

2005

Janet S. Perez v. Utah Department of Health, Division of Health Care Financing : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JANET S. PEREZ,	:	
Petitioner/Appellant,	:	BRIEF OF APPELLANT
vs.	:	
UTAH DEPARTMENT OF HEALTH, DIVISION OF HEALTH CARE FINANCING,	:	
Respondent/Appellee.	:	Appellate Case No. 20050895-CA

PETITION FOR REVIEW OF A FINAL AGENCY ORDER OF THE
UTAH DEPARTMENT OF HEALTH, DIVISION OF HEALTH CARE FINANCING,
BASED ON DECISION OF DOUGLAS JENSEN, HEARING OFFICER

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UTAH APP

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JURISDICTIONAL BASIS FOR THIS APPEAL

This Court has jurisdiction of this petition for review pursuant to *Section 78-2a-3(2)(a), Utah Code*, “final orders and decrees resulting from formal adjudicative proceedings of state agencies. . . .”

ISSUES PRESENTED FOR REVIEW

1. The central issue in this case is whether the Final Agency Order incorrectly concludes that a parcel of real property held by the Atticus Family Trust pursuant to an Irrevocable Trust Agreement dated September 15, 1992 (hereafter sometimes “Trust” or “Trust Agreement”) is an asset of the petitioner, Janet S. Perez (hereafter “petitioner” or “Mrs. Perez”) which disqualifies Mrs. Perez from Medicaid assistance on the grounds that its value exceeds the Medicaid asset limit. The standard of review of this issue is

essentially a correction of error standard involving interpretation and construction of the Irrevocable Trust Agreement, in light of Utah law, and the applicable Medicaid statutes and regulations. *Section 63-46b-16(4)(d), Utah Code; Savage Industries, Inc. v. Utah State Tax Commission*, 811 P. 2d 664, 160 U. A. R. 5, (Utah, 1991); *Utah Department of Administrative Services v. Public Service Commission*, 658 P. 2d 601 (Utah, 1983). Cf. *Bleazard v. Utah Department of Health*, 861 P. 2d 1048, 220 U. A. R. 33 (1993), “This appeal requires us to construe federal and state statutes, regulations and rules governing the Medicaid program. Thus, it presents questions of law and ‘we accord no particular deference to the agency decision . . . but review . . . for correctness.’ *Allen v. Department of Health*, 850 P. 2d 1267, 1269 (Utah 1993).” 861 P. 2d at 1049. Similarly, interpretation of the Trust Agreement is essentially a question of law which is reviewed for correctness, no deference being given to the finder of fact. *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, 94 P. 3d 292, ¶6.

The following specific issues are significant to determination of the central issue described above:

A. Whether the Final Agency Order incorrectly concludes that Mrs. Perez is a “beneficiary” of the entire corpus of the Trust on the basis of the general definition of “beneficiary” found at *Section 75-7-103, Utah Code*, rather than the terms of the Trust Agreement itself, which limits any interest of Mrs. Perez to an undisputedly valueless lifetime use right. The standard of review is identical to that set forth for issue one above.

B. Whether the Final Agency Order incorrectly fails to find that any interest of Mrs. Perez in the trust property is a valueless lifetime use right, based on the evidence presented at hearing. This issue is reviewed on a substantial evidence standard, *Section 63-46b-16(4)(g), Utah Code*, however, there is no evidence in the record disputing Mrs. Perez' evidence regarding value. The hearing officer did not reach this question of fact due to his interpretation of the Trust Agreement.

C. Whether the Final Agency Order incorrectly concludes that all trust property not specifically gifted to the named beneficiaries constitutes Mrs. Perez' "separate estate," rather than trust corpus which the successor trustees may distribute only according to the terms of the trust, which terms do not include any power to distribute to Mrs. Perez. The standard of review for this issue is identical to that set forth for issue one above.

D. Whether the Final Agency Order incorrectly concludes that the successor trustees have succeeded to Mrs. Perez' reserved power to alter the beneficial interest under the Trust Agreement. The standard of review for this issue is identical to that set forth for issue one above.

DETERMINATIVE STATUTES

42 U. S. C. 1396a(k):

(1) In the case of a medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor . . . is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For

purposes of the previous sentence, the term “grantor” means the individual referred to in paragraph (2).

(2) For purposes of this subsection, a “medicaid qualifying trust” is a trust, or similar legal device, established (other than by will) by an individual. . . under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

(3) This subsection shall apply without regard to—

(A) Whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable the grantor to qualify for medical assistance under this subchapter; or

(B) Whether or not the discretion described in paragraph (2) is actually exercised.

Section 75-5-503, Utah Code:

“A power of attorney may not be construed to grant authority to an attorney-in-fact or agent to perform any of the following, unless expressly authorized in the power of attorney:

(1) create, modify, or revoke an inter vivos revocable trust created by the principal. . . .”

STATEMENT OF THE CASE

1. Nature of the Case

This is a petition for review of a Final Agency Order of the Utah Department of Health, Division of Health Care Financing (hereafter sometimes the “Department of Health”), based on a recommended decision by hearing officer, Douglas Jensen, denying Mrs. Perez medicaid benefits based on imputation to her of the value of a tract of land situated in Kane County, Utah, owned by the Atticus Family Trust pursuant to a

September 15, 1992 Irrevocable Trust Agreement.

2. Course of Proceedings.

On October 12, 2004, the Department of Health issued a Notice of Decision to Mrs. Perez denying her medicaid benefits on the grounds that her assets exceeded the \$2,000.00 Medicaid asset limit (*R. 5, 125*). Mrs. Perez, through family, requested a hearing on that denial. *Ibid.* On May 23, 2005, hearing convened (*R. 124*). Following hearing, the hearing officer issued a Recommended Decision, (*R. 124-133*), which the Department of Health adopted as its Final Agency Order (*R. 122*). Mrs. Perez has appealed to this court.

3. Agency Disposition

On September 2, 2005, the Department of Health issued a Final Agency Order confirming their prior Notice of Decision denying Medicaid benefits to Mrs. Perez (*R. 122*).

STATEMENT OF FACTS

1. Mrs. Perez is 65 years old (*R. 71*).
2. Since January 22, 2004, she has resided at the Kane County Skilled Nursing Facility, where she suffers from meningioma (cancer of the covering of the brain) and hydrocephalus (*Ibid*).
3. Mrs. Perez has an advance case of meningioma. Her son, Rob Perez, testified that communication with Mrs. Perez is very difficult, sometimes she responds, other times she stares blankly and is not responsive to any stimulus (*Tr. 55*). Mrs. Perez'

daughter, René Pace, testified that Mrs. Perez cannot get out of bed on her own, she cannot feed herself, and she can't hold hands for lack of strength in her arms (*Tr. 56*). Sometimes Mrs. Perez says to René that she loves her, but other times she just blankly stares, even saying that she has not seen her daughter René when René is standing in front of her (*Tr. 56*).

4. Mrs. Perez was first diagnosed with a brain tumor in 1977 (*Tr 54*). Surgery followed that same year and Mrs. Perez recovered and was re-employed (*Tr. 55*).

5. Meningioma is a very slow moving condition (*Ibid*). It was not until December, 2003 that Mrs. Perez began a very marked decline in her condition, going from being able to get up on her own, feeding herself, and carrying on coherent conversations to her present condition in the period of about one month (*Tr. 57*).

6. Today, Mrs. Perez is confused most of the time and unable to care for herself outside of a skilled nursing facility (*Tr. 86*).

7. Mrs. Perez' physician, Dr. Jonathan Bowman states that Mrs. Perez "is completely dependent on skilled nursing care for her daily needs. She is bed-bound most of the day and is only able to be transferred to a wheelchair with a lift." (*R. 72*).

8. Dr. Bowman concludes that Mrs. Perez "is confused most of the time and is unable to make daily decisions due to her mental status. She would not be able to care for herself outside of a skilled nursing facility" (*Ibid*).

9. On September 15, 1992, Mrs. Perez, with her sister, Roberta Jean Flournoy, established the Atticus Family Trust by Irrevocable Trust Agreement of that date (*R. 31*).

10. The Atticus Family Trust has no bank account and no cash assets of any kind, its sole asset being a 50 acre tract of land in Kane County (R. 55-57).

11. René Pace testified that this 50 acre tract of land is approximately two-thirds gully or canyon with a creek running through it (Tr. 60). It is the same general area where a local boy was killed when a canyon wall collapsed earlier in 2005 (*Ibid*).

12. The property is very sandy (Tr. 60). The portion of the property up out of the canyon has large sink holes (*Ibid*).

13. The Trust Agreement has an unusual provision that “[i]n the event of erosion of a beneficiary’s ½ acre choice of land, rendering the land unsuitable for a homesite,” the site “can be extended, provided only that said extended portion does not encroach on another beneficiary’s homesite selection, or a different site can be selected” (R. 37).

14. One of the selected homesites has a mobile home on it which is now dangerously close to the canyon and which has been condemned by the building inspectors (Tr. 61). No one lives there (*Ibid*).

15. In a period of about nine years, the area behind the condemned mobile home has eroded 6-8 feet so that the small fence around the back of the mobile home is now on the edge of the canyon (Tr. 64).

16. The travel trailer referred to in the Trust Agreement, Article IV(A)(2), was removed four to five years ago due to its condition (Tr. 64, 76).

17. There is no fence around the property and the property has a lot of sagebrush, with no grassy areas (Tr. 60, 63). René Pace opined that a cow feeding there “would not

last very long” (*Tr.77*).

18. The eastern boundary of the property appears to follow the creek bottom but there are no water rights with the property, and no rights to water cattle from the creek (*Tr. 65, 77*).

19. None of the three witnesses supporting petitioner at the hearing could conceive of any way in which a right to use the property for Mrs. Perez’ lifetime could have any marketable value (*Tr. 79*).

20. The witnesses for the Department of Health acknowledged that none of them had ever looked at the property (*Tr. 38*).

21. Mrs. Perez’ sister, Roberta Jean Flourney, with whom Mrs. Perez established the Atticus Family Trust, died in March approximately two years before the hearing (*Tr. 50*).

22. The name Atticus Family Trust relates to family history and demonstrates an intent to create a safe haven for the family (*Tr. 67-69*).

23. The Department of Health denied benefits on the basis of Kane County’s assessment of the property which placed its value at \$82,219.00 (*R. 5, 96*).

24. Petitioner here summarizes key provisions of the Trust Agreement:

A. By the Preamble and Article I of the Trust Agreement, petitioner, Janet Pace Perez, as Trustor, establishes the Atticus Family Trust, with herself and her sister, Roberta Jean Flourney, as trustees and transferred to the Trust the property described above. (*R. 34, 55-57*).

B. By Article IV, Trustor “irrevocably gifts beneficial ownership in the Trust to her children Rene’ Elizabeth Pace Tulak and Roberta Thomas Perez, and her niece and nephew, Jean Virginia Jiroudek, aka Jean V. Flournoy and Thomas Ronald Jiroudek.” (R. 35).

