring that the proceeds or replacement property arising from a premarital asset held by a party pass to his or her descendants rather than the surviving spouse under paragraph 5.

6. Paragraph 7. Paragraph 7 provides that if Lou and Barbara were to die simultaneously, Lou's property owned prior to the marriage would be divided equally among his "heirs at law" and Barbara's property owned prior to the marriage would be divided equally among her "heirs at law." Ante Nuptial Agreement ¶ 7; R. 1047. This provision is entirely in line with the provision of paragraph 1 stating that if one spouse dies before the other, his or her property owned prior to the marriage passes to his or her separate children. This provision is also consistent with the agreement's recital stating that the agreement's purpose was to preserve each party's separate property earned during his or her life for his or her heirs at law.

7. Paragraph 8. Paragraph 8 of the Ante Nuptial Agreement deals with the distribution of the property "acquired by them during the marriage" if Lou and

Barbara were to die simultaneously. This clause provides that such property be divided equally between their estates.⁵ Ante Nuptial Agreement ¶ 8, R. 1047. Barbara incorrectly asserts that the trial court's interpretation of paragraph 5 to grant only the parties' jointly held property to the survivor is in conflict with this provision. If Barbara were entitled to all of the parties' joint property on Lou's death, and Lou were entitled to all of the parties' joint property on his death, and both were to die simultaneously, the cumulative and net effect would be to divide the parties' jointly held property between their estates equally. Thus this provision is entirely consistent with the trial court's interpretation of paragraph 5.

8. Paragraph 9. Paragraph 9 of the Ante Nuptial Agreement provides that if a party sells, converts or exchanges an asset owned prior to the marriage, the replacement asset or proceeds will be deemed property owned prior to the marriage and, as clarified in paragraph 6, will pass to the party's descendants under paragraph 1 rather than to the surviving spouse under paragraph 5. Ante Nuptial Agreement ¶ 9, R. 1047. Barbara asserts that paragraph 9 is unnecessary under the trial court's interpretation of

⁵The cases cited by Barbara in her discussion of paragraphs 7 and 8 for the proposition that "acquired by the parties" means "an acquisition by the husband, the wife or both," are divorce cases that address only the narrow issue of whether a particular asset was acquired during the marriage and therefore subject to division in the divorce. *Jefferies v. Jefferies*, 895 P.2d 835, 837 (Utah App. 1995) (dealing with whether growth in husband's 401(k) was property acquired during the marriage); *Elman v. Elman*, 2002 UT App 83, 45 P.3d 176 (addressing whether wife should be awarded portion of appreciation of husband's separate partnership interest).

paragraph 5. However, under the trial court's interpretation, paragraph 9 is needed precisely to distinguish between two types of property: the property that Lou and Barbara acquired jointly during the marriage with their earnings **during** the marriage—which passes to the survivor under paragraph 5, and any property they commingled or acquired together during the marriage with assets they owned prior to the marriage—which passes to the deceased's descendants under paragraph 1. In addition, as throughout the rest of the Ante Nuptial Agreement, in this paragraph, when Lou and Barbara are dealing with property owned by them separately prior to their marriage that passes to their separate descendants, the agreement uses the individuating phrase "either party" rather than referring to Lou and Barbara jointly as "the parties," further evidencing Lou's and Barbara's intent that only property acquired by them jointly during the marriage was to pass to the surviving spouse under paragraph 5.

The trial court's interpretation of the Ante Nuptial Agreement gives effect to all of its provisions, as well as the parties' intent stated therein, and should be affirmed.

