

2005

Marian B. Boulton, David Boulton, and Steven Boulton v. Carl H. Bronn : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARIAN B. BOULTON, DAVID BOULTON, and STEVEN BOULTON, Plaintiffs/Appellants, vs. CARL H. BRONN, Alternate Trustee of “THE ALICE MAY HUGHES BRONN TRUST” and CARL H. BRONN, Individually, Defendants/Appellees.	Case No. 20050391
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BRIEF OF THE APPELLEES

On appeal from the Second District Court
For Davis County, State of Utah
Honorable Darwin C. Hansen, Presiding

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MARIAN B. BOULTON, DAVID BOULTON, and STEVEN BOULTON, Plaintiffs/Appellants, vs. CARL H. BRONN, Alternate Trustee of “THE ALICE MAY HUGHES BRONN TRUST” and CARL H. BRONN, Individually, Defendants/Appellees.	Case No. 20050391
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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this matter pursuant to Utah Code §78-2-2(j)(1953 as amended). The Supreme Court poured over jurisdiction to the Court of Appeals.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the selling of the real property in a trust by the settlor/trustee and depositing the funds into her personal bank accounts manifested her intention to revoke the revocable trust as to those parcels of real property, when the terms of the trust allow revocation by any method during her lifetime without notice to anyone.

Standard of Review:

This is a factual question, which is reviewed for clear error. “Questions of intent as determined by extrinsic evidence are questions of fact to be decided by the trier of fact and are subject to the ‘clearly erroneous’ standard of review.” *Sprouse v. Jager*, 806 P.2d 219, 222 (Utah App. 1991) (citing *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990)); Utah R. Civ. P. 52(a). “To show clear error, the [contesting party] must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.” *State v. Shipp*, 2005 UT 35, ¶ 20, 116 P.3d 317 (citing *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996)).

2. Whether the selling of the real property in a trust by the settlor/trustee/beneficiary and depositing the funds into her personal bank account fulfills

the terms of the trust when the settlor/trustee is the beneficiary during her lifetime and the trust gives the settlor/trustee/beneficiary the right to “use, transfer, contract to sell, encumber, mortgage, convey and in every way deal in and with the said real property . . .”

Standard of Review:

This is a factual question, which is reviewed by this Court for clear error. *Sprouse v. Jager*, 806 P.2d 219, 222 (Utah App. 1991); Utah R. Civ. P. 52(a).

STATEMENT OF THE CASE

Nature of the Case

This case is on appeal from the Second District Court, Judge Darwin Hansen. This court is called upon to review a finding that a settlor, beneficiary, and trustee of a revocable trust manifested an intent to revoke the trust by selling the trust property and depositing the proceeds into her personal bank account.

Course of Proceedings and Disposition Below

This action was brought by tangential relatives of decedent Alice May Hughes Bronn for recovery of money and/or property that had been transferred to the Alice May Hughes Bronn Trust established in 1979. Plaintiffs brought this lawsuit against the successor trustee of the 1979 Trust for distribution of the assets of the trust. The case was tried to the bench on March 22 and 23, 2005. After trial, the court made findings of fact as to the actions of Alice May in selling the real property and depositing the funds into her personal bank accounts. Based upon those facts, the court determined that there was sufficient evidence to find that Alice May intended to revoke the trust as to the portions

of the real property that she sold and used the proceeds outside the terms of the trust. As such, the trial court dismissed Plaintiffs' cause of action and awarded costs to Defendants.

Statement of Relevant Facts

1. On April 5, 1979, Alice May Hughes Bronn ("Alice May") established an inter vivos revocable trust, the Alice May Hughes Bronn Trust. (R. 50-51; 371-372; 586 at 24-25.) Alice May was the settlor, the sole trustee, and the beneficiary. (R. 50, 371.) She reserved unto herself the right to, "use, transfer, contract to sell, encumber, mortgage, convey, and in every way deal in and with the said real property, and any other real or personal property transferred to or held by the trust, without notice to or consent from any person, and to modify, amend, or revoke the trust, in whole or in part, in any manner, at anytime." (Id.)