C. By Article IV(A)(1), Trustor “reserves to her children and niece and nephew named above for their exclusive use a minimum of ½ acre each . . . to be used as a homesite for each beneficiary, for such beneficiary’s use. . . .” (R. 35-36).

D. By Article IV(A)(2), “Trustees Janet Pace Perez [petitioner] and/or Roberta Jean Flournoy shall be entitled to use and enjoyment of the property for their lifetimes. . . .” (R. 36).

E. By Article IV(A)(4), homesites can be adjusted in event of erosion. (R. 37).

F. By Article IV(A)(7), “[t]he Trust may use the ‘common’ land for purposes of generating income,” so long as certain conditions are met, including sufficient income to support expenses, compliance with law, land preservation, and no undue hardship on the beneficiaries.” (R. 37-38).

G. By Article IV(C), Trustor, “shall have the power to alter the terms of the use or disposition of the property during her lifetime, provided that she may not pledge the property for the benefit of her individual creditors, or change any homesite of the beneficiaries after a homesite is selected and the beneficiary has made material improvements to the homesite. Until then, the Trustor may modify the beneficial

interests regarding the homesite. Other than the homesite, the Trustor reserves the right to change the beneficial interest as she may wish.” (R. 38).

H. By Article V(A), “[d]uring the lifetime of the Trustor, the Trustee may pay to the beneficiaries, in the discretion of the Trustee, the up-to-the net income of the Trust Estate. . . .” (R. 38).

I. By Article V(B), “[i]f Trustor or any Beneficiary shall come under any physical or mental disability, in addition to the net income of the Trustor’s separate estate, the Trustee may pay to or apply for the benefit of the Trustor so much of the principal of the disabled Trustor’s separate estate as the Trustee shall deem necessary for the Trustor’s proper support, health, and maintenance, to be paid out of all beneficiaries’ shares, as the case may be, provided that no payment shall be made where other means of support are available, including insurance, or public assistance.” (R. 39).

J. By Article VI, “[u]pon the death of the Trustor, the Trustee shall marshall the assets of the trust estate . . . and do the following:

“(1) Divide the Estate into four (4) equal shares of beneficial interest [for the four beneficiaries]. . . .

“(2) The surviving Co-Trustees may thereafter liquidate and distribute the Trust to the beneficiaries [upon affirmative vote] . . . If not so liquidated (partially or fully) the property shall continue to be held in trust with the property administered for the benefit of the beneficiaries. . . .” (R. 40).

K. By Article IX(A), if “either Trustee resigns or is unable to act for any

reason, the following shall act as Successor Trustee, in the order named:

“1. The survivor of the initial Trustees.

“2. Robert Thomas Perez and Thomas Ronald Jiroudek as Co-Trustees, with a majority of the beneficiaries as set forth in Article III.” (R. 44).

L. By Article XI(K)(1), “If at any time the Trustee (or Successor Trustee, as the case may be) shall receive a written statement signed by a Trustor’s or Trustee’s personal physician (or a specialist approved by such personal physician, or any two other licensed physicians) stating that he considers a Trustor or a Trustee to be so mentally or physically incapacitated as to be substantially unable to manage his or her financial resources and affairs effectively. . . such Trustor or Trustee shall be considered incapacitated. . . .” (R. 49).

M. By Article XI(K)(2), “[i]f a Trustor or Trustee is determined to be incapacitated as provided above, then, during the period of such incapacity (a) if such Trustor or Trustee is then acting as a trustee hereunder, he shall be deemed to have resigned. . . . (c) the Trustee shall have power and authority on such incapacitated Trustor’s or Trustee’s behalf to exercise or perform any act, power, duty, right or obligation whatsoever that such Trustor or Trustee may have, relating to any person, matter, transaction, or property, real or personal, tangible or intangible, whether in the trust estate or owned by Trustor or Trustee including, without limitation, power to transfer to himself as Trustee upon the terms set forth in this agreement any property owned by Trustor or Trustee. The power granted under (c) above shall be construed and

interpreted as a general durable power of attorney to act as such Trustor's attorney in fact and agent in his name and for his benefit and shall be in addition to all other powers bestowed upon the Trustee by this agreement." (R. 50).

SUMMARY OF ARGUMENT

Nowhere in the Trust Agreement is there any provision granting to Mrs. Perez anything other than the lifetime use right set forth in Article IV(A)(2). By Mrs. Perez' undisputed hearing evidence, this lifetime use right is valueless, considering the nature and limitations of the subject real property, which property is the only asset of the Trust.

By Article IV(A), Mrs. Perez "irrevocably gifts beneficial ownership in the Trust to" four named beneficiaries. Mrs. Perez is not one of these. Upon the death of the Mrs. Perez, her successor trustee(s) are to divide and distribute the trust estate among these same four named beneficiaries. There simply is no basis for concluding, as the hearing officer did, that Mrs. Perez is a beneficiary of the entire corpus of this irrevocable trust, which ultimately vests in her surviving beneficiaries only after her death.

The Trustee(s) reserved power to invade principal of Mrs. Perez' "separate estate" in Article V(B) reaches nothing which violates the Medicaid asset limit because the only "separate estate" which can be identified anywhere is her undisputedly valueless lifetime use right.

The Trustor's reserved power under Article IV(C), to alter the terms of the use or disposition of the property during her lifetime cannot include the power to make herself a beneficiary of the trust because she has already gifted, irrevocably, the beneficial interest

under the trust to the four named beneficiaries. In any case, this reserved power died with Mrs. Perez' mind since, as a matter of law, a general power of attorney such as that created by Article XI(K)(2), does not include an amendment power unless expressly granted by empowering document.

ARGUMENT

Petitioner does not dispute application of *42 U. S. C. A. Section 1396a(k)(1)*, relied on by the hearing officer, that in determining the medicaid asset limit the amount deemed available to the petitioner is "the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor." Petitioner submits, however, that only a strained and improbable construction of the Trust, such as that created by the hearing officer, allows the trustees to do anything which violates the Medicaid asset limit.

There is no clause in the Trust naming Mrs. Perez as a beneficiary of the Trust. Article IV(A) identifies four beneficial interests and names four beneficiaries. Mrs. Perez is not one of these. Article VI directs distribution of the trust assets to these same four named beneficiaries on Mrs. Perez' death. Obviously, Mrs. Perez is not one of these. No clause in the Trust identifies Mrs. Perez as one of the beneficiaries of the Trust.

Article IV(A)(2) reserves to Mrs. Perez and her sister a "right to use and enjoyment of the property for their lifetimes," but this is a far different right from the full

beneficial interest in the trust corpus granted to the four named beneficiaries.

The hearing officer concluded that Mrs. Perez “is a beneficiary of the trust during her lifetime because she has a present beneficial interest in 48 acres of the property” and that further, “[a]s an incapacitated person, she is currently entitled to the net income and principal from the trust.” (*R. 125*).

The hearing officer justifies his conclusion by citation to Section 75-7-103, Utah Code, that a “beneficiary” is a “person that (i) has a present or future beneficial interest in a trust, vested or contingent.” Even if statutory definition is substituted for reasonable trust construction to determine that Mrs. Perez is a “beneficiary” of the Trust, the next logical question must be what is the nature of Mrs. Perez’ interest in the trust property? It certainly cannot be the ultimate benefit of distribution from the Trust upon Mrs. Perez’ death since that is granted to four named individuals other than Mrs. Perez. It can only be whatever interest is reserved by the terms of the trust to the Mrs. Perez. That interest is a limited lifetime use right only, which obviously terminates at Mrs. Perez’ death.

At hearing, Mrs. Perez presented extensive evidence that her lifetime right to use the property is valueless. Mrs. Perez admits that the property has an assessed value on the records of Kane County, but this value is necessarily based on conveyance of the fee interest in the property to a third party--something which Mrs. Perez no longer do since she conveyed the property instead to this irrevocable trust. The hearing officer made no findings on this evidence. The only basis for not doing so is the improbable conclusion that Mrs. Perez’ interest in the trust property is identical to that of the four named

beneficiaries, which clearly is not the case.

In *Perrenoud, et al., v. Harman, et al.*, 2000 UT App 241, 8 P. 3d 293, this court considered and stated certain rules of construction applicable to trusts, citing to and quoting from *Makoff v. Makoff*, 528 P. 2d 797 (Utah, 1974). First, “The general rules of construction of written instruments apply to the construction of trust instruments, and those rules require a determination of the intention of the settlor where the creation of the trust is a unilateral matter.” *Ibid*, ¶13. If the trust is a written instrument, “the intention of the settlor must be ascertained from the language thereof, and the court may not go outside of the language in an effort to give effect to what it thinks the intent was.” *Ibid*. However, ascertaining the intention of the settlor does involve consideration of the “entire instrument aided by surrounding circumstances existing at the time of the creation of the trust.” *Ibid*. Thus, in *Perrenoud*, the “entire instrument” was considered in order to determine the effect of an addendum. *Ibid*.

Mrs. Perez submits that no reasonable and harmonious construction of the Trust can conclude that Mrs. Perez’ interest in the trust property is equal to that of the named beneficiaries. Repeatedly, the term “beneficiary” is used in the Trust in circumstances which obviously do not include Mrs. Perez: Article III refers to a quorum of “beneficiaries” after Mrs. Perez death. Article IV allows selection of one-half acre homesites for each “beneficiary’s use.” Article IV(B) prohibits a “beneficiary” from adding to the Trust but allows the initial trustees to do so. Article VI, dealing with distribution after the death of Mrs. Perez, repeatedly uses the term “beneficiary” to refer

only to her survivors. Thus, while Mrs. Perez has a lifetime use right to the property, that is all she has. She does not have a disqualifying beneficial interest in or to the corpus of the Trust.

The hearing officer is correct that at the hearing there was “much discussion,” (*R. 129*), of the impact of Section V(B) of the Trust: “If Trustor or any Beneficiary shall come under any physical or mental disability, in addition to the net income of the Trustor’s *separate estate*, the Trustee may pay to or apply for the benefit of the Trustor so much of the principal of the disabled Trustor’s *separate estate* as the Trustee shall deem necessary for the Trustor’s proper support, health, and maintenance, to be paid out of all beneficiaries’ shares, as the case may be, provided that no payment shall be made where other means of support are available, including insurance, or public assistance.”

[Emphasis supplied.]

The most obvious meaning of this clause is that Mrs. Perez may have accumulated, by the time of her disability, a valuable estate separate and apart from this Trust. This clause allows her successor trustees to pay disability related expenses of Mrs. Perez or any beneficiary from Mrs. Perez’ separate estate and property. In fact, Mrs. Perez has no valuable separate property, so the clause simply has no application.

However, the Department of Health cited this clause in support of their claim that the Trustees had a general power to pay Mrs. Perez’ disability related expenses out of the Trust (*R. 115*). For this reason, Mrs. Perez’ case presentation at the hearing included consideration of the potential benefits Mrs. Perez might have by reason of her lifetime

right to use the property, which right is arguably part of her “separate estate,” since it is reserved to her by Article IV(A)(2). Mrs. Perez’ evidence was unopposed by any contrary evidence from the Department of Health. Mrs. Perez’ evidence demonstrated that, considering the nature and condition of the property, this lifetime use right had no value.