B. Barbara's Interpretation is Directly Contrary to the Parties' Stated Intent.

In contrast to the trial court's harmonizing interpretation of the Ante Nuptial Agreement, Barbara's interpretation of the Ante Nuptial would vitiate the entire purpose of the Ante Nuptial Agreement itself. The parties clearly intended, in their own words, for the Ante Nuptial Agreement to protect the interest of their respective children in the property each party acquired "during their lives." Under Barbara's interpretation,

paragraph 5 of the Ante Nuptial Agreement would have the effect of destroying this interest rather than protecting it. Under the well-settled rules of contract construction, the Ante Nuptial Agreement must be interpreted according to the parties' stated intent. *WebBank*, 2002 UT 88 at ¶ 11. Lou's stated intent in the Ante Nuptial Agreement was to preserve the assets acquired during his life—which included the period of his marriage to Barbara—for his children.

Barbara's asserted interpretation would negate both this stated intent and paragraph 1 of the Ante Nuptial Agreement, in violation of the rule of contract construction that "[p]rovisions which are apparently conflicting are to be reconciled and harmonized, if possible, by reasonable interpretation so that the entire agreement can be given effect." *Munford v. Lee Servicing Co.*, 2000 UT App. 108 ¶ 18, 999 P.2d 23 (quotation and citation omitted). During his marriage to Barbara, Lou received a survivor annuity under Ruth's pension, he received payments for his business sold prior to the marriage, he earned wages, and, when he retired, he received social security payments. R. 1413. Transcript of Bench Trial, October 7, 2003 ("Trial Transcript") at 98:13-15, 99:21-23. During their 23-year marriage, Lou spent his earnings on his and Barbara's living expenses, and made gifts to his daughters. Trial Transcript at 66:19-24, 87:23-25, 88:1-7. Yet Barbara's interpretation of paragraph 5 would require distribution to her of all of Lou's earnings, **even if Lou no longer held these earnings at his death**, including

\$59,086.22 in gifts he made to his daughters during the marriage.⁶ Therefore, to satisfy a bequest under Barbara's theory, the Personal Representative necessarily would have to go beyond the probate assets to satisfy the distribution, and the only place he could look is to assets previously gifted to Lou's daughters or assets that pass to his daughters under paragraph 1 of the Ante Nuptial Agreement. Indeed, Barbara's claim includes the amount of Lou's POD accounts on which his daughters were death beneficiaries, it includes the amount of gifts that Lou made to his daughters during the marriage, and it seeks to set aside the Deed transferring to Lou's daughters their remainder interest in real property that Lou owned prior to the marriage, which clearly passes to Lou's daughters under paragraph 1 of the Ante Nuptial Agreement. R. 1046. Barbara therefore asks the Court to infer that Lou intended her entitlements under paragraph 5 to cut into the distribution to his daughters under paragraph 1 of the Ante Nuptial Agreement, without providing any legal basis whatsoever for such an inference.

In fact, this inference is contrary to the longstanding principle of construction that "[a]n absolute testamentary gift to a first taker cannot be cut down by subsequent inconsistent language of doubtful or ambiguous significance." 80 Am. Jur. 2d WILLS § 1261 (1981). "Before such a result will be permitted, the language indicating an intention

⁶Barbara bases this figure on gifts over \$100, although she provides no rationale for this threshold under the Ante Nuptial Agreement. R. 1139-40. Adoption of Barbara's interpretation would therefore require an inference that the parties intended a \$100 gift "exemption." There is absolutely nothing in the Ante Nuptial Agreement or the record to support such an inference. The trial court therefore properly declined to make it.

to cut down the gift must be as clear, plain and unequivocal as that used in the gift itself."

Id. Thus in order to demonstrate that she is entitled to a distribution that would cut into the share of Lou's children under paragraph 1, Barbara must establish that paragraph 5 clearly, plainly and unequivocally intends this result.

Barbara did not meet this burden at trial, because her interpretation is grossly inconsistent with the stated terms and intent of the Ante Nuptial Agreement. The Ante Nuptial Agreement says absolutely nothing at all about making a payment to Barbara equal to Lou's earnings during the marriage. To find for Barbara, the trial court would have been forced to read this requirement into the Ante Nuptial Agreement and Lou's Will, an invitation it properly declined. "The rule of construction that the intent of the testator must be carried out does not authorize courts to make a new will to conform to what they think the testator intended, but the intent of the testator must be ascertained from the will as it stands." *In re Estate of Hunt*, 842 P.2d 872, 874 (Utah 1992).