2. The trust instrument named Plaintiffs (the "Boultons") as contingent beneficiaries for one-half of the corpus and Defendant, Carl H. Bronn, Alice May's husband of some 60 years, for one-half, as of the death of the settlor, Alice May Hughes Bronn. (R. 50-51, 371-372).

3. The trust was funded by three separate parcels of land, designated Parcel 1, Parcel 2, and Parcel 3, all located in Davis County, Utah, as follows: Parcel 1, 29 acres, more or less; Parcel 2, a small tract of land not involved in this litigation; Parcel 3, subdivided into Plats A and B, entitled the Hillside Subdivision, containing 19 separate lots. (R. 52; 373; 586 at 16-19.)

4. During Alice May's lifetime, she began selling certain portions of the real

property until eventually she had sold all of the property in Parcel 1 and Parcel 3. (R. 574-575.) Parcel 3 was sold by lot naming the grantor as Alice May Hughes Bronn, trustee of the Alice May Hughes Bronn Trust. (R. 54-58.) The conveyances occurred between September 27, 1988, and April 17, 1992. (R. 233-350.) Monies paid for each purchase were funneled through Security Title Company. (*See, e.g.*, R. 234-241, 243, 245-248.) Funds were payable to the trust, but were directed by Alice May Hughes Bronn, as trustee, to be deposited into her personal bank account with First Security Bank, located in Utah. (*See, e.g.*, R. 262-263, 266-267, 271-273.) That account was set up in her name only, without reference that the funds were trust assets. (*Id.*) The total amount paid was \$241,161.75. (R. 233.)

5. Parcel 1 was sold June 22, 2000. (R. 60.) Bonneville Title Company received the purchase price and drew a check to Alice May Hughes Bronn, trustee, in the amount of \$300,349.26. (R. 63, 411.) The settlement statement provided that the funds were to be deposited into the Alice May Hughes Bronn personal account with First Security Bank. (R. 60, 64, 413-415, 419.)

6. The sale of all portions of real property followed the same pattern—Alice May as Trustee of the Alice May Hughes Bronn Trust executed a warranty deed and received money from the sale. (R. 54-58, R. 234-241, 243, 245-248.) Alice May deposited that money into her personal bank account. (R. 262-263, 266-267, 271-273.) Part of the funds from the personal account of Alice May Hughes Bronn were then invested by her with Merrill Lynch and part with Putnam Investment in her own name and not as trustee.

(R. 75-78, 430-432.) At the time of Alice May's death, the property that is the subject of this litigation had all been sold. (R. 586 at 105-106).

7. Sometime during this period, Alice May Hughes Bronn and her husband, Carl Bronn, moved from Utah to Arlington, Virginia. (R. 211, 575.) While there they were importuned by a representative of First Union National Bank to consolidate each of their respective investments with the bank under an instrument entitled Trust Agreement, naming Alice May Bronn grantor, and First Union National Bank Private Capital Management Personal Trust Administration as trustee. (R. 73; 429; 575; 586 at 56-59.) Alice May Hughes Bronn agreed and signed the document on October 16, 2000. (R. 68-71, 377-380, 575.) She was to receive convenient installments as she directed with the balance being paid to her estate at her death. (Id.)

8. The document was signed by Alice May Hughes Bronn at the Bronn home in Virginia. (R. 586 at 59-61.) Three representatives of the bank witnessed her signature: James Roque; Glenda Briscoe; and Molly Carr. (R. 586 at 60-61, 110.) Mr. Roque and Ms. Briscoe appeared in court and testified that they each believed Alice May Hughes Bronn understood the nature of the transaction. (R. 586 at 62-68, 112-113.) Mr. Roque had theretofore met with the Bronns several times as the salesperson importuning the Bronns to accept the bank's management services. (R. 586 at 124.) Mrs. Briscoe met Alice May Hughes Bronn on the date of signing for the first time and spent approximately one hour with her. (R. 586 at 79-80, 110, 112.) Each testified that the trust management document was reviewed with Alice May Hughes Bronn, that she appeared to understand

its terms, and that she voluntarily signed the document. (R. 586 at 62-68, 112-113.)