Incredibly, the hearing officer concluded that “the entire 48 acres of ‘ungifted’ property remain the petitioner’s ‘separate estate,’” (R. 130). There simply is no sense to this conclusion. Mrs. Perez placed the entire property irrevocably in trust, to be administered according to the terms of the trust. Having done so, Mrs. Perez had no estate or interest in the trust property except as reserved by the terms of the trust. To conclude otherwise, as the hearing officer did, is to stand the entire law of trusts on its head. It is tantamount to saying that this irrevocable conveyance in fact has no legal significance--this trust property is still Mrs. Perez’ separate property despite the Trust Agreement. Clearly this conclusion cannot be sustained.

Petitioner does not dispute the conclusion of the hearing officer that “it is not until the death of the petitioner that her children and niece and nephew are entitled to ownership of any property beyond their previously selected ½-acre sites as stated in Article VI. . . .” (R. 130). By the same token, it is also correct that the general trust corpus is not the separate property of the petitioner. The property has been placed, irrevocably, in trust. While there and until distribution following petitioner’s death, it is neither the separate property of the four named beneficiaries nor the separate property of

the petitioner. It is trust property to be administered by the trustees under the terms of the trust. Unless this court is prepared to conclude, for some unknown reason, that this trust has no legal significance whatsoever, this court cannot sustain the conclusion of the hearing officer that the petitioner's "separate estate" extends beyond a limited lifetime use right, which is undisputedly valueless.

The hearing officer's decision also mentions a reserved right in Petitioner to amend the trust, which right is stated in Article IV(C) as follows: "Trustor shall have the power to alter the terms of the use or disposition of the property during her lifetime," including the reserved right "to change the beneficial interest as she may wish." (*R. 38, 128*). However, it is beyond dispute that the petitioner lacks capacity to amend the trust. Her physician has stated that since her admission to the Skilled Nursing Facility "she has been neither physically nor mentally capable of managing her own financial affairs," (*R. 71*), and in the Recommended Decision below the petitioner is "acknowledged as disabled." (*R. 128*). Nevertheless, the hearing officer concludes that the "successor trustees now hold the authority to take any and all actions originally granted to the petitioner as Trustor and original Trustee of the trust." (*R. 129*).

It is incorrect to conclude that the successor trustees of the trust have the legal ability to alter the terms of the trust so as to extend petitioner's interest in the trust beyond her limited and valueless lifetime use right. By the terms of Article XI(K)(2) of the trust, the trustees have "(c) . . . power and authority. . . to perform any act, power, duty, right or obligation whatsoever that such Trustor or Trustee may have . . . [which]

power granted to the Trustee under (c) above shall be construed and interpreted as a *general durable power of attorney* in fact and agent in his name and for his benefit. . . .” [Emphasis supplied.] (R. 50). Under Utah law, specifically *Section 75-5-503, Utah Code*, a “power of attorney may not be construed to grant authority to an attorney-in-fact or agent to . . . (1) create, modify, or revoke an inter vivos revocable trust created by the principal. . . ,” unless such a power to amend is “expressly authorized in the power of attorney.” Therefore, the specter of creating an additional right or conferring an additional benefit on petitioner which violates the Medicaid asset limit does not exist as no power to amend is expressly named as a power which inures to the successor trustees.

While *Section 75-5-503, Utah Code*, specifically mentions “revocable” trusts, it’s underlying policy should be held to apply also to amendable, irrevocable trusts. The reasons for the limitation on the holder of the power of attorney apply regardless of whether the Trust is revocable or irrevocable: the holder of a mere power of attorney should not have authority to alter a person’s lifetime property dispositions. The probability is that the drafters of *Section 75-5-503* simply did not anticipate an *amendable* irrevocable trust. Moreover, *Section 75-5-503, Utah Code*, simply restates the law of agency as it applies to existing agreements: “The rule is quite universal that the power to execute a contract or agreement does not grant authority to vary the agreement after it has been executed, nor is the power to vary an agreement after execution inferred from a general power to make it.” *Agency* §85, 3 *Am Jur 2d* 488 (1962). Therefore, there is no power in any current trustee of the Trust to alter the Trust

so as to grant to Mrs. Perez any beneficial interest in the Trust which would disqualify her from Medicaid benefits.

It bears asking that even if none of this were accurate, and Mrs. Perez were competent to amend her trust, how would she do so to extend a benefit to herself beyond the limited and valueless lifetime use right which she already has? She cannot take the fee of the trust property back to herself because she has placed it already in trust, irrevocably, and it makes no sense whatsoever for her to make herself a beneficiary of the trust, since she would then take a beneficial interest in the fee of the trust property only after her death. There simply is no realistic amendment scenario under which Mrs. Perez' lifetime use right under the Trust can be enlarged so as to disqualify her from Medicaid benefits.

Finally, at the hearing, there was argument that the Trust assets should be considered disqualifying assets if for no reason other than that the Successor Trustees might be friendly to the Petitioner, do as they please, and allow distribution to the Petitioner just because they wanted to do so, or just because everybody involved decided to allow it to happen.

This kind of argument was considered and specifically rejected by the United States District Court for the Northern District of New York in *Verdow Ex Rel. Meyer v. Sutkowy*, 209 F. R. D, 309 (N. D. N. Y., 2002). *Verdow* involved a certified class action in which the plaintiffs were elderly nursing home residents who had established irrevocable trusts. In administering the Medicaid program, the State adopted a broad

ranging “any circumstances” test for disqualification—if there was any remote possibility of benefit to these plaintiffs from their trusts, then the plaintiffs should be disqualified from Medicaid benefits. Though the plaintiffs’ trusts were irrevocable, the terms of their trusts allowed them to appoint or change beneficiaries, and New York law allowed for revocation of any Trust, even an irrevocable one, if all beneficiaries consent. The State argued that because the plaintiffs could alter their trusts to include beneficiaries who were friendly to them and therefore amenable to revocation of their otherwise irrevocable trusts, all trust assets should be considered available to the plaintiffs.

The District Court rejected this argument as “entirely speculative,” *209 F. R. D. at 316*, holding that “the decision of whether or not to provide Medicaid benefits should not be based on the remote possibility of collusion,” *ibid*, instead concluding as a matter of law that despite the plaintiff’s reserved powers to control who benefitted from their trusts “there are no possible circumstances under which payment from the corpus of the irrevocable trusts could be made to or for the benefit of plaintiffs.” *Ibid*.


In the present case, Mrs. Perez is entitled to the same treatment. The possibility of other disposition based on remote possibilities or unwarranted speculation is not a basis for imputation of trust assets to Mrs. Perez, as a matter of law.

CONCLUSION

The Final Agency Order should be reversed. Since no contrary evidence as to the value of Mrs. Perez’ lifetime use right was presented at hearing, there is no factual basis

on which Mrs. Perez could be denied benefits on remand. The Department of Health should be ordered to extend Medicaid benefits to Mrs. Perez.

Respectfully submitted this 19th day of January, 2006.

By: 
L. Edward Robbins
Attorney for Petitioner/Appellant

Certificate of Service

I hereby certify that on the 19th day of January, 2006, I served the foregoing Brief of Appellant upon the following individuals by depositing two true and correct copies thereof in the U. S. Mails, first class postage fully prepaid, addressed as follows:

Brent A. Burnett
Assistant Attorney General
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Attorney General
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Attorneys for Respondent/Appellee


L. Edward Robbins

APPENDIX I

FINAL AGENCY ORDER



**Utah Department of Health
Executive Director's Office**

David N. Sundwall, M.D.
Executive Director

A. Richard Melton, Dr. PH
Deputy Director

Allen Korhonen
Deputy Director

Health Care Financing

Michael J. Davis
Division Director

State of Utah

MARK HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

JANET S. PERFZ

Petitioner

vs

UTAH DEPARTMENT OF HEALTH

DIVISION OF HEALTH CARE FINANCING,

Respondent

FINAL AGENCY ORDER

Case No. 04-350-88

IF YOU ARE NOT SATISFIED WITH THIS DECISION, YOU MAY REQUEST A RECONSIDERATION FROM THE DIRECTOR OF HEALTH CARE FINANCING WITHIN TWENTY (20) DAYS AFTER THIS DECISION IS SIGNED. IF YOU WOULD LIKE TO APPEAL THIS DECISION, YOU MAY FILE A PETITION IN THE UTAH COURT OF APPEALS WITHIN THIRTY (30) DAYS AFTER THIS DECISION IS SIGNED. IF YOU DECIDE TO APPEAL, YOU ARE NOT REQUIRED TO ASK FOR A RECONSIDERATION FIRST, BUT YOU MAY DO SO IF YOU WISH. IF YOU HAVE QUESTIONS, CALL (801) 538-6576.

The enclosed Recommended Decision has been reviewed pursuant to Section 63-46b-12 Utah Code Ann. 1953, as amended, entitled "Agency Review - Procedure," and Department of Health Administrative Rule R410-14, entitled "Division of Health Care Financing Administrative Hearing Procedures for Medicaid/UMAP Applicants, Recipients, and Providers."

I hereby adopt Recommended Decision No. 04-350-88 in its entirety.

RIGHT TO JUDICIAL REVIEW

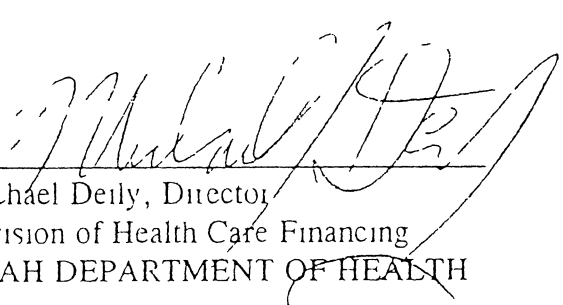
Within twenty (20) days after the date that this Final Agency Order is issued, you may file a written request for reconsideration with the Director of the Division of Health Care Financing. Any request for reconsideration must state the specific grounds upon which relief is requested. The filing of such a request is not a prerequisite for seeking judicial review.

Judicial review may be secured by filing a petition in the Utah Court of Appeals within thirty (30) days of the issuance of this Final Agency Action or, if a request for reconsideration is filed and denied, within thirty (30) days of the denial for reconsideration. The petition shall be served upon the Director of Health Care Financing and shall state the specific grounds upon which review is sought. Failure to file such a petition within the 30-day time limit may constitute a waiver of any right to appeal the Final Agency Order.

A copy of this Final Agency Order shall be sent to Petitioner or representative at the last known address by certified mail, return receipt requested.