Likewise, an interpretation cannot be adopted when there is "absolutely nothing in the will that can justify [the party's] contention," and "[i]ngenious conjecture would have to be indulged in if we were to hold with [the party]." *Id.* Thus "in ascertaining the intent of the testator, [the court] is limited to what he had written," and should "reject" a party's "invitation to find by implication what we thought would have been the testator's desire had he expressed it in the will." *Id.* Contrary to this well-settled precedent, Barbara asserts an interpretation of the Ante Nuptial Agreement that would vitiate the parties'

stated intent, and which favors conjecture and implication over what is actually said in the Ante Nuptial Agreement. The Court of Appeals should instead affirm the trial court's interpretation, which is consistent with the intent of the parties and the actual provisions of the Ante Nuptial Agreement.

C. Barbara's Interpretation is Not Supported by the Record.

Barbara asserts that the trial court's interpretation of the Ante Nuptial Agreement leaves her with "essentially nothing," and is unreasonable given that she "gave up a valuable right to a \$325.00 annuity during the marriage in return for the promise contained in paragraph 5." Appellant's Brief at 12. Barbara provides no record cite for either contention. The Court of Appeals "need not, and will not, consider any facts not properly cited to, or supported by, the record." *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978). In fact, the record demonstrates that both contentions are untrue. Barbara received distributions and property valued at almost \$350,000 under the Ante Nuptial Agreement. R. 789; Trial Transcript at 100:5-17, 101:24-25, 102:1-17, 104:13-25, 105:1-2, 107:11-15. This is far from "essentially nothing."⁷ Likewise, the

⁷Barbara's characterization that she received "essentially nothing" appears intended to bring her claim under the purview of *Peirce v. Peirce*, 2000 UT 7, 994 P.2d 193, a case she relied on extensively in her pre- and post-trial briefs (R. 1036, 1139-40). In particular, Barbara relied on *Peirce* below to support her contention that she should be awarded the total amount of gifts over \$100 that Lou made to his daughters during the marriage. R. 1139-40. *Peirce* reveals the deficiencies in Barbara's asserted interpretation. In *Peirce*, the parties entered a post nuptial agreement under which Mr. Peirce promised Mrs. Peirce that if she would give him every paycheck she earned thereafter during the marriage (less a small amount of spending money for her personal use), he would name her as the sole

record reveals that Barbara did not trade her annuity rights for her benefits under the Ante Nuptial Agreement. The annuity Barbara refers to was a Federal civil service survivor's annuity Barbara received as a result of the death of her first husband, who was a federal employee. R. 654-55, 1005. The annuity ceased when Barbara married Lou because under the terms of the Federal civil service annuity plan, a survivor's annuity was suspended for a surviving spouse if she remarried prior to age 60. R. 654-55, 1005. Thus Barbara did not "give up" the survivor annuity in order to receive benefits under the Ante Nuptial Agreement. The annuity would have been suspended if Lou and Barbara had never entered into the Ante Nuptial Agreement at all. When Lou died, the annuity resumed, as per the terms of the annuity plan. R. 654-55; Trial Transcript at 36:20-25.