9. Thereafter, steps were taken to consolidate the investment in Alice May Hughes Bronn's name, including working with Merrill Lynch, Putnam, and First Security Bank in Utah. (R. 75-78.) Carl Bronn assisted First Union Bank in that effort. (Id.)

10. First Union Bank was not aware of the 1979 trust concerning Parcels 1, 2, and 3 in Utah until sometime in March of 2001. (R. 586 at 68-69, 102-104, 114-116.) Mr. Roque discovered the document when he was going through some of the Bronns' records, while he was in their home assisting with payment of bills, opening mail, and otherwise providing financial services. (R. 586 at 68-69, 89-90, 102-104, 114-116.) At the time, both Alice May Hughes Bronn and Carl Bronn were failing due to age, both being approximately 88 years old. (R. 586 at 85-87.) At that time Alice May Hughes Bronn needed an independent caregiver. (R. 586 at 85-86.) Mr. Roque did not believe that she then was competent to understand financial matters, nor was she competent to either change, modify, or enter into other financial arrangements. (R. 586 at 90-91, 100-101.)

11. Alice May Hughes Bronn died June 6, 2001. (R. 434.) Her estate was probated in Virginia. The inventory showed a value of \$1,320,629. (Id.) The Bronns had no children, nor any Wills. (R. 1-2.) Accordingly, Carl Bronn inherited the whole estate rather than one-half of the estate as prescribed under the 1979 trust. (R. 586 at 161-162, 172-173.) As a consequence, Plaintiffs brought suit against Carl Bronn, alleging that disposition of Alice May Hughes Bronn's estate should be pursuant to the terms of the 1979 trust and not Virginia law of intestate succession. (R. 1-5.)

12. After the lower court found against the Boultons (R. 572-581), they appealed the decision to this Court (R. 583-584).

SUMMARY OF ARGUMENT

The 1979 Trust was a revocable trust that allowed the settlor to modify, amend, or revoke the trust in whole or in part in any manner at any time. The vested interests of a contingent beneficiary are subject to divestiture by the revocation of the trust. The Boultons were designated as contingent beneficiaries of the 1979 Trust. Alice May vested unto herself the power to revoke the trust in whole or in part during her lifetime. As such, the interests of the Boultons were subject to being divested during Alice May's lifetime. The trial court determined that the sale of the real property by Alice May during her lifetime and the depositing of the proceeds from the sale into her personal bank accounts evidenced a clear intention by Alice May to revoke the terms of the trust as to those portions of real property. Therefore, the selling of the real property by Alice May and her use of the funds outside the terms of the 1979 Trust acted as a revocation of the trust in regard to those funds which divested the Boultons from their contingent interest. Alternatively, the Court of Appeals can affirm the dismissal of the action by determining that Alice May fulfilled the terms of the trust by selling the real property and distributing the proceeds to the beneficiary. Alice May's actions in selling the corpus of the trust and distributing the proceeds from the sale to her as beneficiary are consistent with the terms of the trust and thus the purpose of the trust, to provide for the beneficiary during her lifetime, was fulfilled.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT ALICE MAY'S ACTIONS IN REVOKING THE TRUST DIVESTED THE CONTINGENT BENEFICIARIES' INTERESTS