DATED this 12 day of September 2005

BY



Michael Deily, Director
Division of Health Care Financing
UTAH DEPARTMENT OF HEALTH

BEFORE THE UTAH DEPARTMENT OF HEALTH

DIVISION OF HEALTH CARE FINANCING

STATE OF UTAH

-----ooOoo-----

JANET S PEREZ	:	
PETITIONER,	:	
vs	:	RECOMMENDED DECISION
	:	
UTAH DEPARTMENT OF HEALTH	:	CASE NO. 04-350-88
DIVISION OF HEALTH CARE	:	
FINANCING,	:	Douglas Jensen
	:	Hearing Officer
Respondent.	:	

Pursuant to Rule R410-14 of the Utah Department of Health and the Utah Administrative Procedures Act, Section 63-46b-1 et seq , Utah Code Annotated, 1953 as amended, a formal administrative telephonic hearing for the above captioned case was held on Monday, May 23, 2005. The petitioner, a nursing home resident, did not appear but was represented by L. Edward Robbins, attorney-at-law. Present for the petitioner and presenting testimony were daughter, Rene Pace, son and attorney-in-fact, Robert Perez, and nephew, Tom Jiroudek. The respondent was represented by Jean Hendrickson, assistant attorney general, Elaine Jensen, case manager with the Bureau of Eligibility Services (BES), and Sandra Woodbury, supervisor with BES.

ISSUE

DID THE MEDICAID AGENCY CORRECTLY DENY THE PETITIONER'S APPLICATION BECAUSE THE ASSET CONTAINED WITHIN THE ATTICUS FAMILY TRUST WAS AN AVAILABLE ASSET?

The petitioner, Janet Perez, entered the Kane County Nursing Home on January 22, 2004. An application for Nursing Home (NH) Medicaid benefits was submitted in her behalf on September 14, 2004. During the eligibility determination process, the Medicaid agency was informed that the petitioner had created a trust in September 1992. The Medicaid agency determined that the assets contained in that trust were available to the petitioner and further determined that the value of the trust assets exceeded the \$2,000.00 Medicaid asset limit. A Notice of Decision was sent to the petitioner on October 12, 2004, informing her that the Medicaid application had been denied due to excess assets. The petitioner (and/or those acting for the petitioner) disagreed with the agency action and requested a hearing on December 13, 2004, seeking to dispute the denial.

FINDINGS OF FACT

1. The petitioner, Janet Perez, is a 65 year-old, widowed female. She entered the Kane County Nursing Home on or around January 22, 2004, for long-term institutional care. She continues to reside in that facility.
2. The petitioner suffers from meningioma (cancer of the covering of the brain) and hydrocephalus which has made her completely dependent on skilled nursing care for her daily needs.
3. The Atticus Family Trust (the trust) was created on September 15, 1992.
4. A Quit-Claim Deed was completed on September 15, 1992, wherein Janet Pace Perez, grantor, quit-claimed the property (described in Exhibit A of the trust) to the Atticus Family Trust, Janet Pace Perez and Roberta Jean Flourmoy trustees.
5. The property transferred to the trust is 50 acres of land located outside or near Kanab, Utah. A 2003 Kane County Notice of Property Valuation and Tax Charges valued the property at \$82,219.00 (\$17,000.00 as Primary Improved Property and \$65,219.00 as Agricultural Land).
6. The petitioner is a beneficiary of the trust during her lifetime because she has a present beneficial interest in 48 acres of the property. As an incapacitated person, she is currently entitled to the net income and principal from the trust.
7. The current trustees have the legal authority and responsibility to act for the benefit of the petitioner in accordance with the terms of the trust. Distributions from the trust are determined by the current trustees and they are permitted to exercise full discretion with respect to such distributions.
8. Undue hardship does not exist because the petitioner (i.e., those acting for the petitioner) has not exhausted all legal means to gain access to the trust.

CONCLUSIONS OF LAW

The Atticus Family Trust is a Medicaid Qualifying Trust and the asset contained within the trust is an available asset within the Medicaid program as described in sec 1902(k) of the Social Security Act

REASONS FOR HEARING OFFICER'S DECISION

The Medicaid program was enacted in 1965 as Title XIX of the Social Security Act (the Act) as a cooperative federal state program designed to provide health care payment for needy individuals. Prior to the Omnibus Budget Reconciliation Act of 1993, the Medicaid statute governing trusts was found in Sec 1902(k) of the Act. Because the Atticus Family Trust was created prior to 1993, that statute remains operable in deciding this case. The statute reads in it's entirety

- (1) In the case of a Medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence the term 'grantor' means the individual referred to in paragraph (2)
- (2) For purposes of the subsection, a 'Medicaid qualifying trust' is a trust or similar legal device established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual
- (3) This subsection shall apply without regard to
 - (A) whether or not the Medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title; or
 - (B) whether or not the discretion described in paragraph (2) is actually exercised
- (4) The State may waive the application of this subsection with respect to an individual where the State determines that such application would work an undue hardship

The Medicaid agency determined that the Atticus Family Trust satisfied all of the elements of a Medicaid qualifying trust (MQT) as described above and determined that the trust asset (the property) was available to the petitioner, and countable towards the Medicaid asset limit

The petitioner's legal representative, Mr. Robbins, stated that the property held within the trust was irrevocably gifted to the petitioner's two children (Rene Pace and Robert Perez) and her niece and nephew (Jean Jiroudek and Tom Jiroudek) in September 1992. As such, Mr. Robbins argued that the trust provisions prohibit "taking back the gift" and that the only value left to the petitioner is a 'valueless lifetime use right'. Therefore, there are no payments that can be permitted for the benefit of the petitioner and the "sole Trust asset, undeveloped land, is not

an available asset ”

Medicaid law states that a trust must be considered an available asset if the trust meets the conditions of an MQT. There are three essential elements necessary for an MQT: first, the trust must be established by the individual, second, the individual must be the beneficiary of all or part of the payments from the trust, and third, the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion regarding distribution to the individual.

The trust must be established by the individual. The trust begins by stating, ‘This TRUST AGREEMENT is entered into by and between JANET PACE PEREZ (referred to as the “Trustor”), and JANET PACE PEREZ and ROBERTA JEAN FLOURNOY or their successors, as Trustee (referred to as “Trustee”)’.” Article I, Creation of Trust, continues, ‘By this agreement Trustor transfers and delivers to the Trustee the property described in the attached Schedule A. The property so described shall constitute the “trust estate,” and shall be held IN TRUST and administered and distributed as provided below. The Trust shall be irrevocable.’”

Clearly, the trust document shows that the trust was established by the petitioner. Tom Jiroudek took exception to this interpretation stating that his mother, Roberta Flournoy, was also a trustor in that the property was originally bought and paid for by both Roberta and the petitioner together. However, there was no evidence presented which would support Tom’s position and the actual evidence is contradictory to the assertion. Not only is the petitioner the sole trustor identified within the trust document, the September 15, 1992, Quit-Claim deed lists only Janet Pace Perez as the grantor who transferred the property to the trust (to be managed by the original trustees, Janet and Roberta). As the petitioner was the sole legal owner of the property with the power to transfer the property into the trust, it must be concluded that the petitioner established the trust with her own property as the only trust asset.

The individual may be the beneficiary of all or part of the payments from the trust. Rene Pace consistently argued that her mother was not a beneficiary of the trust. Rather, only she, her brother and two cousins were beneficiaries. A complete reading of the trust document appears to support the contention that, generally, the term “beneficiaries” applies to Rene, Robert, Tom and Jean. However, the controlling clause of the Medicaid statute, “under which the individual may be the beneficiary of all or part of the payments,” goes beyond a simple listing of ‘beneficiaries’.¹ Utah law found in the *Utah Code 75-7-103, Definitions*, defines “‘Beneficiary’ means a person that (1) has a present or future beneficial interest in a trust, vested or contingent.”

As such, a beneficiary is identified as any person who does or can benefit from the trust and not merely if a person is specifically mentioned (or not) as a beneficiary in writing.

¹ In fact, there are no clauses within the trust document which specifically lists and identifies ‘beneficiaries’ by name.

It is clear that the petitioner benefits from the trust property. Article IV(A)(2) states in part "Trustees Janet Pace Perez shall be entitled to use and enjoyment of the property for their lifetimes." Article IV(A)(7) states in part "The Trust may use the 'common' land for purposes of generating income." Article IV(C) states in part "Notwithstanding the requirements stated above Trustor shall have the power to alter the terms of the use or disposition of the property during her lifetime, provided that she may not pledge the property for the benefit of her individual creditors, or change any homesite of the beneficiaries. Other than the homesite, the Trustor reserves the right to change the beneficial interest as she may wish." Article V (A) states in part "Trustee may also retain funds in trust for any purpose sufficient to Trustee." Article V(B) states "If Trustor or any Beneficiary shall come under any physical or mental disability, in addition to the net income of the Trustor's separate estate the Trustee may pay to or apply for the benefit of Trustor so much of the principal of the disabled Trustor's separate estate as the Trustee shall deem necessary for the Trustor's proper support, health, and maintenance to be paid out of all beneficiaries' shares, as the case may be, provided that no payment shall be made where other means of support are available, including insurance or public assistance." Article IX(F) states in part "During the lifetime of Trustor, the Trustor shall have the power to direct the Trustee in writing, from time to time to retain, sell, exchange, or lease any property of the trust estate on specified terms and conditions, and to invest funds of the trust estate that Trustor specifies." Article XI(P) states in pertinent part "This Trust may be amended only in writing by Trustor during her lifetime, provided that she may not amend to the benefit of any creditor of hers."

Thus the petitioner has a present benefit in the use and enjoyment of the trust property (except for two acres given as gifts) during her lifetime. The petitioner retains the right to control the property held within the trust and can arrange for income generating schemes on the 'common' land (potential future benefit), to sell, exchange, or lease the property (present and future benefit). The petitioner has the ability to alter the terms of use or disposition of the property within the trust (potential future benefit). The petitioner, now acknowledged as disabled, has the present right to the net income and principal from the trust. The presiding officer determines that the petitioner holds significant beneficial interest (both present and future) in the trust and that she is indeed a beneficiary of the payments from the trust.

The distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution.

Originally the petitioner and her sister, Roberta Flournoy, were the listed trustees. Their trustee duties have now been taken over by Robert Perez and Tom Jiroudek as Roberta is deceased and the petitioner is incapacitated. Despite who is acting as trustee(s), any trustee has the legal responsibility to administer the trust according to the terms of the trust. Although Tom Jiroudek testified that he (as a successor trustee) would not authorize any payments from the trust to the petitioner, he has a legal responsibility to do so and is explicitly required to do so according to the terms of the trust. Article XI(K)(2)(c), Effect of Determination of Incapacity, states in pertinent part "the Trustee shall have power and authority on such incapacitated Trustor's or

Trustee's behalf to exercise or perform any act, power, duty, right or obligation whatsoever that such Trustor or Trustee may have ... The power granted to the Trustee under (c) above shall be construed and interpreted as a general durable power of attorney to act as such Trustor's attorney in fact and agent in his name and for his benefit and shall be in addition to all other powers bestowed upon the Trustee by this agreement." Thus, the successor trustees now hold the authority to take any and all actions originally granted to the petitioner as Trustor and original Trustee of the trust. As explained, this includes the discretion to sell, exchange or lease the property, to alter the terms of the use or disposition of the property and to change the beneficial interests of the trust. Most importantly, the trustee(s) have the discretion to distribute income and principal as contained in Article V(B). "If Trustor or any Beneficiary shall come under any physical or mental disability, in addition to the net income of the Trustor's separate estate, the Trustee may pay to or apply for the benefit of Trustor so much of the principal of the disabled Trustor's separate estate as the Trustee shall deem necessary for the Trustor's proper support, health, and maintenance, to be paid out of all beneficiaries shares, as the case may be, provided that no payment shall be made where other means of support are available, including insurance, or public assistance." It is determined here that the trustee(s) are permitted to exercise full discretion with respect to the distribution of potential trust payments.