beneficiary of his estate. *Peirce*, 2000 UT 7 at ¶ 3. During the 16-year marriage, Mr. Peirce was largely unemployed, while Mrs. Peirce supported the family by working in a coal mine. *Peirce*, 2000 UT 7 at ¶ 2. Several years later, and less than two months prior to his death, Mr. Peirce moved in with his nephew and his nephew's wife. During this two-month period, Mr. Peirce gave away a substantial portion of his estate in numerous conveyances to his nephew, his nephew's wife, and others. *Peirce*, 2000 UT 7 at ¶ 4. In contrast, Barbara did not promise to turn over her separate earnings to Lou. In fact, she kept her earnings and assets strictly separate from Lou. R. 1343. Barbara was not Lou's source of financial support during the marriage. Each party worked and had separate earnings, investments and assets. R. 1342-43. Trial Transcript at 94:35, 95:1-15, 96:4-25, 97:1-3. Lou did not give away a substantial part of his estate to someone other than Barbara shortly prior to his death. In fact, the only gift made to anyone shortly before Lou's death was the \$15,000 check **to Barbara** that she deposited shortly after Lou's death. R. 1344. And unlike the widow in *Peirce*, Lou's gifts to his daughters did not dissipate his estate or negate the possibility of distributions to Barbara—Barbara's testimony at trial established that as a result of Lou's death she has received cash and property of almost \$350,000. Trial Transcript at 100: 5-17, 101:24-25, 102:1-17, 104:3-25, 105:1-2, 107:11-15. Thus the trial court's refusal to rely on *Peirce* as supporting Barbara's interpretation was proper.

In addition, Barbara also claims that her interpretation is reasonable and the trial court's unreasonable because her interpretation "rewards the survivor of a marriage of substantial length with an increasing share of the decedent's estate." Appellant's Brief at 13. Thus she asserts that her interpretation should be adopted because it "compensat[es] a party for being loyal to the end of a long term marriage." *Id.* Barbara provides not one citation to any legal authority for this contention, nor can she point to anything in the Ante Nuptial Agreement, Lou's Will or the record that supports it. The Ante Nuptial Agreement says nothing about rewarding one spouse for staying married to the other or compensating a spouse for the length of the marriage. Instead, it says that Lou and Barbara intended by the agreement to preserve their separate assets acquired "during their lives" for their descendants. "In interpreting contracts, the principal concern is to determine what the parties intended **by what they said.**" *Berman v. Berman*, 749 P.2d at 1273 (emphasis added). Barbara's conjecture as to what other ante nuptial agreements might say is irrelevant, because the issue here is the meaning of this one. In this Ante Nuptial Agreement, the parties clearly stated their intent to preserve their separate assets for their children. Barbara's interpretation is wholly unsupported by the record and the trial court correctly declined to adopt it.

D. The Trial Court's Interpretation is Consistent with Lou's and Barbara's Conduct During the Marriage

The trial court's interpretation of paragraph 5 of the Ante Nuptial Agreement is proper because it is consistent with the parties' intent demonstrated during their marriage. The Personal Representative demonstrated at trial that Lou and Barbara intended to preserve their separate assets and earnings for their descendants unless they purposely commingled them. Barbara's trial testimony established that during the marriage Lou deposited all of his earnings in bank accounts opened in his name only. Trial Transcript at 66:5-15. Lou's stocks were held in his name only. R. 1007-08. Lou made frequent gifts to his children throughout the marriage. Trial Transcript at 97:23-25, 98:1-6. Barbara's course of performance under the Ante Nuptial Agreement is even more telling. She testified that she deposited all of her earnings and income during the marriage in separate accounts opened in her name only (or in her name and her daughter's name). Trial Transcript at 65:6, 92:1-3, 96:4-25. She made frequent gifts to her daughter from her separate earnings but did not consider herself in violation of the Ante Nuptial Agreement. Trial Transcript at 97:6-22. Neither Lou nor Barbara acted like they intended their separate earnings to be jointly acquired assets under paragraph 5 of the Ante Nuptial Agreement. Had they so intended, they would have deposited their earnings in joint accounts and paid the household expenses from those accounts. But instead Lou and Barbara very carefully kept their earnings separate. Barbara knew that she and Lou kept their earnings separate, and, with the exception of the joint Zions Bank account in

Barbara's possession, they held all of their monies in separate bank accounts at Lou's death. Trial Transcript at 65:6-17, 66:5-15. The parties' course of conduct during the marriage therefore supports the trial court's interpretation of paragraph 5.