A. The 1979 Alice May Hughes Bronn Trust was Revocable.

A revocable trust can be revoked by the settlor by complying with the terms of the trust. “[A] settlor has the power to modify a trust...to the extent that such a power was reserved by the terms of the trust. The same rule applies to a settlor’s power to revoke a trust.” *Flake v. Flake*, 2003 UT 17, ¶ 13, 71 P.3d 589 (citations omitted). *See also* Restatement (Second) of Trusts § 331, cmt. c (stating that if the settlor reserves a power to modify or revoke the trust without specifying the method of modification, the power can be exercised in any manner which manifests the intent of the settlor to modify) (cited by *Flake*, 2003 UT 17 at ¶ 22). In this case, the terms of the 1979 Trust specifically contain a provision that gives the settlor the power to “modify, amend, or revoke the trust in whole or in part in any manner at any time.” (R. 50, 371.) The language of the 1979 Trust specifically reserves to Alice May the ability to modify, amend, or revoke the trust in whole or in part. As such, the 1979 Trust was revocable. A court cannot rewrite the terms of a trust to achieve an alternative outcome. As stated by one court, “[t]his court is unable to rewrite the trust to make it into something which it is not, i.e., an irrevocable trust.” *Perrenoud v. Harman*, 2000 UT App 241, n3, 8 P.3d 293.

B. The Boultons were Contingent Beneficiaries whose Interests were Subject to Divestiture.

The Boultons were contingent beneficiaries of the 1979 Trust and their interest was subject to divestiture. The specific language of the 1979 Trust indicated:

Upon the death of Settlor, Carl H. Bronn, if he survives Settlor, shall be entitled to have distributed to him one-half of the trust estate for his exclusive use, ownership and benefit. The remaining one-half shall be held in trust to pay or distribute annually the income from said one-half and one-twentieth of the principal annually of said one-half to Marian B. Boulton for life with the remainder to her sons David and Steven, equally and in full upon the death of Marian B. Boulton. The portion to which Marian, David and Steven Boulton shall become entitled may not be disposed of by assignment or order, voluntary or involuntary, nor garnishment, execution or claim of any creditor whatsoever during the lifetime of Marian B. Boulton.

(R. 50-51, 371-372.) The language of the Trust indicates that the Boultons' interest would not pass to them until sometime in the future—upon the death of the Settlor, Alice May. Because the interest was not a present interest, but a future interest, and because the Trust was revocable, the Boultons' interest was subject to being divested. “[W]e do not hold that a vested beneficiary interest can never be revoked, but only that the revocation is subject to the terms of the individual trust agreement.” *Flake*, 2003 UT 17 at n1 (interpreting *Banks v. Means*, 2002 UT 65, ¶ 14, 52 P.3d 1190). “The children’s vested rights are subject to divestiture and will not ripen until the death of the surviving settlor.” *In re. West*, 948 P.2d 351, 356 (Utah 1997). Therefore, because the Boultons' interest was subject to divestiture if the Trust was revoked, revocation of the Trust effected a divestiture of any contingent interest held by the Boultons.

C. Alice May's Actions in Selling the Real Property and Depositing the Funds in Her Personal Bank and Investment Accounts Revoked the Trust as to Those Funds.

The trial court determined that the 1979 Trust was revocable and determined that the language of the trust did not state a specific method of revocation. (R. 577). Therefore, the trial court made factual conclusions to determine whether or not Alice May's actions manifested her intention to revoke the trust:

Alice May specifically reserved unto herself the right to revoke the trust in any manner at any time. The 1979 trust was revocable by Alice May Hughes Bronn and was subject to being amended or modified. The trust contained no specific provision for such action by her as trustor. Therefore, the Court must consider her intent to revoke, amend, or modify based upon her conduct. Utah Code §75-7-605(3)(b)(ii).

(R. 577.)

The trial court correctly determined that review of the evidence was required to determine the intent of Alice May with regard to the proceeds from the sale of the real property formerly in the 1979 Trust. "If the settlor reserves a power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust." *Lambin v. Dantzebecker*, 181 A. 353, 357 (Md. 1935) (citing Restatement of Trusts, § 330). In *Lambin*, the settlor created a trust six months before her death with the aid of her sister. Then, just before her death, she executed a new trust which substantially increased the gift to her sister and reduced that to her brothers. The court found that, although the trust did not specifically reserve the power of revocation, it contained the words, "until otherwise directed." It thus found that the grantor retained the power of revocation. The

court then found that the settlor had revoked the first trust insofar as it was inconsistent with the second. “She did not revoke it in express terms, but if declaration No. 2 is valid, it is so far inconsistent with declaration No. 1 as to amount to an implied revocation *pro tanto*.” *Id.* (emphasis in original). The court further reasoned that “if the settlor reserves a power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust.” *Id.*