It is the conclusion here that the trust meets all requirements of a Medicaid qualifying trust. The trust was established by the petitioner, the petitioner is a beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the petitioner.

Having determined that the trust is an MQT and therefore countable as an asset for Medicaid eligibility, it is necessary to address other arguments presented at the hearing which primarily address the value of the property held in trust.

There was much discussion concerning Article V(B), particularly the wording "separate estate." Mr. Robbins argued that the entire trust estate was "gifted" to the petitioner's children and niece and nephew. As such, the only "separate estate" available to the petitioner (and the other original trustee, Roberta Flournoy) was her specific right of the "use and enjoyment of the property for their lifetimes" (Article IV(A)(2)). Further, he stated that there was not a value or market which could be placed on the petitioner's exclusive "use" right and thus there was no countable Medicaid asset.

Contrary to the determination that the entire trust estate was "gifted" to the petitioner's children and niece and nephew upon establishment of the trust, the presiding officer finds that only specific ½-acre lots were "gifted" leaving the remaining 48 acres "ungifted" and comprising the petitioner's "separate estate." Article IV(A), Creation of Beneficial Interests, clearly states in pertinent parts: "Trustor hereby irrevocably gifts beneficial ownership in the Trust to her children ... and her niece and nephew ... **as follows** (emphasis added): (1) Trustor declares that she reserves to her children and niece and nephew named above for their exclusive use, a

minimum of ½ acre each out of a total 50 acre parcel of property on a 'first come, first serve' basis to be used as a homesite for each beneficiary for such beneficiary's use (2) Trustees Janet Pace Perez and/or Roberta Jean Flournoy shall be entitled to the use and enjoyment of the property for their lifetimes with limited use reserved to the beneficiaries provided that it does not conflict with the use by Janet Pace Perez and/or Roberta Jean Flournoy (6) Without the concurrence of the Trustees and other beneficiaries no beneficiary shall be entitled to sell or otherwise dispose of encumber or mortgage his or her interest in the property or the ½ acre homesite (7) The Trust may use the 'common' land for purposes of generating income (8) No beneficiary can be forced to move from the property once their homesite is established "

It is not until the death of the petitioner that her children and niece and nephew are entitled to ownership of any property beyond their previously selected ½ acre sites as stated in Article VI Disposition on Death of Trustor 'Upon the death of the Trustor, the Trustee shall marshal the assets of the trust estate and do the following (1) Divide the Estate in four (4) equal shares of beneficial interest to the children of the Trustor and the niece and nephew of Trustor (2) The surviving Co Trustees may thereafter liquidate and distribute the Trust to the beneficiaries If not so liquidated (partially or fully) the property shall continue to be held in trust "

It is concluded here that the entire trust estate (50 acres) was not "gifted" to the petitioner's children and niece and nephew, rather, only potential ½ acre homesites were irrevocably 'gifted' The 48 acres of 'ungifted' property remain the petitioner's "separate estate" Article V allows for disbursements from the net income and principal of the "separate estate" for the care of the petitioner once she is under physical or mental disability

Mr Robbins argued that there were unique factors with the property which must be considered when determining a value for the property He stated that two-thirds of the property is creek gully and that the canyon wall is crumbling Earlier in the year, a deadly accident occurred along the same strip when the canyon wall collapsed and killed a young boy Mr Robbins stated that the description of the property in the trust warns in Article IV(A)(4) that, "In the event of erosion of a beneficiary's ½-acre choice of land, rendering the land unsuitable for a homesite, said portion can be extended

Robert Perez testified that the Kanab area is "fairly depressed" concerning land values and that property is not selling

Rene Pace testified that at one point her cousin Jean listed the property for sale over the internet for \$45 000 00 but there were no serious offers

The Medicaid agency determined that the value of the property (50 acres) was \$82,219 00 based on a 2003 Kane County Notice of property Valuation and Tax Changes document Robert Perez testified that he has taken the responsibility to pay the property taxes for the last couple of years but no family member has challenged the assessed value and tax Greater weight is given here to the county valuation It is reasonable to conclude that if the property were of much less value

than the official valuation, the family would have taken steps for a reassessment. Therefore, the presiding officer values the 48 acres of available property at \$78,930.24.

The petitioner's representative and family also presented testimony regarding the intent of the petitioner in creating the trust (to provide "a safe haven or refuge for family members which would remain unencumbered and beyond the reach of any creditors"). However, the Medicaid statute at paragraph 3 of section 1902(k) explicitly states that the MQT rules will apply "without regard to whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title." This case is illustrative of conclusions reached by the United States Congress when explaining the purpose of the MQT law:

Our conclusion reflects the legislative concern that the Medicaid program not be used as an estate planning tool. The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the state. Congress enacted the Medicaid qualifying trust provision as an addition to the provisions designed to assure that individuals receiving nursing home and other long-term care services under Medicaid are in fact poor and have not transferred assets that should be used to purchase the needed services before Medicaid benefits are made available. (H. Rep. No. 99-265, 99th Cong., 1st Sess. 71 (1985)).

It is the decision here that the trust is an MQT (and therefore countable as a Medicaid asset) and that the trust asset is valued at \$78, 930.24 which is the maximum amount (net income plus principal) which can be distributed to the petitioner assuming the full exercise of discretion by the current trustees.

Finally, arguments pertaining to the "undue hardship" clause of section 1902(k)(4) were heard at the hearing. The Utah Medicaid policy concerning undue hardship is found in *The Utah Medical Manual*, Vol.IIIM Sec.511-8 and reads in pertinent parts:

(7) The assets of a trust can be excluded from countable assets when there would be an undue hardship on the client if the trust assets were counted. An undue hardship exists if both of the following conditions are met:

A. The client has exhausted all reasonable legal means to gain access to the trust which can include petitioning a court or trustee to allow access to trust funds. It is not reasonable to require the client to take action if a knowledgeable source (such as the client's lawyer or financial institution) confirms that it is doubtful those efforts will succeed. That knowledgeable source must explain the reason for the decision ... It is not reasonable to require the client to take action more costly than the value of the asset.

B. Without Medicaid coverage for institutional ... care, the client will not be able to get the medical care needed AND the client is at risk of death or permanent disability without that care. This must be verified by a physician's statement. Additionally, the client must verify that the client

and the client's spouse or parents(s) cannot afford to meet the client's medical needs at home

The Medicaid agency evaluated undue hardship based on documentation provided by the petitioner's family. The agency determined that undue hardship did not exist in this instance stating "Information we have received does not indicate all legal means to make the trust available have been exhausted. Requirement A of the requirement for undue hardship has not been met. Pertaining to Condition B, the client is receiving the care needed. There is a question as to whether pharmacy is being met but no conclusive evidence that prescriptions are not being provided by the Kane County Hospital. Conditions A and B must be met for undue hardship to be granted. Since they have not been met the request for Undue Hardship is denied.

The documentation provided by the petitioner's family in their support for an undue hardship exemption included two statements from Dr. Bowman attesting to the fact that the petitioner is completely dependent on skilled nursing care for her daily needs," and that, "Our hospital has been providing her medications for the past five months and has had to write off these expenses." Rene Pace presented a statement to the agency voicing her understanding that she felt all reasonable legal means to make the trust asset available to her mother had been exhausted. Ms. Pace also stated that neither she nor her brother Robert would be able to properly care for their mother outside of the care center. Also presented for undue hardship consideration was a statement by Stephen Howells, Chief Financial Officer of the Kane County Hospital, stating that in his opinion, the petitioner was not a beneficiary of the trust because there was no "method in the trust for those funds to be accessed for Mrs. Perez' care." Mr. Robbins had provided the family with a statement dated March 21, 2005, wherein he expressed his legal opinion that the trust asset was not available to the petitioner because she is not a beneficiary of the trust asset and, "In fact, she is expressly forbidden to pledge any asset of the Trust for the benefit of her creditors. It strikes me as somewhat anomalous that the property is being urged as a disqualifying asset even though Mrs. Perez is expressly denied the right to use the property to pay any of her debts or obligations." Mr. Robbins also opined that he is familiar with the property and that the value of the property was much reduced due to the expanding creek bed, eroding canyon walls, sandy soil, sinkholes, and general narrow confines of the land. He concluded that, "in any kind of forced sale situation, the property would realize only a nominal value."

The presiding officer finds no undue hardship at this time because the first criterion (that all reasonable legal means to gain access to the trust have been exhausted) is not met. MQT law dictates that the trust asset is available to the petitioner. If the trustees refuse to disburse the asset to the petitioner they would not only be failing in their fiduciary capacity but the petitioner would be required, at a minimum, to petition a court to allow disbursement before a hardship determination could be rendered. Although it is understood that the petitioner suffers from severe medical impairments and requires long term care, there is no legal basis to determine that her medical needs cannot be covered by the trust asset. A hardship waiver cannot be granted.

RECOMMENDED AGENCY ACTION

The decision by the Medicaid agency to deny the petitioner's application because the asset held within the trust is available and countable is hereby **AFFIRMED**. No further agency action is necessary.

RIGHT TO REVIEW

This Recommended Decision will be automatically reviewed by the Department of Health, Division of Health Care Financing, prior to its release. Both the Recommended Decision and a Final Agency Action, which represent the results of that review, will be released simultaneously by the Department of Health, Division of Health Care Financing.

DATED this 17th day of August 2005


DOUGLAS JENSEN
HEARING OFFICER

APPENDIX II

IRREVOCABLE TRUST AGREEMENT

IRREVOCABLE TRUST AGREEMENT

NAME: ATTICUS FAMILY TRUST
TRUSTOR: JANET PACE PEREZ
TRUSTEES: JANET PACE PEREZ
ROBERTA JEAN FLOURNOY
DATE: September '15, 1992

*Plg. in our
Vault*

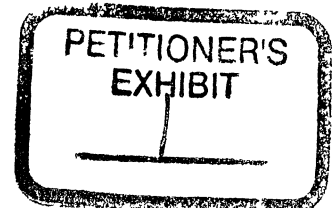


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Schedule A

ATTICUS FAMILY TRUST

This TRUST AGREEMENT is entered into by and between JANET PACE PEREZ (referred to as the "Trustor"), and JANET PACE PEREZ and ROBERTA JEAN FLOURNOY, or their successors, as Trustee (referred to as "Trustee").

ARTICLE I
CREATION OF TRUST

Janet is sole Trustor
By this agreement, Trustor transfers and delivers to the Trustee, the property described in the attached Schedule A, the receipt of which is hereby acknowledged by the Trustee. The property so described, together with any other property that may become subject to this trust shall constitute the "trust estate," and shall be held IN TRUST and administered and distributed as provided below. This trust shall be known as the "ATTICUS FAMILY TRUST." The Trust shall be irrevocable.