E. The Trial Court's Interpretation is Consistent with Lou's Will.

In addition to the parties' intent stated in the Ante Nuptial Agreement and demonstrated throughout their marriage, Lou's intent to distribute his separate property to his children is clearly borne out in his Will, where he states that distributions should be made in the following order:

- (1) first, payment of debts, administrative and funeral expenses;
 - (2) then, "all of my property, real, personal and mixed" passes to his daughters;
 - (3) then Barbara receives her entitlements under the Ante Nuptial Agreement;
- and
- (4) then Lou's granddaughters Amanda and Angela receive a distribution of \$5,000 each.

As with contracts, "[t]he paramount objective in interpreting a will is to give effect to the intent and desire of the testator." *In re Wallich*, 420 P.2d 40, 42 (Utah 1966). A will should therefore be read "as a whole, and meaning given to all of its provisions considered in their relationship to each other." *Id.* Under this rule of construction, as with the Ante Nuptial Agreement, Lou's Will must be construed to give effect to each of his bequests in relation to each other. Lou intended that the distribution of "all my

property" to his daughters would take place **before** the distribution to Barbara under the Ante Nuptial Agreement. Likewise, Lou's and Barbara's children are first takers under paragraph 1 of the Ante Nuptial Agreement, followed later by the surviving spouse under paragraph 5. Under the first taker rule, Lou's and Barbara's separate children are therefore "presumed to be the favorite of the testator" under the Ante Nuptial Agreement. 80 Am. Jur. 2d WILLS § 1261. This is carried through in Lou's Will, where he designates his children as first takers of "all my property" with priority over the distribution to Barbara. Lou therefore clearly set out his intent in the Will that the distribution to Barbara under the Ante Nuptial Agreement not cut into the distribution of "all my property" to his children under the Will. Yet by incorporating Barbara's entitlements under the Ante Nuptial Agreement into his Will, Lou also demonstrated his intent that the distribution of "all my property" to his children would not deprive Barbara of a distribution under the Ante Nuptial Agreement. Lou described and ordered his bequests this way for a reason, to which the trial court gave effect. The only way Lou's intent could be carried out is if the assets Lou intended to pass to Barbara were held jointly with her and therefore distinct from Lou's separate property that passes to his daughters. The trial court's interpretation of the Ante Nuptial Agreement is therefore correct as being consistent with Lou's Will.

IV. THE ISSUE OF THE PERSONAL REPRESENTATIVE'S WAIVER OF RIGHTS IN THE PERSONAL PROPERTY IS NOT PROPERLY BEFORE THE COURT OF APPEALS.

Barbara's argument that the trial court incorrectly failed to recognize the Personal Representative's waiver of personal property rights fails because it is not properly before the Court of Appeals. The issue of whether the Personal Representative had waived the estate's rights to Lou's personal property owned prior to the marriage arose as a result of the Personal Representative's desire to facilitate settlement negotiations between Barbara and Lou's daughters ongoing at the time of trial as to the personal property. Trial Transcript at 139:21-25, 146:1-4. The Personal Representative therefore asserted that while the personal property was not included in Barbara's life estate under Utah law and belonged to the estate, the Personal Representative would be willing to release his claim to all but certain items requested by Lou's daughters and testified to at trial. Trial Transcript at 139:21-25, 140:1-8. Following trial, the trial court issued two rulings on the personal property. First, in the April 6, 2004 order the trial court ruled that as a matter of law Lou's life estate in the residence granted to Barbara did not include the personal property. R. 1346. In response to Barbara's objection that the personal property should be awarded to her under her waiver theory, the trial court dealt directly with the issue of whether and what the Personal Representative waived as to personal property in the Residence in its separate April 6, 2004 minute entry, in which it directed the Personal Representative to file a written waiver as to any personal property to which he waived a

claim. R. 1349.