In the case at bar, Alice May sold the property that was in the 1979 Trust and then deposited the proceeds received from the sale into her individual bank account. Subsequently, Alice May transferred all her funds from her individual bank and investment accounts into an account with First Union Bank. The trial court correctly found that Alice May’s actions in liquidating the assets of the trust and depositing the proceeds therefrom into her personal bank and investment accounts evidenced her intention to revoke the 1979 Trust. The Boultons cannot dispute that during her lifetime Alice May took the proceeds from the sale of the property that had been in the 1979 Trust and transferred them into her personal bank and investment accounts. The trial court determined that the transfer of the proceeds from the sale of the trust assets into multiple, personal accounts was sufficient evidence of Alice May’s intention to revoke the 1979 Trust as to those funds. These actions are consistent with Alice May’s specifically reserved right to revoke the trust in any manner at any time. Because no specific method

of revocation was specified, actions reasonably inconsistent with the terms of the 1979 Trust acted as a revocation.

The Boultons argue that Alice May sold the property as the trustee, not the settlor, of the 1979 Trust. For support, the Boultons rely on the fact that Alice May signed the deeds transferring property as “Alice May Hughes Bronn, Trustee of the Alice May Hughes Bronn Trust.” As such, the Boultons argue, the name on the deed unequivocally demonstrates that Alice May, as settlor, had no intention of revoking the trust. Br. of Appellants at 18. The Boultons misunderstand the nature of the relationship between the settlor and the trustee.

It is undisputed that real property must be titled in the name of a trustee rather than a trust itself. Otherwise, it would be an invalid conveyance. “Trusts are property interests which cannot hold property.” *Sharp v. Riekhof*, 747 P.2d 1044, 1046 (Utah 1987). Furthermore, “a deed of conveyance is void unless the grantee is capable of taking and holding the property named in the deed, and the general rule also is that to make a deed effective the grantee must be a person, either natural or artificial, capable of taking and holding the property.” *Id.* Once the property is titled in the name of the trustee, the trustee must execute the appropriate documents to transfer the property out of the name of the trustee. In order to complete the sales transaction, Alice May was required by law to execute the deed in comportment with the status of the title. The trial court correctly found that Alice May revoked the trust as settlor each time she, as trustee, sold the property and deposited the funds in her personal bank and investment accounts. The trial

court correctly found that this series of actions, coupled with the consistency of treating every sale the same, manifested her intention to revoke the trust as to those funds. (R. 577.)

The trial court found that Alice May's actions in liquidating the assets of the 1979 Trust and not replenishing it with any assets was sufficient evidence of Alice May's intention to revoke the 1979 Trust. *In Adessa Estate*, 1994 Pa. D. & C. Lexis 59, a Pennsylvania court held that the decedent's actions in liquidating the trust account and not ever replenishing the account was evidence that the decedent intended to terminate the trust agreement and that her actions revoked the trust. In this case, Alice May liquidated the real property that was held in the 1979 Trust. When she received funds from the sale of the real property, she used those funds for her benefit and she also deposited some funds into accounts that did not belong to the 1979 Trust. Alice May did not set up any account for the 1979 Trust and she did not use the proceeds from the sale of the real property to purchase any assets in the name of the 1979 Trust. As such, Alice May liquidated the assets of the 1979 Trust which left the trust empty and she did not replenish the trust with any assets. Therefore, just as in *Adessa*, the evidence shows that Alice May intended to revoke the 1979 Trust by her actions, and the trial court correctly determined that Alice May's actions evidenced her intention to revoke the trust as to those funds.