ARTICLE II
STATEMENT REGARDING FAMILY

Trustor declares that her only children are the following: RENE' ELIZABETH PACE TULAK and ROBERT THOMAS PEREZ.

Janet is Trustee
ARTICLE III
CONTROL BY INITIAL TRUSTEES

At all times that JANET PACE PEREZ shall be the Trustee, she shall administer the Trust with her Co-Trustee without requirement to consult the beneficiaries. After said

Co-Trustees cease to serve as Trustee(s), the Successor Trustees shall control the trust, provided that the major decisions to sell, subdivide or encumber the property shall be concurred in by a majority of a quorum of beneficiaries. Such concurrence of a majority of a quorum of beneficiaries shall not apply in the case of the Trust being administered by the initial Trustees, or the survivor of them. A quorum shall consist of three (3) beneficiaries. A majority of a quorum of lines shall be represented at a meeting held for this purpose, with notice sent to the last known address of a beneficiary. A meeting may be held by telephone conference if so specified in the notice; notice to be given at least five (5) days in writing prior to the meeting. Vote by written proxy shall be allowed. There shall be one vote for each of the four (4) beneficiary lines. If any vote for a beneficiary line shall be represented by more than one beneficiary, the majority of that line shall control. If any beneficiaries are minors, their vote shall be controlled by the Trustees.

ARTICLE IV
BENEFICIAL OWNERSHIP OF REAL PROPERTY
AND OPERATION OF TRUST

A. CREATION OF BENEFICIAL INTERESTS

At the inception of the Trust, the Trust Property shall be that certain property located in the State of Utah set forth at Schedule A. Trustor hereby irrevocably gifts beneficial ownership in the Trust to her children, RENE'ELIZABETH PACE TULAK and ROBERT THOMAS PEREZ, and her niece and nephew, JEAN VIRGINIA JIROUDEK, aka JEAN V. FLOURNOY and THOMAS RONALD JIROUDEK, as follows:

1) Trustor declares that she reserves to her children and niece and nephew named above for their exclusive use, a minimum of 1/2 acre each out of a total 50-acre parcel of property described at Exhibit A hereto, on a "first come, first serve" basis, to be used as a homesite for each

beneficiary, for such beneficiary's use (no beneficial interest is intended to be given to any other person, although the beneficiaries may allow their family, guests or invitees to use the property for living purposes with the express written consent of the Trustees).

2) Trustees, JANET PACE PEREZ and/or ROBERTA JEAN FLOURNOY shall be entitled to use and enjoyment of the property for their lifetimes, including specific use of the existing R.V. trailer which has been set up on the property complete with utility hookups, with limited use reserved to the beneficiaries provided that it does not conflict with the use by JANET PACE PEREZ and/or ROBERTA JEAN FLOURNOY.

3) JEAN VIRGINIA JIROUDEK (a/k/a Jean V. Flournoy), is the only one who has selected her approximately one-half (1/2) acre homesite and presently resides on the land because she volunteered to be the resident caretaker to protect the property from vandals and other concerns. Therefore, JEAN VIRGINIA JIROUDEK is guaranteed the parcel she has chosen, as follows:

Beginning at the West Quarter Corner of Section 4, Township 44 South, Range 6 West, Salt Lake Base and Meridian, and running thence North to fifty (50) feet, more or less, South of the (power, water and sewer) RV Hookup, along the Section Line; thence East to the West Rim of the Canyon; thence South along the West Canyon Rim to directly East of the BLM Quarter Corner Marker; thence West to the point of beginning.

If this description does not equal at least 1/2 acre of solid top land, the description is to be changed to extend South of the Quarter Corner Marker until it does.

It is to be noted here that the improvements and structures on this specific portion of the land belong to JEAN VIRGINIA JIROUDEK and are not a part of the Trust, as she paid for them with her own personal money.

Since the utilities that run from Navajo Drive to JEAN VIRGINIA JIROUDEK's homesite were partially paid for by JANET PACE PEREZ, and the City of Kanab has allowed for only one water meter at this time, it is to be understood that the

utilities are to be shared (if possible) by the other beneficiaries until and if provision can be made for separate utilities and water meter(s). While the utilities are shared, the parties shall work out payment for usage among themselves unless the Trustee shall notify the affected parties that there is enough money in a trust account to pay for them.

4) In the event of erosion of a beneficiary's 1/2-acre choice of land, rendering the land unsuitable for a homesite, said portion can be extended, provided only that said extended portion does not encroach on another beneficiary's homesite selection, or a different site can be selected.

5) An easement shall be provided for ingress and egress to all other homesites, after all four (4) beneficiaries have designated their 1/2-acre choice of land.

6) Without the concurrence of the Trustees and other beneficiaries, no beneficiary shall be entitled to sell or otherwise dispose of, encumber or mortgage his or her interest in the property or the 1/2-acre homesite.

7) The Trust may use the "common" land for purposes of generating income, provided that:

a) The Trustees and a majority of beneficiaries agree to such project as per ARTICLE III;

b) The project does not displace, infringe upon, block access to, or otherwise invade or devalue the personal homesite of any of the beneficiaries;

c) The project generates income to support:

i) Expenses of project/venture

ii) Expenses of maintenance of property (i.e. property taxes, insurance, assessments, trust expenses, etc.)

iii) Expenses and support of beneficiaries directly involved in project/venture.

iv) Conforms to local, state and federal ordinances and laws.

v) Does not destroy the land or cause it to lose value through abuse or neglect.

vi) Does not create undue or unjust financial hardship on any of the beneficiaries.

8) No beneficiary can be forced to move from the property once their homesite is established unless it is found that beneficiary is conducting illegal activities on the property.

B. ADDITIONS TO TRUST

No Beneficiary may add to the Trust. Initial Trustees may add property to the Trust but any such addition may be accounted separately if required by the document conveying any such assets.

C. CONTROL OF TRUSTOR

Notwithstanding the requirements stated above, Trustor shall have the power to alter the terms of the use or disposition of the property during her lifetime, provided that she may not pledge the property for the benefit of her individual creditors, or change any homesite of the beneficiaries after a homesite is selected and the beneficiary has made material improvements to the homesite. Until then, the Trustor may modify the beneficial interests regarding the homesite. Other than the homesite, the Trustor reserves the right to change the beneficial interest as she may wish.

ARTICLE V
DISPOSITION OF TRUST ESTATE DURING
LIFETIME OF TRUSTOR

A. DISTRIBUTION OF INCOME AND PRINCIPAL

During the lifetime of the Trustor, the Trustee may pay to the beneficiaries, in the discretion of the Trustee, the up-to-the net income of the Trust Estate, (if any) quarter-annually or in more frequent installments.

Trustee may also retain funds in trust for any purpose sufficient to Trustee.

*income
asset*

B. INVASION OF PRINCIPAL BY TRUSTEE

If Trustor or any Beneficiary shall come under any physical or mental disability, in addition to the net income of the Trustor's separate estate, the Trustee may pay to or apply for the benefit of Trustor so much of the principal of the disabled Trustor's separate estate as the Trustee shall deem necessary for the Trustor's proper support, health, and maintenance, to be paid out of all beneficiaries' shares, as the case may be, provided that no payment shall be made where other means of support are available, including insurance, or public assistance.

Separate estate - Does not include

ARTICLE VI

DISPOSITION ON DEATH OF TRUSTOR

Upon the death of the Trustor, the Trustee shall marshall the assets of the trust estate, including any assets that devolve to the Trust by the testamentary disposition and do the following:

1) Divide the Estate in four (4) equal shares of beneficial interest to the children of the Trustor, RENE' ELIZABETH PACE TULAK and ROBERT THOMAS PEREZ, and the niece and nephew of Trustor, JEAN VIRGINIA JIROUDEK and THOMAS RONALD JIROUDEK. If any of the four (4) named beneficiaries shall predecease the Trustor, that deceased beneficiary's share shall be held in Trust by the Trustee for the benefit of that person's living children, distributed in the same manner as ARTICLE VIII, with respect to children. The final discretion of the Trustee shall control.

2) The surviving Co-Trustees may thereafter liquidate and distribute the Trust to the beneficiaries upon the affirmative vote of three of the four Co-Trustees (if there are 4); two of three (if there are three); two of two

*separate
estate
ownership*

(if there are two), or at the discretion of the Trustee, if there is one (1) Trustee. If not so liquidated (partially or fully) the property shall continue to be held in trust with the property administered for the benefit of the beneficiaries. Notwithstanding the above, the Trustees may not liquidate the 1/2 acre homesite and access and utility of any beneficiary who is living on the project without that beneficiary's express written consent.

ARTICLE VII
DISPOSITION OF CHILDREN'S SHARES

Upon the death of any beneficiary, his or her share shall be given to that person's living children, and if no living children, then to the surviving beneficiaries of Trustor, or their children if they shall not survive. In the event that any beneficial interest shall be payable to a minor, the Trustee(s) shall have the obligation to apply the income from the Trust allocated to this interest to the benefit of the minor, provided that principal may be invaded if necessary to pay education, general welfare, or health needs, as determined by the Trustee(s), provided that no payments shall be made if insurance payments or public assistance are otherwise available. If liquidation of the Trust is elected and any beneficiary shall be a minor, it shall be paid to their parent(s) having custody or the legal guardian, for the benefit of the child, provided that no payment shall be made to JERRY THOMAS TULAK or his relatives (except the beneficiaries) and in this event, the Trustees shall continue to hold such minor's share in trust until age twenty-one (21).

ARTICLE VIII
POWERS OF TRUSTEE

To carry out the purposes of any trust created under

HAN & WESTALL
ATTORNEYS AND COUNSELORS AT LAW

this instrument and subject to any limitations stated elsewhere in this instrument, the Trustee is vested with the following powers with respect to the trust estate and any part of it, in addition to those powers now or hereafter conferred by law:

A. STATUTORY POWERS

All powers enumerated in the Utah Probate Code as it exists on the date of this instrument, as though such powers were herein set forth in full, without necessity for petition to the court having jurisdiction over this Trust.

B. POWER TO RETAIN PROPERTY OR BUSINESS IN TRUST

To continue to hold any property, including shares of the stock of any Trustee under this instrument, and to operate at the risk of the trust estate any business received or acquired under the trust by the Trustee as long as the Trustee shall deem advisable; provided, however, that except as to a residence or other property held for the personal use of the Trustor, unproductive or underproductive property shall not be held as an asset of the trusts established hereunder for more than a reasonable time during the lifetime of the Trustor without such Trustor's written consent.

C. POWER OF SALE, EXCHANGE AND REPAIR

To manage, control, grant options on, sell (for cash or on deferred payments), convey, exchange, partition, divide, improve and repair trust property.

D. POWER TO INSURE

To carry, at the expense of the trust, insurance of such kinds and in such amounts as the Trustee shall deem advisable to protect the trust estate and Trustee against any hazard.

E. POWER TO COMMENCE OR DEFEND LITIGATION

To commence or defend litigation with respect to the trust or any property of the trust estate as the Trustee may deem advisable, at the expense of the trust.