Barbara has not appealed the minute entry nor does she object to the procedure established by the trial court in it. Instead, she raises an assortment of irrelevant issues about waiver of criminal rights, writs of replevin and conversion, none of which were raised below.⁸ Absent a showing of plain error or exceptional circumstances—neither of which Barbara has asserted—"issues not raised at trial cannot be argued for the first time on appeal." *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah, 1996) (quoting *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994)). Barbara also fails to provide any analysis of how these issues or the cases cited to support them are relevant to the issues on appeal. Under Utah R. App. P. 24, "[b]riefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Sloan*, 2003 UT App 170, 72 ¶ 13, 72 P.3d 138. "Implicitly, rule 24(a)(9) requires not

⁸Barbara's assertion that the Personal Representative had the burden of establishing which items of personal property Barbara should deliver is legally and factually incorrect. The trial court ruled that Lou's personal property owned prior to the marriage did not pass to Barbara under the life estate. Therefore, this property always belonged to the estate. The Personal Representative did not have to make claim to property that the estate already owned. If Barbara wanted to claim any of the personal property, **she** had the burden to identify which items she made claim to. Barbara's replevin and vagueness arguments also fail for this reason. Any vagueness in the description of the personal property as between what Barbara wanted and what Lou's daughters wanted is a deficiency in Barbara's claim to the property. Finally, any issues as to whether the tools were adequately described would again be deficiencies in Barbara's claim, and would in any event be resolved by the trial court's written waiver procedure, which Barbara has not objected to on appeal.

just bald citation to authority but development of that authority and reasoned analysis based on that authority. *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). Barbara's bare references to legal theories not raised below do not meet this standard. More importantly, the trial court addressed Barbara's waiver concerns in the April 6, 2004 Minute Entry, to which Barbara has not objected. Barbara's waiver argument is therefore not properly before the Court of Appeals and should be disregarded.

CONCLUSION

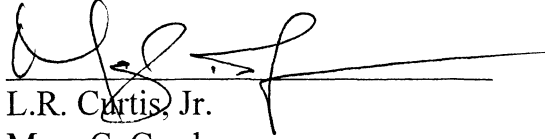
The trial court properly ruled that Barbara, if a creditor of the estate, failed to bring her claims within the one-year period imposed under Utah Code Ann. § 75-3-803. The trial court's dismissal of Barbara's complaint may therefore be affirmed on this basis alone. The trial court also properly affirmed the Personal Representative's execution of the Deed because the Deed was authorized under the Ante Nuptial Agreement and Lou's Will and was not a violation of fiduciary duty or a conflict of interest under the Utah Probate Code. The trial court's interpretation of paragraph 5 of the Ante Nuptial Agreement should be affirmed because it is consistent with the entire agreement's terms, the parties' intent stated in the agreement, their course of performance during the marriage and Lou's Will. Finally, the trial court established a procedure to address Barbara's waiver contention below. Barbara has not objected to this procedure nor has she provided any legal basis to overturn it. All of Barbara's claims therefore fail and the trial court's order dismissing her Complaint with prejudice should be affirmed and costs on appeal

awarded to the Personal Representative.

DATED this 19th day of August, 2004.

MANNING CURTIS BRADSHAW & BEDNAR LLC

By:

A handwritten signature in black ink, appearing to be "L.R. Curtis, Jr.", written over a horizontal line.

L.R. Curtis, Jr.

Mary C. Gordon

Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed via U.S. mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE**, this 14th day of August, 2004 to the following:

Charles M. Bennett
BLACKBURN & STOLL, LC
77 West 200 South, Suite 400
Salt Lake City, Utah 84101
Attorneys for Barbara Uzelac

Margaret Olson, Esq.
HOBBS & OLSON
525 South 300 East
Salt Lake City, Utah 84111
Attorneys for Allyson D. Uzelac and Susan Brooke Mageras

Angela Marie Mageras
4200 East Lodewyck Drive
Las Vegas, Nevada 89121

Amanda D. Mageras
4200 East Lodewyck Drive
Las Vegas, Nevada 89121

Staci L. Hill