The Boultons argue that there was no evidence of Alice May's intention to revoke the trust. Br. of Appellant at 22. Determining the intent of an actor is a question of fact that can only be reversed upon a finding that the ruling of the lower court was clearly

erroneous. *Sprouse v. Jager*, 806 P.2d 219, 222 (Utah App. 1991) (citing *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990)). “To show clear error, the [contesting party] must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.” *State v. Shipp*, 2005 UT 35, ¶ 20, 116 P.3d 317 (citing *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996)). The Boultons, however, do not marshal any facts to support their conclusion that there was no evidence of Alice May’s intention to revoke the trust. In fact, the record shows that the trial court correctly determined that the actions of Alice May evidenced her intention to revoke the trust as to those funds.

The underlying facts are undisputed by the Boultons; they merely reargue that the facts establish their case and that the trial court was wrong. Such an argument is misplaced. The Boultons’ failure to marshal the evidence to show that the trial court’s findings of fact are clearly erroneous is fatal to their appeal. In order to demonstrate to the reviewing court that the trial court’s findings of fact are clearly erroneous, the party challenging those facts is required to present each and every scrap of evidence to support the trial court’s findings then must show that those findings are “so lacking in support as to be against the clear weight of the evidence.” *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). In *West Valley*, the Court of Appeals articulated the burden of the litigant who challenges the findings of fact as:

[T]he marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The

marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id. Here, the Boultons argue that the facts are undisputed but that the facts do not support the trial court's conclusion of law that the actions taken by Alice May show her intention to revoke the trust as to those funds. As such, the Boultons have failed to marshal the evidence to show that the trial court's findings of fact are clearly erroneous and thus their appeal must fail.

II. ALICE MAY, AS TRUSTEE, HAD THE POWER TO DISTRIBUTE THE CORPUS OF THE TRUST TO THE BENEFICIARY

A. The Court can Affirm the Ruling of the Lower Court on Alternate Grounds.

The Court "may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action,'" and even though it "was not considered or passed on by the lower court." *Okelberry v. W. Daniels Land Ass'n.*, 2005 UT App 327 (quoting *Bailey v. Bayles*, 2002 UT 58, P10, 52 P.3d 1158). In this case, the trial court determined that Alice May Hughes Bronn's actions in selling the real property and depositing the proceeds from the sales acted as a revocation of that portion of the trust. However, the court could have reached the same conclusion simply

by finding that Alice May, acting as trustee, distributed the proceeds of the trust to herself as beneficiary.

B. Alice May Fulfilled the Terms of the Trust by Selling the Real Property and Distributing the Proceeds to the Lifetime Beneficiary.

The trial court concluded that Alice May, in effect, paid herself as beneficiary of the trust which gave her the ability to use the funds as she saw fit. By transferring the assets of the trust into the personal account of the beneficiary, Alice May, as trustee, fulfilled the terms of the trust and manifested her intent to distribute the trust proceeds to herself as the lifetime beneficiary of the 1979 Trust.

In *Larrabee v. Royal Dairy Prod. Co.*, 614 P.2d 160 (Utah 1980), the settlor created a revocable trust. The trust, however, was made pursuant to an agreement, and the agreement was not revocable. The court found that, although the trust was revocable, the beneficiary was entitled to certain properties under the agreement. However, the court also held that the settlor, as lifetime beneficiary, retained the right to use up the trust property during her lifetime. Thus, even though she could not divest her son by revocation, she could effectively divest him simply by exhausting the corpus of the trust during her lifetime. *Id.* at 163. Therefore, although the agreement was “valid and unrevoked in its entirety,” the mother retained the right “to use and consume all of her property during her lifetime.” *Id.*

Whether selling the property and depositing the proceeds into the beneficiary’s personal account showed an intent by the trustee to distribute the trust to the beneficiary is a question of fact, which is reviewed for clear error. *Sprouse*, 806 P.2d at 222. Here, the