F. INVESTMENT POWERS

To invest and reinvest all or any part of the trust estate in such common or preferred stock, shares of investment trusts, and investment companies, bonds, municipal bonds or other obligations of political subdivisions, debentures, mortgages, deeds of trust, notes, real estate, or other property as the Trustee in the Trustee's absolute discretion may select, including any common trust fund administered by any Trustee under this instrument, and the Trustee may continue to hold in the form in which received (or the form to which changed by reorganization, stock split, stock dividend, or other like occurrence) any securities or other property the Trustee may acquire at any time under this trust, it being Trustor's express desire and intention that the Trustee shall have full power to invest and reinvest the trust funds without being restricted to and forms of investment that the Trustee otherwise may be permitted to make by law; and the investments need not be diversified.

G. DETERMINATION OF PRINCIPAL AND INCOME AND OWNERSHIP

Ownership of the Trust Estate shall be determined by percentage of ownership that the beneficial interest account shall bear to the total (initially determined by the fair market value of the property). All cash expense of the Trust shall be paid out of Trustor's share, until her death, after which all expenses of the Trust (except last expenses and taxes of Trustor) shall be shared and allocated according to beneficial interest. All income, losses and depreciation shall be shared according to beneficial interest. Generally accepted accounting principles shall be used, subject to the direction above.

H. DECISIONS AFFECTING TAXES

If no Personal Representative of the Trustor's estate is appointed following a Trustor's death, the Trustee acting under this instrument shall, in determining federal estate and income tax liabilities, have discretion to select

the valuation date, to determine whether any or all of the allowable expenses shall be used as federal estate tax deductions or as federal income tax deductions (with like discretion as to any applicable state taxes), to select the redemption date of any United States obligations that are eligible for redemption at par in payment of taxes, to make all other elections, and to take all other appropriate actions with respect to taxation of Trustor or the trust estate.

I. ADJUSTMENT TO COMPENSATE FOR TAX DECISIONS

Except as otherwise provided in this instrument, the Trustee shall have absolute discretion, but shall not be required, to make adjustments in the rights of any beneficiaries or among the principal and income accounts, to compensate for the consequences of any tax decision or election that the Trustee believes has had the effect, directly or indirectly, of preferring one beneficiary or group of beneficiaries over another.

J. DEALINGS WITH PERSONAL REPRESENTATIVE

The Trustee, in the Trustee's discretion, may make loans at the prevailing rates of interest to the Personal Representative of the Trustor's estate on such terms and conditions that the Trustee shall determine, and may purchase at the fair market value thereof, and retain as assets of the trust, any real and personal property held in the Trustor's estate.

K. RIGHT TO RENOUNCE

If no Personal Representative of a Trustor's estate is appointed following a Trustor's death, the Trustee is authorized (except to the extent fundamentally inconsistent with the provisions of this instrument and the Trustor's estate plan) to renounce, in whole or in part, any devise or legacy or any interest in any trust for a Trustor's benefit (including a trust created under this instrument), at any time within nine (9) months after the date of the transfer which created the interest in the Trustor.

ARTICLE IX
PROVISIONS RESPECTING TRUSTEE

A. SUCCESSOR TRUSTEE

In case either Trustee resigns or is unable to act for any reason, the following shall act as Successor Trustee, in the order named:

1. The survivor of the initial Trustees.
2. ROBERT THOMAS PEREZ and THOMAS RONALD JIROUDEK, as Co-Trustees, with a majority of beneficiaries as set forth in ARTICLE III.

3. All four (4) beneficiaries acting as Co-Trustees.

The decision of a majority of Co-Trustees shall control, except as otherwise provided. If there shall be only two (2) Trustees, both must agree.

B. WAIVER OF BOND

No bond shall be required of any Trustee named in this instrument.

C. LIMITATION UPON INDIVIDUAL TRUSTEE

Notwithstanding any other provision of this instrument to the contrary, no person acting as Trustee hereunder shall participate as Trustee in the exercise of any Trustee's power or discretion which would have the effect of discharging any of such person's legal obligations or which is exercisable in favor of such person, his estate, his creditors or the creditors of his estate, including (but without limitation thereto) any power or discretion of the Trustee to invade principal for the benefit of such person; and any such power or discretion shall reside solely in the disinterested Trustee. This limitation on such person shall apply only to any power or discretion exercisable by him as Trustee and shall not apply to any power or discretion herein conferred upon such person solely in his individual capacity.

In addition, no individual Trustee shall possess or exercise any incidents of ownership over any life


insurance policies on such Trustee's life that are included in the trust estate, and the possession of and power to exercise such incidents of ownership shall reside solely in the disinterested Trustee.

D. NO COMPENSATION TO TRUSTEE

The Trustee shall not be entitled to compensation for his or her services, but shall be compensated for the services of counsel retained by him or her, and other out-of-pocket expenses, including services in connection with the termination in whole or in part of any trust hereunder.


E. AUTHORITY OF TRUSTOR TO TRANSFER
ADMINISTRATION OF TRUST

At any time and from time to time the Trustor shall have full power to change the situs of any trust created hereunder for purposes of administration and to remove the property constituting the trust estate, or any part of the property, to any other state in these United States in which she may then be domiciled and to employ whatever assistants are necessary for this purpose. If the Trustor should become a nonresident of Utah while she is a Trustee hereunder, she shall retain the power to administer any trust property remaining in Utah and such removal from such state shall not be ground for removal of her as Trustee of any trust hereunder. Such power to transfer the situs of any trust hereunder for purposes of administration or to remove any property constituting the trust estate shall not be denied to the Trustor on the ground that any Trustee hereunder is unable or unwilling to continue as the Trustee after such transfer or removal, and in such case the provisions above prescribed for the appointment of a successor Trustee shall govern as applicable.



F. INVESTMENT POWER SOLELY IN TRUSTOR

During the lifetime of Trustor, the Trustor shall have the power to direct the Trustee in writing, from time to time, to retain, sell, exchange, or lease any



property of the trust estate on specified terms and conditions, and to invest funds of the trust estate that Trustor specifies. The Trustee shall comply with all such written directions, shall have no responsibility to review trust investments, and shall incur no liability to any beneficiary of the trust or to any other person for following such written direction received by it from Trustor, or for failure to act in the absence of such written direction.

ARTICLE X
NO CONTEST

ESTD

In the event any beneficiary under this trust shall, singularly or in conjunction with any other person or persons, contest in any court the validity of this trust or of Trustor's Last Will or shall seek to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such Will or any of its provisions is void, or seek otherwise to void, nullify, or set aside this trust or any of its provisions, then the right of that person to take any interest given to him by this trust shall be determined as it would have been determined had the person predeceased the execution of this trust instrument without surviving issue.

The Trustee is hereby authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions.

ARTICLE XI
GENERAL TRUST PROVISIONS

IF JEN
IS TRUSTOR
CAN SHE
WASSE
TRUST
FINALLY

A. SPENDTHRIFT PROVISION

No interest in the principal or income of any trust created under this instrument shall be anticipated, assigned, or encumbered or subject to any creditor's claim or to legal

process, prior to its actual receipt by the beneficiary.

B. MANNER OF MAKING PAYMENTS TO MINORS OR INCOMPETENTS

The Trustee, in the Trustee's discretion, may make payments to a minor or other ~~beneficiary~~ under disability by making payments to his guardian, or to any suitable person with whom he resides, or to any qualified adult person or trust company as custodian for such minor under the Uniform Gifts to Minors Act as enacted by the state of such minor's residence, or the Trustee may apply payments directly for the ~~beneficiary's~~ benefit. The Trustee, in the Trustee's discretion, may make payments directly to a minor if, in the Trustee's judgment, he is of sufficient age and maturity to spend the money properly.

C. NO PHYSICAL DIVISION OF TRUST PROPERTY REQUIRED

There need be no physical segregation or division of the assets of the various separate trusts except as segregation or division may be required by the termination of any of the trusts, but the Trustee shall keep separate accounts therefore. The Trustee may merge the assets of any trust hereunder with those of any other trust maintained for the same beneficiaries upon substantially the same terms and having the same Trustee.

D. SIMULTANEOUS DEATH

In case any income beneficiary and any remainderman of any trust created hereunder die either simultaneously, or under such circumstances as to render it difficult or impossible to determine who predeceased the other, the income beneficiary shall be deemed to have survived the remainderman.

E. NOTICE OF EVENTS

Until the Trustee receives written notice of any birth, death, marriage or other event upon which the right to receive payments from the trust estate may depend, the Trustee shall incur no liability for disbursements of principal or income made in good faith to any person whose

interest may have been affected by that event.

F. TERMINATION CLAUSE REQUIRED BY LAW

Unless sooner terminated in accordance with other provisions of this instrument, each trust created under this instrument shall terminate twenty-one (21) years after the death of the last survivor of the Trustor and Trustor's issue who are living at the time of the predeceased Trustor's death, or living at such time as this trust might earlier become irrevocable. All principal and undistributed income of any trust so terminated shall be distributed to the then income beneficiaries of that trust in the proportions in which they are, at the time of termination, entitled to receive the income; provided, however, that if the rights to income are not then fixed by the terms of the trust, distribution under this clause shall be made, by representation, to such issue of Trustor as are then entitled or authorized in the Trustee's discretion to receive income payments, or, if there are no such issue of Trustor, in equal shares to those beneficiaries who are then entitled or authorized to receive income payments.

G. DISCRETIONARY TERMINATION BY TRUSTEE

If, at any time, in the judgment of the Trustee, the aggregate fair market value of any trust established hereunder shall be sufficiently small that its administration is no longer economically advisable, the cost of administration is disproportionate to the value of the assets, or the continuation of the trust is no longer in the best interest of the beneficiaries, the Trustee, in the Trustee's absolute discretion, may terminate such trust and distribute the then remaining balance thereof as in the previous subparagraph relating to a termination required by law.

H. SEVERABILITY

If any provision of this instrument is unenforceable, the remaining provisions shall nevertheless be

carried into effect.

I. GENDER AND NUMBER

As used in this instrument, the masculine, feminine or neuter gender, and the singular or plural number, include the other whenever the context so indicates.

J. PARAGRAPH HEADINGS

The descriptive phrases at the head of various paragraphs as to their content are inserted only as a matter of convenience and reference, and in no way are intended to be part of this instrument or to define, limit or describe the scope or intent of the text of the particular paragraphs to which they refer.

K. INCAPACITY

1. Determination of Incapacity. ~~If at any time~~ the Trustee (or Successor Trustee, as the case may be) shall receive a written statement signed by a Trustor or Trustee's personal physician (or a specialist approved by such personal physician, or any two other licensed physicians) stating that he considers a Trustor or a Trustee to be so mentally or physically incapacitated as to be substantially unable to manage his or her financial resources and affairs effectively ~~or to resist fraud or undue influence,~~ and if the Trustee other than such incapacitated Trustor or Trustee shall concur in any such statement and shall file a similar statement in the records of the trust, then, whether or not such Trustor or Trustee may have been adjudicated or certified an incapacitated or incompetent person and notwithstanding any contrary direction from such Trustor or Trustee, such Trustor or Trustee shall be considered to be incapacitated; ~~provided, however, that if a court of competent jurisdiction has within a reasonable time made a finding on such matter, such judicial finding shall control.~~ This paragraph "K" shall also apply to the determination of incapacity of any Successor Trustee.

2. ~~Effect of Determination of Incapacity.~~ If a Trustor or Trustee is determined to be incapacitated as provided above, then, during the period of such incapacity, (a) if such Trustor or Trustee is then acting as a trustee hereunder, he shall be deemed to have resigned; (b) any attempt by such Trustor to exercise any of the powers reserved by him under this agreement shall be without force and effect; (c) the Trustee shall have power and authority on such incapacitated Trustor's or Trustee's behalf to exercise or perform any act, power, duty, right or obligation whatsoever that such Trustor or Trustee may have, relating to any person, matter, transaction or property, real or personal, tangible or intangible, whether in the trust estate or owned by Trustor or Trustee including, without limitation, power to transfer to himself as Trustee upon the terms set forth in this agreement any property owned by Trustor or Trustee. The power granted to the Trustee under (c) above shall be construed and interpreted as a general durable power of attorney to act as such Trustor's attorney in fact and agent in his name and for his benefit and shall be in addition to all other powers bestowed upon the Trustee by this agreement.

★

trustee to
act for
trustor
benefit
★

3. ~~Restoration of Capacity.~~ If at any time after the determination of incapacity under subparagraph 1 the Trustee shall receive a written statement signed by such Trustor's or Trustee's personal physician (or a specialist approved by such personal physician, or any two other licensed physicians) that such Trustor or Trustee is no longer so mentally or physically incapacitated as to be substantially unable to manage his financial resources and affairs effectively or to resist fraud or undue influence, then such Trustor or Trustee shall no longer be deemed to be incapacitated and the provisions of subparagraph 2 shall cease to apply. If the Trustee other than such Trustor or Trustee shall object to such physician's statement, the

Trustee may institute proceedings to determine capacity before any appropriate court and such Trustor or Trustee shall no longer be deemed to be incapacitated unless and until a court having jurisdiction has determined that such Trustor or Trustee is in fact incapacitated. Restoration of capacity pursuant to this article or such a finding by a court having jurisdiction over such proceedings shall not automatically restore Trustor as a Trustee under this instrument.

L. ACCRUED INCOME ON TERMINATION OF INTEREST

Other than income required to be paid to the surviving Trustor, income accrued or in the hands of the Trustee for payment to an income beneficiary at the termination of the beneficiary's interest shall go to the beneficiaries entitled to the next succeeding interest in the proportions in which they take such interest.

M. TANGIBLE PERSONAL PROPERTY

The Trustee shall have no responsibility for any tangible personal property transferred to the Trustee under the terms of this instrument for so long as either Trustor shall retain the use and possession of such property. The Trustee shall be responsible only for such property as may be physically delivered to it.

N. ADMINISTRATION WITHOUT COURT SUPERVISION

Each trust created by this instrument shall be administered free from the continuing supervision of the court having jurisdiction over the trust; provided, however, that the Trustee or any beneficiary may petition the court for judicial settlement of an accounting or for any other proper purpose.

O. REPORTS TO BENEFICIARIES

Periodic reports shall be rendered by the Trustee to each beneficiary eligible to receive the current income, showing the assets then held as the principal of the trust estate and all of the receipts, disbursements, and

distributions during the period. Such reports shall be rendered not less frequently than annually. Reports to any beneficiary who is under a disability may be rendered directly to such beneficiary or to any parent, guardian, or conservator, or to any adult person with whom the beneficiary resides, except that no report under any circumstances shall be made to JERRY THOMAS TULAK or his relatives (excepting beneficiaries).

P. AMENDMENT

This Trust may be amended only in writing by Trustor during her lifetime, provided that she may not amend to the benefit of any creditor of hers. After the death of the Trustor, this may be amended by a writing concurred in by at least two-thirds (2/3) of the remaining beneficial interest.

ARTICLE XII

PROVISIONS REGARDING LIFE INSURANCE POLICIES

A. PAYMENT OF PREMIUMS

During the lifetime of Trustor, the Trustee shall be under no obligation to pay any premiums or other charges necessary to keep in force any insurance policy in the trust estate or in which the Trustee is named beneficiary, nor to determine whether the same have been paid or to notify anyone of the non-payment thereof. Following the death of the Trustor, the Trustee shall have the responsibility to pay premiums and other charges on any life insurance policy owned by the Trust. The Trustee shall keep safely each insurance policy assigned to or deposited with the Trustee.

B. COLLECTION OF INSURANCE PROCEEDS

Upon the death of Trustor, the Trustee shall use reasonable efforts to collect the proceeds of any insurance on the life of the Trustor and any other benefits payable by reason of the Trustor's death. The Trustee shall have full

authority to take any action it deems advisable in regard to collection, and shall pay the expenses of collection, including the expense of any litigation, out of the principal of the trust estate. The Trustee shall have full authority to make any compromise or settlement with respect to the policies and benefits and, if it elects, may exercise any settlement options under any policy. The Trustee may give all necessary and proper releases of liabilities; the receipt of the Trustee to the insurer shall be a full discharge and the insurer is not required to see to the application of any proceeds. The proceeds of any policy shall become principal of the trust estate, except interest paid by the insurer, which shall become income.

ARTICLE XIII
GOVERNING LAW

This trust has been accepted by the Trustee in the State of Utah and, unless otherwise provided in this instrument, its validity, construction, and all rights under it shall be governed by the laws of that State.

Executed at St. George, Utah, on the 15TH day of September, 1992.

Janet Pace Perez
JANET PACE PEREZ
Trustor

Accepted on this 15TH day of September, 1992,

Janet Pace Perez
JANET PACE PEREZ

Roberta Jean Flournoy
ROBERTA JEAN FLOURNOY
Trustees

royed as to Form

LIAN & WESTFALL

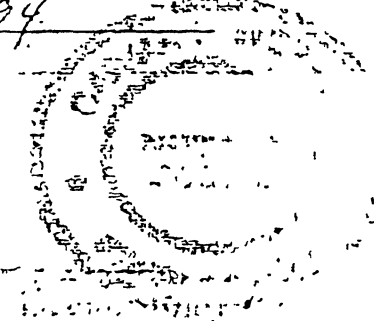
Russell J. Gallian
Russell J. Gallian

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

On the 15th day of September, 1992, personally
appeared before me Janet Pace Perez and Roberta Jean
Burnoy, the signers of the within instrument, who duly
acknowledged to me that they executed the same.

Carmel L. Almon
Notary Public

Commission Expires

1-11-94


Residing at:

St. George, UT

SCHEDULE "A"

REAL PROPERTY LOCATED IN KANE COUNTY STATE OF UTAH

BEGINNING at the West Quarter Corner of Section 4, Township 44 South, Range 6 West, Salt Lake Base and Meridian, and running thence North 1,320.0 feet; ^{ALONG THE SECTION LINE} thence East 940.5 feet; thence South 404.25 feet; thence East 122.5 feet; thence South 1°30' West 572.8 feet, more or less, to the Ronald R. Smith property; thence West 288.7 feet; thence South 75.44 feet; thence West 33.0 feet; thence South 262.52 feet; thence West 66.0 feet; thence South 267.97 feet; thence West 33.0 feet; thence South 1,045.0 feet, more or less, to the 1/16th line; thence West 627.0 feet along said line to the West line of said Section 4; thence North 1,320.0 feet along said line to the point of beginning. DEC

TOGETHER with a right-of-way over and across the following described property:

BEGINNING at a point which is North 337.96 feet and East 1,047.673 feet from the West Quarter Corner of Section 4, Township 44 South, Range 6 West, Salt Lake Base and Meridian, and running thence North 16.5 feet; thence East 1,375.0 feet, more or less, to the city road; thence South 16.5 feet; thence West 1,375.0 feet to the point of beginning.

RESERVED, however, therefrom a road easement granted to Kanab Creek Ranchos, Inc., according to letter agreement dated September 15, 1975, described as follows:

BEGINNING at the Southeast Corner of Lot 1424, Unit 6, Kanab Creek Ranchos Subdivision; thence South Easterly 300.0 feet, more or less, to the North right-of-way line granted to Kanab City; thence North 88°22'50" East 700.0 feet, more or less, to the point where the City right-of-way changes direction to the Northeast. At this point, the street right-of-way line continues Southeast to the East property line of subject property; thence South 60.0 feet to a point which is North 337.96 feet and East 1,047.67 feet from the West Quarter Corner of Section 4, Township 44 South, Range 6 West, Salt Lake Base and Meridian; thence running Northwest to allow a 60.0 foot street right-of-way to intersect with a right-of-way line 10.0 feet South of the City utility easement; thence South 88°22'50" West 700.0 feet; thence Northwest to the Northeast Corner of Lot 1423, Unit 6, Kanab Creek Ranchos Subdivision which will create an easement for the extension of Navajo Drive in an Easterly direction to the public street West of the Kanab Airport.

TOGETHER WITH all improvements and appurtenances appertaining thereto, including ~~one~~ ^{TWO} Kanab City water meter and ~~three~~ City sewer hookups. DEC

Two or three City sewer hookups as determined
by the City of Kanab, X.X.A. G-26-71

X.H.A.
DEC
6/19/91

SCHEDULE A

See copy of Deed attached

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE"

Recorded at Request of Gallian & Westfall, One S. Main, St George, Ut 84770

at M Fee Paid \$

by Dep Book Page Ref:

Mail tax notice to Janet Pace Perez Address P. O. Box 19321, Las Vegas, NV 89132-0321

Quit-Claim Deed

JANET PACE PEREZ

of Las Vegas

County of Clark

, grantor,
State of ~~Utah~~ Nevada, hereby

QUIT-CLAIM to the ATTICUS FAMILY TRUST, under Agreement dated September 15, 1992,
Janet Pace Perez and Roberta Jean Flournoy, Trustees
of

grantee,

for the sum of
DOLLARS,
County,

the following described tract of land in Kane
State of Utah

(See Exhibit A attached)

WITNESS the hand of said grantor, this 15th day of
, A D, one thousand nine hundred and ninety-two.

Signed in the presence of

Janet Pace Perez
Janet Pace Perez

STATE OF UTAH

COUNTY OF Washington

On the 15th day of

September

, 1992, personally appeared before me

Janet Pace Perez, the signer of the within instrument, who
duly acknowledged to me that she executed the same

Notary Public

My Commission Expires

1-11-94

Residing at

St George, ut

APPROVED FORM - UTAH SECURITIES COMMISSION

FD-101 - QUIT-CLAIM DEED - Realty Co. 55 W. Ninth South S.L.C. Utah

374

57

PETITIONER'S
EXHIBIT

ENTRY NO 74293 RECORDED AT REQUEST OF GALLIAN & WESTFALL
DATE SEPT 25, 1992 AT 10:45 A.M. KANE COUNTY RECORDER