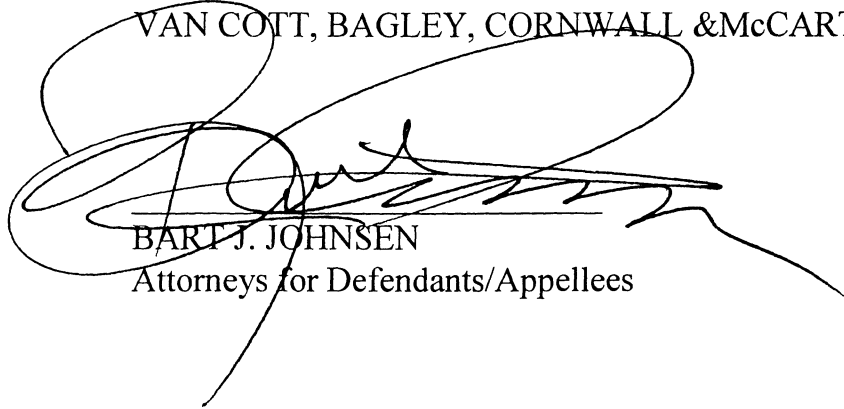
undisputed facts establish that Alice May was the trustee and the beneficiary during her lifetime. It is undisputed that the sale of the real property and the depositing of the funds into her personal bank and investment accounts occurred during her lifetime. Just as in *Larrabee*, Alice May, as beneficiary, had the right to consume the assets of the 1979 Trust during her lifetime which could leave an empty trust for the beneficiaries upon her death. The trial court determined that she, in effect, distributed the proceeds to the beneficiary and thus removed those funds from the terms of the 1979 Trust. It is incumbent upon the Boultons to establish that the trial court's conclusion that "[a]s trustee, she, in effect, paid herself as beneficiary of the trust and thereafter could use and transfer those funds as she chose independent of the trust provisions" was clearly erroneous. (R. 577.) The determination of the trial court can be affirmed on either basis: Alice May, as settlor, directed the trustee to sell the property as a revocation of the trust; or, Alice May, as beneficiary, directed the trustee to sell the property to distribute the funds for the use of the beneficiary.

CONCLUSION

By selling the trust property and depositing the proceeds in her bank account, Alice May manifested an intention to revoke the 1979 Trust. Also, by distributing the proceeds of the 1979 Trust to herself as beneficiary, Alice May fulfilled the conditions of the 1979 Trust and left no property in the trust for the contingent beneficiaries. Because the Appellant cannot show that the trial court was clearly erroneous in reaching each of these conclusions, the decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 26TH day of August, 2005.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

A large, stylized handwritten signature in black ink, appearing to read 'Bart J. Johnsen', is written over the printed name and title.

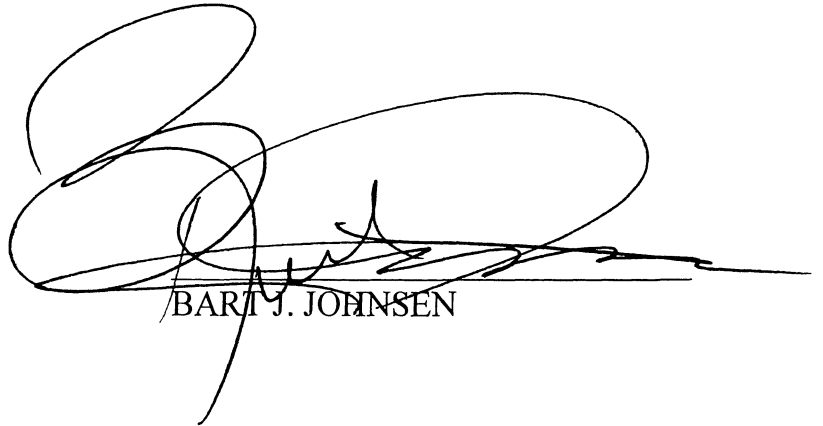
BART J. JOHNSEN

Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the **26th** day of August, 2005, two true and correct copies of the foregoing BRIEF OF THE APPELLEES were Mailed, first class postage affixed to:

**George K. Fadel
170 West 400 South
Bountiful, Utah 84010**



A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

BART J. JOHNSEN

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